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FORM OF LIFE.
AGAMBEN AND THE BIOPOLITICAL DIMENSION OF SOVEREIGNTY AND LAW

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ABSTRACT

Giorgio Agamben's work is a constant presence in the current critical debate over sovereign power, law and politics. With the more than two decades long series *Homo sacer*, he has traversed the borders of academic disciplines, providing renewed sources of inquiry for the orientation before the contemporary widespread and violent biopolitical-economic administration of life. This research project investigates some of the central themes of the critical account of legal and political thought that Agamben has offered in his works. The eight chapters composing this thesis are conceived as specific theoretical paths through Agamben's oeuvre, which in their autonomy and mutual interaction aim at offering a, hopefully, meaningful contribution to the field of continental legal philosophy.

In this work, I argue that Agamben's *Homo sacer* project provides a fundamental theoretical framework for the comprehension of the role and functions of law and sovereign power in biopolitical regimes. The central thesis that this project advances is that Agamben's interrogation of juridical and political thought and of ontology uncover a missing link in the problematic separation of sovereignty and law from governmental practices that the discourse on biopolitics has inadvertently inherited from Foucault's work. Agamben succeeds in doing this in two main ways: first, he redefined the contours of the theory of sovereignty in relation to biopolitics (shading light over the tight bond that ties together sovereign power, life and governmental practices); second, with the idea of "form of life" he has disclosed a biopolitical interpretation of law, providing, also, the ground for an innovative theory of the subject.

This work, thus, is structured in two parts. The first part has been organised around Agamben's engagement with the question of sovereign power. Rather than focusing on the problems of the state of exception or the camp – given that the critical literature on such topics is more than abundant – I proceed with the analysis of sovereignty, as a "normalising power", in its relation to life and the idea of government. The second part of the thesis, instead, has been devoted to the disentanglement of the

concept of the "form of life". A form of life is a life that has been put-in-form, actualised in a given (legal or social) institution, and trapped under the yoke of sovereign power. While the tone and the plane of analysis of the two parts could be sometimes divergent, they intersect on a central point: sovereignty as the power to establish the criteria of normality of the political community, to decide on the forms of life that are "inside or outside" the legal and political order. Sovereignty, in this regard, lays down, from time to time, the limits of the social and political life of the state, and in doing so, decide which forms of "life" are a part of it (and thus worthy of protection), and which are excluded.

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This thesis is the result of an exciting, even though demanding, journey; one of those experiences whose memory will definitively withstand time and oblivion. Of course, this seems just a banal platitude; but as people start to learn when they grow older, banal platitudes and clichés, more generally contain pieces of truth; it could not be otherwise, given their invasive persistence. The thing is that a Ph.D. project is *a* journey – quite literally in my case. Thus, this work has benefited from all the encounters that inevitably take place on a journey; and it would not be such without them.

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Part two:
FORM(S) OF LIFE

ABBREVIATIONS

HS *Homo Sacer: Sovereign Power and Bare Life*

IH *Infancy and History: On the Destruction of Experience*

MWE *Means Without Ends: Notes on Politics*

N *Nudities*

TO *The Open: Man and Animal*

P *Potentialities*

RA *Remnants of Auschwitz: The Witness and the Archive*

KG *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*

S *Stasis*

SA *The Signature of All Things: On Method*

SE *State of Exception*

SL *The Sacrament of Language: An Archaeology of the Oath*

TTR *The Time That Remains: A Commentary on the Letter to the Romans*

UoB *The Use of Bodies*

WA *What is an Apparatus? and Other Essays*

INTRODUCTION

The trajectory of the concept of sovereignty that has accompanied since the outset of Modern time the thought of politics and law seems to approach its point of oblivion, following the decline of the state as a monolithic-bureaucratic-machine for the administration of the *res publica*. Indeed, already in 1963, in the *Foreword* to the new edition of his *The Concept of the Political*, Carl Schmitt resolutely announced that 'the epoch of statehood now goes to the end. […] The state as the holder of the most extraordinary of all monopolies, namely the monopoly of political decision, this masterpiece of European form and Western rationality, is dethroned'.[1] Albeit with due caution necessary in dealing with grand epochal verdicts, the existence of a widespread consensus on the (to one degree or another) obsolescence of the category of the absolute-sovereignty-of-the-state must be recognised.[2]

The classic figure of the nation-state and sovereign power has been eroded in its essential traits from the perspective of both 'its edges and its interior'[3], given the growing importance of the role, played by international organisations, non-state actors and the transformation of political regimes according to, what Thanos Zartaloudis (via Giorgio Agamben) has called, a 'managerial or administrative model of bio-political neo-governmental power'.[4] The emergence of *biopolitical* regimes in the history of the West calls for the rethinking of the idea of sovereignty

[1] Schmitt (1979), p. 4.

[2] The literature on this matter is more than vast. For an overall survey of the question see: Camilleri and Falk, (1992). On the question of sovereignty from the perspective of a sociology of globalisation, see: Sassen (1996). For a philosophical interpretation of the crisis of sovereignty, see: Marramao (1995; 2012).

[3] Brown (2010), p. 22.

[4] Zartaloudis (2011), p. 51.

and the "classic" conceptual apparatuses of law and politics. As Antonio Negri claimed, 'We must re-conceptualise the figure of government […] shifting consideration of sovereign acts from a context of the production of laws or rules to a context of the production of norms or systems'.[5] In the framework of this profound mutation, the use of expressions such as the 'post-sovereign condition' or the 'twilight of sovereignty'[6] becomes in a sense somewhat expected.

Central to the underlying theoretical assumptions of the discourses on and around biopolitics – following the inheritance of Michel Foucault's works – is the disentanglement of sovereignty and law from bio-power and governmental practices. Modern governmentality regards sovereignty and the juridical, as "archaic" configurations of power. The classic theory of sovereignty entails as a constitutive element the figure of a determinate subject that obeys the voice of the sovereign (the "law"), whose main project is the political identity and unity of the community. From the perspective of biopolitics, this schema is overturned: the production of subjectivities constitutes the essence of political power. For Foucault, the sovereign prerogatives over the life or death of the members of the political body of the state are supplanted by different techniques of government aimed at the production and administration of "docile subjects".[7]

In this regard, Roberto Esposito rightly suggested that Foucault elaborated the notion of biopolitics negatively: in 'contrast with the sovereign paradigm […] biopolitics is primarily that which is not sovereignty. More than having its own source of light, biopolitics is illuminated by the twilight of something that precedes it'.[8] However, as Foucault pointed out on various occasions, sovereign power does not disappear; it is rather overshadowed by the emergence of different, fragmented, governmental techniques, which penetrates the socio-political body at a microphysical level.[9] 'Sovereignty', Foucault claims, 'is far from

[5] Negri (2010), p. 205.
[6] Bolaffi (2002); Praet (2010).
[7] This is a reformulation of the popular definition of "docile body" advanced by Foucault in the book *Discipline and Punish. The Birth of the Prison*, see: Foucault (1995).
[8] Esposito (2008), p. 33.
[9] See: Foucault (1977).

being eliminated by the emergence of a new art of government'.[10] Rather, it can be argued that sovereignty (even though declining) resists the triumph of biopower.

Against this historical and theoretical background, this work proposes an examination of the questions of "sovereignty" and "law" from the perspective of the discourse of "biopolitics", through a critical and exegetical engagement with the work of Giorgio Agamben. With his *Homo Sacer* series (now completed), Agamben has supplied arguably the most crucial and persistent insight for the comprehension of the puzzling position of law and sovereignty in relation to biopolitics. In this work, I argue that Agamben's account, on the one hand, offers a way out from the ambiguities that one notes in Foucault about the place and function of law and sovereignty in current governmental regimes, while on the other hand, it draws the lines of a theory of the subject (and of the process of production of subjectivities), in which law and sovereign power play a fundamental role.

The problem: Foucault's legacy

The marginalisation of the concepts of sovereignty and of the "juridical" as operated by Foucault[11] – resumed with his famous *boutade* 'in political thought and analysis, we still have not cut off the head of the king'[12] – is the result of the evolution of his personal experience of research in disciplinary institutions.[13] It was the discovery of the actual concretisation

[10] Foucault (1991), p. 101.

[11] In a recent book titled *A Foucauldian Interpretation of Modern Law: From Sovereignty to Normalisation and Beyond*, Jacopo Martire recognised that while Foucault's critique of Western political and legal tradition marginalises the role of sovereignty and law, his critical-theoretical "toolbox" offers significant interpretative instruments for the historical comprehension of Modern legality. In the book, though, Martire attempts to overcome the deadlock of Foucault's critique of sovereignty and law, using Foucauldian method for a genealogical reconstruction of political and legal modernity. See: Martire (2017). On Foucault's critique of sovereign power see: Smith (2000); Neal (2004); Singer and Weir (2006); Valverde (2008).

[12] Foucault (1998), pp. 88-89.

[13] With the *Disciplinary institutions*, Foucault in *Discipline and Punish*, described a series of institutions such as the School, prison, or the hospital, created in their modern form in the

and penetration of power into the corporeal existence of the subjects that led him to abandon the vision of the classic-hierarchic-juridical determination of power-relations. The modern governmental administration of "men and things" does not follow the logic of sovereign power, according to which a ruling authority determines the existence of the ruled. Therefore, the king (the sovereign) and his "voice" (the law), should not be taken as the primary and privileged target for the comprehension of the tangled relationships between life and politics and of the paradigm of biopolitics.

Foucault's thesis portrays bio-power and the emergence of governmental rationality as a passage from the old-sovereign power configured as the 'right to *take* life or to *let* live', to the modern power 'to *foster* life or *disallow* it to the point of death'.[14] Sovereign power, in this sense, is characterised negatively as mainly constituted by the possible "delivery" of death. Its formal expression is the juridical order framed upon the mere structure of legal rules and penalties. From the perspective of sovereignty, life is what remains when the sovereign remains silent, and his sword remains in the scabbard. On the contrary, biopolitics consists in a "positive" capture of life into the calculation of political power. Life became the object of power, and its flourishing the purpose of political care. While sovereign power expresses its self in the form of repression and prohibition, modern biopower regulates life in order to promote it.

Foucault assigns to the entrance of life into political calculation the rank of the 'threshold of Modernity', which in a given society is a moment 'reached when the life of the species is wagered on its own political strategies'.[15] Biopower, thus, is modern; and modernity is biopolitical. With a typical gesture, Foucault periodises the transition to biopower. During the 17th century, the government of the living, developed in two different – but cooperating – forms. The disciplinary power whose target is represented by the body, its control, its docility and its insertion and integration into efficient socio-economic systems. The second form of

19th century, which represented some of the forms in which disciplinary power is exercised. See: Foucault (1975).

[14] Foucault (1998), p. 138.

[15] *ibid.* p. 143.

power instead consists in a "regulatory control" or "*biopolitics of the population*", and it focuses on the biological processes of a given group of subject (population) – the calculation and scientific observation of birth rates, levels of health, life expectancy – and with the aim of its control and management. These two forms of power 'constituted the two poles around which the organisation of power over life was deployed […] the old power of death that symbolised sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life'.[16]

The appearance of the *population* as the target of political strategies represents the "original" moment of emergence of the modern form of government of things and lives. In pre-modern time, for Foucault, there is no population, but only the people over a territory.[17] The new political object of the population led to the setting aside of the sovereign-like power. As Foucault writes:

> While I have been speaking about population, a word has constantly recurred […], and this word is government. The more I have spoken about population, the more I have stopped saying "sovereign". […] the modern political problem, the privilege that government begins to exercise in relation to rules, to the extent that, to limit the king's power, it will be possible one day to say, "the king reigns, but he does not govern," this inversion of government and the reign or rule and the fact that government is basically much more than sovereignty, much more than reigning or ruling, much more than the imperium, is, I think, absolutely linked to the population.[18]

While the very idea of an "art of government" finds its roots in the speculation around doctrine of the *reason d'état*, therefore, in strict relation to the original ground of elaboration of the modern idea of sovereignty, for Foucault it is only with the emergence of the population – as subject/object of power – that practice of government (properly speaking) could be established. Only when the art of governing and ruling individuals become directed to the maintenance of the wealth and well-being of the

[16] *ibid.* pp. 139-140.
[17] Kelly (2013), p. 102.
[18] Foucault (2009), p. 76.

population – and not to the corroboration of sovereign power – western power entered the (modern) era of biopower and governmentality.

In modern governmentality, thus, sovereign power and the legal (juridical) system lose their prominence as the leading architectures of power. However, Foucault did not push himself that far by declaring their disappearance. Indeed, the problems of sovereignty and law, even if regarded by Foucault as residual to his analysis,[19] have a place in the edifice of his work. In the series of lectures *Security*, *Territory*, *Population*, for example, after having articulated the emergence of a new configuration of power chronologically, he writes:

> There is not a series of successive elements, the appearance of the new causing the earlier ones to disappear. There is not the legal age, the disciplinary age, and then the age of security. […] In reality you have a series of complex edifices in which, of course, the techniques themselves change and are perfected, or anyway become more complicated, but in which what above all changes is the dominant characteristic, or more exactly, the system of correlation between juridico-legal mechanisms, disciplinary mechanisms, and mechanisms of security.[20]

Here, Foucault recognises that the different historical forms power assumed do not replace each other in a chronological series of disappearances. Instead, in the process of evolution of the morphology of power, what changes are the relationship between different mechanisms of power (juridico-legal, disciplinary and security) and the prevalence of one over the others. However, even though Foucault is explicit in recognising the persistence of sovereignty and the juridical in biopolitical regimes, he does not provide a punctual analysis of their operations.

A similar ambiguity is present in Foucault's critique of the law and legal regulation, more generally. The entrance into the new era dominated by the pervasive presence of techniques of government, structuring the totality of the living conditions, does not determine a radical fading away of law; instead, with the appearance of a 'normalizing society', the law

[19] Dean (2013), pp. 32-43.
[20] Foucault (2009), p. 8.

'operates more and more as a norm'.[21] The norm does not oppose law itself; it counters the juridical that is 'the institution of law as the expression of a sovereign power'.[22] Akin to something like a 'natural rule', emerging as a normative material inside the social fabric, the norm is 'alien to the discourse that makes rules a product of the will of the sovereign'.[23] Indeed, 'the very operation of law', Foucault suggests 'is to codify a norm, to carry out a codification in relation to the norm'.[24] In this perspective, the juridical is subsidiary to the norm, which constitutes the positive content of legal regulation, becoming "mere" ratification of what constituted immanently to the social fabric.

In light of these ambiguities, critics and interpreters have divergent opinions on this matter. Some sustained that Foucault simply "expelled" the question of law and sovereignty from the perspective of biopolitics. The expulsion thesis has been advanced by Alan Hunt and Gary Wickham, who maintained that for Foucault law and sovereign power are irrelevant for the purposes of his analysis. Through a specific investigation of Foucault's reference to sovereignty and law, Hunt and Wickham claimed resolutely that Foucault sees the law essentially in negative terms, as historically tied to monarchical sovereignty and overtaken by other technologies of power.[25]

In the volume *Foucault's Law*, Ben Golder and Peter Fitzpatrick criticised such an approach, suggesting that three hypothesis could be sustained about Foucault's engagement with law that could counter the expulsion thesis.[26] The first is the recognition that actually Foucault do not oppose the law and disciplinary power: the law in modern time does not disappear from power's mechanisms but becomes more embedded in disciplinary control. Therefore, law and discipline interact and articulate

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[21] Foucault (1998), p. 144.
[22] Ewald (1990), p. 138.
[23] Foucault (2004), p. 38.
[24] Foucault (2009), p. 56.
[25] Alan Hunt and Gary Wickham sustained the thesis of the expulsion of the question of law, suggesting that in Foucault researches law is not a relevant issue. See: Hunt and Wickham (1994). Ben Golder and Peter Fitzpatrick criticised such an approach. See: Golder and Fitzpatrick (2009).
[26] Golder and Fitzpatrick (2009), p. 26.

one another. The second claim Golder and Fitzpatrick made against the expulsion thesis are that the law does not disappear in governmental regimes, but it is subsumed by administrative apparatuses. In light of the fact that governmentality operates in accordance with disciplinary power, and that discipline and law are fundamentally interrelated, the law maintains a crucial function in governmentality. Finally, the third and last attempt to (re)locate the legal within Foucault's thought, by Golder and Fitzpatrick is based on the fact that Foucault's sees the law as a technical form of regulation functioning properly as a "normative device". What, disappears, according to them, is not the law as such, but the law as an expression of sovereign centralised and absolute power.[27]

As it is often the case when one is dealing with Foucault, the question of sovereignty and law is quite complicated, and it cannot be reduced to a straightforward schematisation. Both the expulsion thesis and the readings offered by Golder and Fitzpatrick are plausible options, grounded on a detailed interpretation of the late Foucault. I think that rather than choose a side in the dispute, a more beneficial move for the comprehension of the conundrums raised by the relationship between sovereignty, law and biopolitics, consists in finding a middle ground. It is necessary to recognise that Foucault is rather ambiguous in treating the classic categories of law and sovereignty: on the one hand, in fact, he claims that the juridical and the image of an absolute-centralised sovereign are archaic forms of power, but in the same time, he does not declare their extinction. We must admit that in the end, Foucault does not give us a comprehensive analysis of the role of sovereignty and law in governmental regimes, but he provides us with the theoretical tools to think to such a role. Agamben's work represents – admittedly in a quite articulated and complicated way – a middle ground between the expulsion thesis and the opposed side embodied in the work of Golder and Fitzpatrick. Indeed Agamben, while recognising in Foucault the lack of an investigation of the point of intersection between the juridical-sovereign and the governmental models of power, he nevertheless accepts the Foucauldian paradigms of

[27] *Ibid.* pp. 26-31.

biopower and governmentality as crucial for the scrutiny of the juridico-political sphere.

Sovereignty, law and life

Agamben's philosophical enquiry in the Western legal and political tradition finds its place in the terrain of the crossroads between the 'juridico-institutional and the biopolitical models of power'. (HS, 6) Through his archaeological research, Agamben rethinks the classic categories of political and philosophical thought, opening in this way new theoretical trails for the critical comprehension of contemporary politics. The transformation of political power, in the direction of a ubiquitous and acephalous government of lives and things, denounced by Foucault, has put into question the very substance of the conceptual apparatus of political thought. The emergence of biopower calls for the urgent rethinking the categories founding modern politics and asks us to decide whether they 'will have to be abandoned or will, instead, eventually regain the meaning they lost in that very horizon' (HS, 4). Agamben decided for the second of the two options – especially by looking at the terminology of classic jurisprudence and political thought. Indeed, the *Homo Sacer* series provides a re-conceptualisation of the central paradigms of politics, from the angle of the renewed configuration of power characterising contemporary governmental regimes. And this allows Agamben to elucidate some of the ambiguities that Foucault has left in his delineation of the theory of biopolitics, giving us the possibility to think through what Foucault's has left unexplained – that is the biopolitical significance of sovereignty and law.

The placing of the moment of the inclusion of life into the realm of politics already in the Greek conception of the *polis*, allows Agamben to rethink the biopolitical essence of western political tradition anew. The emergence of the tactics and strategies of the government of the population, centred upon the administration and the "fostering" of life, in modernity, is nothing other than the resurgence of a hidden bond, between

politics and biological life, which stood in latency ever since (at least) Greek philosophy. As Agamben puts it:

> Placing biological life at the center of its calculations, the modern State therefore does nothing other than bring to light the secret tie uniting power and bare life, thereby reaffirming the bond (derived from a tenacious correspondence between the modern and the archaic which one encounters in the most diverse spheres) between modern power and the most immemorial of the *arcana imperii* (HS, 6).

For Agamben, thus, modern biopower represents neither a breakpoint nor a turn, rather it consists in the moment of the materialisation of a particular configuration of power, whose germs were already present, even if in a state of latency, in the way "the West" has conceived its politics since its outset. And sovereignty, being the form that state's institution historically acquired, does not exclude – logically – any ties with life; on the contrary, Agamben claims, it can be argued 'that the production of a biopolitical body is the original activity of sovereign power' (HS, 6).

Biopolitics, thus, emerges in the continuum of the development of the *theoria* and *praxis* that have determined the organisation, the structure and the allocation of power in Western political structures. It is under the sign of continuity, of the 'tenacious correspondence between the modern and the archaic' (HS, 6), that Agamben has undertaken his archaeological deconstruction of the Western tradition. It is thanks to such an approach – which suspends the periodisation of historical time, in favour of the observation of the shifting signatures of concepts and ideas – that he has shed light on the ambiguities that Foucault has left to his heirs.

As I will argue in the first part of this thesis titled *Sovereignty, Government and Life* in his archaeology of Western politics, Agamben reconciles and reconnects some of the elements, the separation of which, allowed Foucault to delineate the contours of biopolitics. Along with the uncovering of the hidden linkage between sovereignty and life, he has also questioned the Foucauldian split between sovereign power and government, and the un-relatedness of sovereignty and population. Agamben's archaeological effort indicates a missing link between the problematic separation (on both theoretical and practical level) between

sovereignty and government that has been characteristic of Foucault's theory of biopolitics. Under the umbrella of the paradigm of political theology, for Agamben, the separation between sovereignty and government – which implies a distinction between two modalities of exercising power – has to be found in the medieval speculation on God's government of the world (*oikonomia*); separation that has worked as a model for the organisation of state's power in late middle age and early Modernity. The difference between an immobile-transcendental-absolute sovereign and non-sovereign efficient administration of things and men is the reflection of the divine model of God's kingship and government. Agamben's critique-correction of Foucault hypothesis is not only a backdating of the emergence of the separation in the body of power between its substance and its concrete application but is also a critique of the separation itself. While recognising the heterogeneity of sovereign power and governmentality, Agamben has demonstrated how these two configurations of power are working in synergy, forming the "double structure" of a "governmental machine".

Moreover, Agamben's works allow for the reconsideration of the biopolitical subject *par excellence*, the population, has emerged within the discourse of sovereignty, more specifically within the process of establishment of the conception of popular sovereignty. The production of a biopolitical body, as a passive-docile de-politicised multitude – Agamben suggests – is a decisive performance of sovereign power.

A further hypothesis that I will advance in the second part of this work, titled *Form of Life*, is that Agamben recognises in law, and the legal sphere, a specific biopolitical function. With the term "form of life" (to be distinguished from "form-of-life", which is in a way its opposite as I will explain in due course)[28], the Italian philosopher refers to the capacity of law to codify segments of life, putting the "living" in forms. A form of life

[28] Even though the idea of form-of-life is central to Agamben critique of Western metaphysics, in this work I decided to focus principally on the concept of form of life as the peculiar product of the encounter between law and life. This choice has been guided by the fact that a theory of form of life (as a dynamic of institutionalisation of human living) is more pregnant than its counterpart form-of-life for the scopes of the critical jurisprudence elaborated in this thesis.

is the sum of the constitutive rules that define the life of the subject; namely the abstract juridical and social identities – the voter, the worker, the journalist, the student, but also the HIV-positive, the transvestite, the porn star, the elderly, the parent, the woman etc. – which are fictitious constructions, masks (*personae*), behind which stands, as a presupposition, *bare life* (MWE, 6-7).

The original performance of sovereign power consists in including life into the realm of law. The role of the law, in this perspective, resides in instituting life, that is to say codifying life, giving it a form, keeping in this way human beings attached to both their identities *and* their bare life. Sovereignty is that power that has the faculty to "decide" which forms of life should be included or excluded in/from the (bio)political body; it is that power that could unravel the bond between the singular subject and its form of life. Sovereignty and law, hence, are active elements in the processes of "individualisation" and the creation of subjectivity.

Challenging the question of "form of life", however, is not an easy task, since Agamben does elaborate a precise definition of such concept, but sketches out its contours in different moments of his philosophical works. The second part of the thesis, then, is devoted to the reconstruction and the definition of the main traits of the idea of "form of life" – providing in this way a biopolitical interpretation of the law. I will argue, then, that Agamben draws the line of a theory of the *subject* in which the law and sovereign power work properly as an anthropological machine for the determination of human subjectivities.

For Agamben human life is a life of potency, for which all the different forms it takes are possibilities and not unavoidable determinations. 'The form of human living', he claims,

> is never prescribed by a specific biological vocation nor assigned by any necessity whatsoever, but even though it is customary, repeated, and socially obligatory, it always preserves its character as a real possibility, which is to say that it always puts its very living at stake (UoB, 208).

Human life is intrinsically potential, in the sense that it is not predetermined by biological aprioristic forms (like what instincts are for

animals, for example).[29] A life of the potential could be seen as an indeterminate substance, upon which political and legal "power" is principally exercised in order to "actualise" and restrain it in concrete forms. In this schema, law and sovereign power limit life enclosing it into given fictitious forms and *habits*, the composition of which goes to create the way of living we experience in our everyday lives.

This putting-into-form of life – the entering of the human life into the mechanism of law and sovereign power – in Agamben's perspective, represents a process of subjectivation, whose inner logic replicates what he has called "relation of exception". The human subjectivity is always the result of a process of division, expulsion and presupposition of an "element" in relation to another "element" (according to the functioning of the *ontological dispositive* that the Aristotelian philosophy has left to Western culture). As *bios* (the qualified life of the member of the *polis*) becomes possible through the separation and internalisation of its negation, *zoē*, human beings become subjects, through the separation and articulation of the "bare life" (the *zoē* as the common presupposition of a generic life for all human beings as captured by law and sovereign power), and a qualified "form of life" (as what makes the subject as singular-personal subjectivity). The distinction between *zoē* and *bios*, thus, traverses the very existence of human beings and is what makes ultimately possible the existence of the community.

In this light, sovereign power realises a proper mechanism of subjectivation. 'The fundamental activity of sovereign power', Agamben claims, 'is the production of bare life' (HS, 181), which represents the substrate, the 'ultimate subject' (UoB, 209), the *hypokeimenon*, the material (animal) substrate of every subjectivity. In this sense, the form of life through which human beings experience their humanity as members of the community has as its core (as foundational presupposition) bare life – that is to say, the natural-bodily life as exposed to the absolute power of the sovereign. Subjectivity, in Agamben, thus, is always the result of a division and the articulation – on the plane of the very existence of human beings – of a substrate (bare life – existence) and a form of life.

[29] I will return on this issue in chapter 7.

Relation of exception

The concept of the "state of exception" (or simply: the "exception") represents the common thread that connects the different stages of this research project. Despite the vast literature on this matter, defining precisely such a concept is not an easy task, essentially because of its formal resistance to a sharp definition. In this regard, Agamben writes:

> it is difficult even to arrive at a definition of the term given its position at the limit between politics and law […] if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form (SE, p. 1).

The "exception" is the call for the urgent need to react quickly to avoid or reduce the damage to a socio-political order, caused by grave and imminent threats. The state of exception is a legal doctrine that refers to all of those dispositions proclaiming, in a time of emergency and severe crisis, the possibility for an agent – entitled to challenge and solve the critical situation – to act freely by, and sometimes in contrast with, the legal (procedural and substantive) constraints of the ordinary "rule of the law". The state of exception is, in this way an abnormal course *of* the law.

The peculiar position (or place) of the exception, as a limit or threshold, renders such a concept into a privileged *heuristic* sign[30] for the progression in the knowledge of the normal functioning of law in its intimate relationship with the other spheres of social life. The importance of exceptional and abnormal moments for the comprehension of normality, is not, however, anything new. Soren Kierkegaard (in a passage rendered familiar by Schmitt), claimed: 'the exception explains the universal and himself, and if one really wants to study the universal, one only needs to look around for a legitimate exception; he discloses everything far more clearly than the universal itself'.[31] In a similar manner, but in a different

[30] Polya (1973), p. 178.
[31] Kierkegaard (1983), p. 227.

context, Lon Fuller defined legal fictions as anomalies, which represent, what he calls, the pathology of law, and he added:

> When all goes well and established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions […] Law then proceeds with a transparent simplicity suggesting no need for reflective scrutiny. Only in illness, we are told, does the body reveal its complexity. Only when legal reasoning falters and reaches out clumsily for help do we realize what a complex undertaking the law is.[32]

Furthermore, in a comparable fashion, Georges Canguilhem, when discussing the epistemological emergence of physiology, as a science of the normal function of the body, affirmed that what generates 'theoretical interest in the normal' is properly the abnormal: 'norms are recognised as such only when they are broken. Functions are revealed only when they fail. Life rises to the consciousness of science of itself only through maladaptation, failure and pain'.[33]

In the *Homo Sacer* series, Agamben recognises the exception as the intimate mechanism that articulates sovereignty and law *with* government and life, making the law a peculiar device for the normalisation and administration things and living beings. Therefore, the exception represents a privileged access point for the comprehension of the cardinal points of intersection between human life, sovereign and governmental power and law, which constitute the architecture of the western conception of the organisation and administration of power.

Agamben's conception of the exception (and of sovereignty) has been influenced by the Schmittian lesson. He takes up Schmitt's legal and political theory and what he calls the "paradox of sovereignty", claiming that in the state of exception lies the very possibility of the juridical rule and the very meaning of state authority.[34] Being defined by Schmitt as a limit concept – in the sense that is outside *and* inside of law – sovereignty lives the paradoxical life of being essentially the limit – or more appropriately the threshold – between the ambit of law and contingency of social and political

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[32] Fuller (1967), p. viii.
[33] Canguilhem (1991), p. 209.
[34] Mills (2008), p. 61.

reality. The sovereign, having the power to declare – or not – the state of exception, is the depository of the decision on what constitutes public order and security, and hence, whether the social order has been disturbed – or disrupted. The exception, the abnormal case, represents, in Schmittian terms, the key element defining sovereign power; it is – as I will argue – a kind of "foundational" element in every juridical and political order.

In his works, Agamben develops further the concept of exception, toward an ontological approach to law and politics. 'The structure of the exception', he claims, 'has been revealed more generally to constitute in every sphere the structure of the *archè*, in the juridico-political tradition as much as in ontology'. The exception consists of a 'strategy' according to which something is divided – separated, taken-out (in line with the etymology of the word *ex-capere*) – excluded and 'pushed to the bottom', and through this exclusion, included as a 'foundational" element' (UoB, 264). The logic of the exception represents the common ground of a number of experiences that Agamben has analysed throughout his writings. The *polis* – as in the first volume of the *Homo sacer* series – is founded on the scission of life in a *zoē* (animal life) and *bios* (a politically qualified life – a form of life). The "human" is defined through the exclusion-inclusion of animality; and "law" through the exclusion-inclusion of a state of anomy and violence. Moreover, "government" is structured through the exclusion of inoperativity and its inclusion in the form of the glory (UoB, 264-265).

Agamben finds something like the "point of insurgence" of the relation of the exception in Aristotle's ontology, and especially in his theory of the subject [*hypokeimenon*] and his elaboration of the relation between potentiality [*dynamis*] and act [*energheia*]. The two theories for Agamben form a peculiar 'ontological dispositive'– inherited by Western thought –, which has shaped decisively 'the horizon of human actions and knowledge' (UoB, 112). If the relation of the exception is the structure upon which "we" have conceived being, politics, law and in general all the fields of knowledge involving a particular understanding of human being, language and action, it is because of specific "epistemic" conditions. The recurrence of the relation of the exception and its logic in the field of the human experiences of politics and law, thus, is the reflection of something

"original" that continues to operate in the present of social reality and gives shape to the very composition those experiences have. It is through the unmasking and the deactivation of this ontological machine that, for Agamben, it becomes ultimately possible a new experience of politics, which could overcome the sometimes-deadly distortions of the Western configuration of power.

Methodology

A section on methodology in a work that is fundamentally philosophically oriented is neither something unpredictable nor something from which one should expect a conclusive frame of a specific method. Despite the philosophical speculation on method constituted one of the initial steps of Western thought into modern time, philosophy never had and never purported methods as such. The tangled and sometimes-evanescent relationship that philosophy maintains with its methodology is due mainly to the fact that, at least in Modernity, the practice of method entered the semantic sphere of science. Sciences have methods, by definition. Philosophy, instead, since it has never really succeeded at reducing or elevating itself to a science (depending on one's viewpoint), does not maintain a method; at most, philosophy reflects on the methods of all others. This was, indeed, the allotted destiny of philosophical speculation, from Descartes, Bacon and Galilei, all the way to the late modern ideas of, for example, *deconstruction* and *genealogy*.

This section, thus, does not wish and cannot provide a description of the methodology of this research. It is not concerned with something like a definition of a method. The following paragraphs are intended to note a more modest purpose. They propose a description of the analytical strategies of this work and then advance a justification over why such a research project that tries to use continental philosophy within a critical study of law (and the juridical more generally), could and should find a reasonable place within the walls of a law department.

The chapters composing this work are conceived as *theoretical paths* aimed at outlining some coordinates toward a biopolitical interpretation of sovereign power and law, taking their cue from the extensive work of Agamben. This thesis, therefore, proceeds with a twofold purpose: the reading and the critical reconstruction of some of the main themes of Agamben's thought, along with the advancement of particular theses on their basis. It is a matter of utilising – hopefully in an adequate manner – a part of Agamben's "methodology". As he writes in a text *What is an Apparatus?*

> One of the methodological principles that I constantly follow in my investigations – Agamben claims – is to identify in the texts and contexts on which I work what Feuerbach used to call the philosophical element, that is to say, the point of their *Entwicklungsflihigkeit* (literally. capacity to be developed), the locus and the moment wherein they are susceptible to a development. Nevertheless, whenever we interpret and develop the text of an author in this way, there comes a moment when we are aware of our inability to proceed any further without contravening the most elementary rules of hermeneutics. This means that the development of the text in question has reached a point of undecidability where it becomes impossible to distinguish between the author and the interpreter. Although this is a particularly happy moment for the interpreter, he knows that it is now time to abandon the text that he is analyzing and to proceed on his own (WA, 13).

The chapters, thus, are organised and developed around specific themes and questions central to Agamben's work. They are designed as autonomous moments of analysis, which in their schematic synergy will try to outline a significant effort into the field of what we can call "legal continental philosophy" on the particular questions of sovereignty, law and biopolitics. And as outlined above, the project makes an original contribution in two main ways. On the one hand, it adds to the current critical literature on Agamben an account of the question of *form of life*, which is a topic that has not been inquired extensively yet; on the other hand, this thesis (through a close engagement with Agambenian philosophy) provides an interpretation of the role of sovereignty and law from the point of view of biopolitics.

It is worthwhile, at this stage, to attempt to answer the second question stated above: why a philosophical work under the auspices of a

law school? The immediate answer has to be found in the emergence, in the last few decades in particular, of an interdisciplinary critical attitude to the study of law along with the growing interest in looking at law in its actual operation in society within and outside the legal West. In this renewed scenario the necessity of the elaboration of theoretical tools for the critical analysis of law engaged the gaze of legal scholars with other disciplines, such as sociology, anthropology and philosophy, among else. The doctrinal study to law, thus, became more and more integrated with the critical and socio-legal approach by now, which – especially before a hyper-pluralistic contemporary society – turned out to be a richly applicable and feasible way of doing research in the phenomenon of law and its operations.

Besides this, it must be taken into consideration what could be seen as the "original sin" of academic philosophical research, namely the radical marginalisation (not to say, perhaps, the elimination) of continental thought and the election, instead, of a more scientific-prone analytic tradition as the *only* proper philosophy worth to be studied and taught. The study of continental philosophy, because of this removal, has been instead accommodated in departments of comparative literature (especially in the United States), politics and to a marginal extent law. In migrating from the enclosure of the classic philosophic approach, continental philosophy docked in different departments, which may have in fact enriched its critical perspectives and possibilities of research. Not having a specific methodology, nor a specific practical vocation, for philosophy it is quite easy to dwell in seemingly foreign lands. More difficult in contrast it is, often, for the homeland, each time, to find accommodation with the external logic and the (modest or not so modest) prerogatives and presuppositions of the other.

In this regard, I would like to think that this work is the result of the fragile encounter that any migration necessarily entails. My ultimate method in this sense is precisely a dialectical awareness of that encounter.

Thesis outline

This work is divided into two parts. The four chapters forming the first part, titled *Sovereignty, Government and Life*, will focus on Agamben's bio-political interpretation of the question of sovereign power and will try to show how his philosophical work provides a critical and fruitful response to the ambiguities of the Foucauldian critical interpretation of sovereignty and law.

As stated above, Schmitt's legal and political theory plays a crucial role in Agamben's understanding of sovereign power. *Chapter 1*, thus, examines Schmitt's theory of sovereignty, through the analysis of the concepts of "exception", "decision" and "normality". The interplay of these three structural-theoretical elements, in fact, draws the lines of the conceptual core of Schmitt's understanding of sovereign power and the law. The sovereign in Schmittian terms is that entity (or agent) who – having the power to decide on the exception – produces and protects the normal situation, which is the minimum criterion for the efficacy of a legal order. Therefore, as I will argue Schmitt conceived sovereign power as a proper "normalising power". For the general economy of this work, the first chapter represents a first step in the understanding of the relationship between law, life and sovereignty. As I will explain, sovereign power operates a codification and fixation of the vital framework of a community – in the form of a decision on what is *normal*. To be effective a legal and political order should be anchored to a *normal* framework of life. Sovereign is that act which by dividing the normal and abnormal, the friend and the enemy, has the power to create and guarantee the subsistence of the order.

Chapter 2 will move around Agamben's conception of the "relation of exception". In this chapter, I will offer an account of how, for the Italian philosopher, the roots of the Western conception of politics have to be located in ontological thought. Ontology, in fact, has constituted for centuries the historical *apriori* through which law and politics have been thought. Therefore, for Agamben, the relation of exception represents a fundamental inner logical mechanism, which had a primary influence in the elaboration of the main legal and political concepts. And if the relation of

the exception is the structure upon which 'we' (the West) have conceived "being", politics, and the law, it is because of specific epistemic conditions, a "*forma mentis*" that has passed throughout the centuries, and which has originated from ontology. In this regard, the ontological tradition laid the ground for the emergence of the conception of sovereignty, life and bare life, constituting a proper "ontological-biopolitical machine", which has had a decisive influence in legal and political thought and at the same time, has formed the matrix of the very idea of the subject.

The hypothesis that a particular understanding of ontology is central to the forms that law and politics assume will be further scrutinised in *Chapter 3*, which will focus on what Agamben has defined as a "double structure of the governmental machine" (or bipolar governmental machine). Agamben's archaeological and genealogical research, demonstrated that the structures of power which have been conceived in Western thought, is articulated upon the distinction between an "absolute power" (embodied in the idea of kingship or *reign*), and an "ordinary", administrative power (represented in what it is usually called "government"). These two forms of power despite referring to different political paradigms are functionally connected. Their original ground of emergence is "theology", and specifically in the onto-theological distinction between *potentia absoluta* and *potentia ordinata*. This bipartition has been used to define God's power in its transcendental and absolute essence, and its concrete application in the mundane affairs, in the form of a to divine *providence* (the government of all things). This distinction represents, in the development of legal and political thought, the model through which political power has been articulated and legitimated. Chapter 3, thus, retraces Agamben's inquiry into political theology focusing mainly on the distinction between absolute power and government attempting to show how his research re-composes what Foucault separated (sovereignty and government). Sovereignty and government are different but strictly dependent upon each other. Their distinction is, in fact, the reflection of a fundamental ontological problem, the one related to the difference between God's being and acting (or between his potentiality and actuality). The

government of "men and things" and sovereignty (or the Kingdom) are two elements in a machine, which cannot function without each other.

Chapter 4 interrogates the concept of *Ademia*, a term that Agamben has coined, to describe the perpetual "absence" of the "people" in the arena of political and legal order. As Agamben has demonstrated in his work *Stasis*, the people is an entity that exists as such only in the moment of the decision for the order; only in the moment of the creation of the community. Outside of the decisional moment, once the political community has been erected, the people disappear leaving the stage to the "passive", manageable population (or multitude). The people remain only as "represented", in the figure of the sovereign power. The aim of the sovereign power is, thus, the creation of a docile, peaceful, secured population, whose care is delegated to the realm and operations of government. In this way, it will be shown that the emergence of the biopolitics of population is not a rupture, a break, as in Foucault, but represents the historical development, and perhaps presupposition, of the theory of sovereign power.

Having outlined sovereign power in its relationship with government and the totalising procedures for the creation of a political body, in Part II this work turns to the analysis of the biopolitical performance of law in the creation of what Agamben calls a *form of life*. Trapped in the sovereign ban, human living becomes codified into forms, which are all tied to the possibility of their revocation into *bare life*. In *Chapter 5*, the relation between forms of life and bare life will be interrogated in detail. A form of life is defined as the sum of its "constituent rules", which institute and constrain the subject to a particular form. Agamben locates his understanding of the relationship between law and life in a theological context. The idea of a constitution and institution of life has been expounded in a philosophical and historical reconstruction of Monastic rules. Thus, this chapter will render its reflective move through the scrutiny of Agamben insight on monasticism, for then proceeding to consider the idea of the constitutive rule and Wittgenstein's idea of *lebensform* [form of life]. The purpose of this chapter is then to show how a form of life, as an *habitus*, is something predicated of a "subject": a form of life is the "form"

assumed by a certain "substance-matter", which determines the essence of a human subjectivity. In this light, a form of life, according to the very meaning of the term form, is something like the external "cover" of the subject, which is ultimately the bodily-animal mere living of the human. However, there isn't a degree of separation between the two sides of the human subject(itivity). Much like the Aristotelian relation between form and matter, mere life and form of life are articulated immanently on the plane of human existence.

Chapter 6 will scrutinise further the relationship between life and law through Agamben's interpretation of the concept of the *imperative* and of the *ontology of the command*. With a move typical of his philosophical style, he undertakes an archaeological inquiry into the ontology of the command by looking into the theological sphere of the *officium* and on the liturgical praxis of the Church ministers (priests). It is, in fact, with the theological elaboration of the sacramental-liturgical action of the priests that something like an ontology of command has been elaborated and transmitted to ethics and law. In this chapter, then, I retrace Agamben's archaeology of duty (with a special focus on the idea of office), to understand better the ontological substrate of the imperative form of law. Moreover, the idea of the office facilitates the comprehension of the relationship between life and its established forms. The *ufficium* is, in fact, a paradigmatic figure of what, in this thesis, has been named a form of life. What is at stake in the idea of office (and of duty) is a modality of thinking the link between forms of life, their *vis obligandi* and the actual (real) effect that law has in the world: that is to say, the performativity of law. The paradigm of performativity in law suggests that law, being a largely linguistic practice, creates its objects – fictions – that have the power to constrain the world into a concrete form; the law has the faculty to create/institute new worlds with material taken from the so-called social fabric. Law, thus, works by creating and fixing subjectivities, which are fictional but formative constructions that allow the social and political community to work (to become operative), and for its members to recognise themselves through it. In this way, I will try to expound how the law has an active role in the formation of a form of life properly human.

Chapter 7 continues on the task of expounding the capture and the modelling of life by law, through the analysis of the concept of the *person*. The person – from the Latin *persona* – originally meant a mask, and in Roman law, it was famously one of three fundamental elements of law along with "acts" and "things" (*res*). The term person referred to the juridical encasement of the citizen. The person is the social and juridical status of the individual, which is determined by power relationships that are susceptible to variation in time. However, much like a mask, the person is something that goes to define the subject, without corresponding with the entirety of the subjective existence. The mask of the person is always other than the individual corporeal dimension of the subject; it lays upon the organic life of the human, without confusing with it. Thus, the person is a dispositive that articulates and ties, a formed (qualified) life with bare life, and, therefore, is what distinguishes who can be included or excluded from a political community. The original performance of the dispositive of the person, thus, is the fixation of the division of life, between a fictitious, social, juridical side and an "insufficient", animal, excluded part.

The dispositive of the person, being a fictitious legal product, raises the question of the wider relationship between law and social reality that is the capacity of law to fix – and to create – social life. The urgent question to answer becomes perhaps this: in which way does the act of naming things create the fictional world of law? In other words, how is it possible for a fiction to sustain itself by creating forms of life? *Chapter 8* will attempt to answer this question. It will be argued that the necessary element, to keep reality actualised in its forms, is violence. Following a suggestion by Walter Benjamin, who claimed that if the violence in/of legal institutions disappears, the institution decay, in this chapter it will be analysed how legal objects are capable of putting in form reality only through violence. In this last chapter, I will point out, also, how Agamben assigns to law a peculiar capacity to create subjects. The law, to be valid, to actualise its performative character, need as a necessary element to its formation and operation: violence. As Agamben suggests, the subject of legal violence is bare life, which is not something original, but the product of the encounter between human bodily existence and legal violence. Thus, if bare life is the

ultimate subject of law and politics, produced by the possibility of implementing legal violence. Sovereignty and law, thus, assumes in this light the capacity of producing subjects.

Part One:

SOVEREIGNTY, GOVERNMENT AND LIFE

> Looking at the world as a whole, there are two works of God to be considered: the first is creation; the second, God's government of the things created. These two works are, in like manner, performed by the soul in the body since, first, by the virtue of the soul the body is formed, and then the latter is governed and moved by the soul. Of these works, the second more properly pertains to the office of kingship.[35]
>
> **Aquinas**
> - DE REGNO

[35] Aquinas (1949).

Chapter one

NORMALISING SOVEREIGNTY

In this chapter, I introduce Schmitt's theory of sovereign power. Given the importance that Schmittian thought assumes in Agamben's critique of law and sovereignty, it would be certainly an oversight not to consider it at length. In approaching this matter, I shall argue that Schmitt conceives sovereignty as a proper "normalising" power, whose main scope is the creation of a normalised frame of life and the establishment of a legal order based on such a framework. While the vast majority of scholars and interpreters looked at Schmitt's theory from the standpoint of the exception, in what follows I will try to expound the crucial function that "normality" – and the process of normalisation – has in and for his theory of sovereignty. In the economy of this work, thus, this chapter will work as an introduction to the question of sovereignty, and as a first attempt to think the functional link between sovereignty and (social) life.

The two phases of Schmitt's thought

Carl Schmitt's effort in juridical and political sciences has been marked by a constant progression made of turns and self-critiques, which render its precise overall definition a quite difficult task. It is a shared opinion that the path of his research could be divided into two phases that stand in opposition to one another.[36] The break is marked by Schmitt's adhesion to the Nazi cause.[37] In the wake of the ultimate collapse of the Weimar

[36] Hofmann (2002), pp. 168-187; Amendola (1999), pp. 103 – 119.

[37] On Schmitt' adhesion to the Nazi regime see: Bendersky (1983); Balakrishnan (2000); Mehring (2014).

Republic and the materialisation of Hitler's totalitarian state, Schmitt not only chose to be actively involved in the new regime but also rejected or revised some of the core lines of his earlier conception of law and politics.

With the works *State, Movement, People* (1933)[38] and *On the Three Types of Juristic Thought* (1934)[39], Schmitt moved, from (the so-called) decisionism, toward an "institutional" conception of law that he defined as "concrete order thinking" [*konkretes Ordnungdenken*].[40] These two theoretical approaches presuppose a radically divergent understanding of the production of norms and legal regulation. Decisionism assumes the sovereign decision as the source of legal validity that is as the element producing the institutional framework of social life necessary for a valid legal order. The decision of the sovereign establishes order and delimits the ambit of what counts as normal for a given community. Concrete order thinking, instead, conceives normality as emerging – as a norm – from within social life. Sovereign power and law, in this latter perspective, operates through the fixation and defence of forms of life that have been autonomously established in society.

When looked at from the point of view of Schmitt's biography, this turn is coherent with the style and the purposes of his general intellectual practice (and with an almost century-long life). It is, in fact, a typical Schmittian gesture to begin investigations from the then current context of Germany's political life. Vis-à-vis the mutated situation of the early 1930's, his decisionist approach turned out to be an inappropriate conceptual apparatus for the theoretical comprehension of the forces dominating the political and legal field under the rule of the *Fürher*.[41] Concrete order thinking, and its conception of law and political life, hinged upon the idea of "institution", is functional in the sense of the theoretical legitimisation of the new regime and the role of the leader.

Observed from the perspective of Schmitt's broad scholarly production, instead, the turn appears less consistent – not to mention that it perhaps does not appear as a turn at all. Recently, the representation of the

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[38] Schmitt (2001).
[39] Schmitt (2004).
[40] *ibid.*
[41] Maus (1997), pp. 127 – 128.

Schmitt's work as structured upon a radical break, in fact, has been disputed on a number of occasions.[42] As it has been suggested by Croce and Salvatore in a recent book on Schmitt's legal theory, decisionism and institutionalism do not constitute two different and opposed phases: 'rather they represent different faces of the same enquiry, whose main concern is with *the definition of law as an autonomous and self-standing field*'.[43] The appeal to institutionalism, in this light, is a form of self-critique, a moment of transition, that Schmitt undertook in order to overcome the limits of a theory he, then, considered unsatisfactory. More than a turn, though, for Schmitt, in moving toward the theory of the institution, this represented an evolution of his research in law and politics, toward an approach that has been defined as an "institutionalist decisionism".[44]

This chapter attempts to think through the continuity of Schmitt's work showing how he has conceived sovereignty, essentially as a normalising power. The function of Sovereignty, for Schmitt, consists primarily, in securing the existential-normal dimension of the political community concretely. The sovereign, in this sense, lays down the foundation of the social and political community, establishing the conditions of "normality" that could guarantee the subsistence of the legal order. The chapter is organised upon a reading of the three concepts of *exception*, *decision* and *normality*, which in their autonomy, as well as in their reciprocal cross-references, draw the lines of a Schmitt's insight conception of the principle of sovereign power. The following passage is, in this sense, instructive:

> The exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about. Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium […] There exists no norm that is applicable to

[42] Croce and Salvatore (2013); Maraviglia (2006); Bates (2006); Maus (1997);

[43] Croce and Salvatore (2013), p. 13.

[44] Croce and Salvatore declare the paternity of the definition of "institutionalist decisionism" as the unification of decisionism and institutionalism. However, already in the early 1990's Ronaldo Porto Macedo reached the same conclusion by suggesting that Schmitt's theory of law should be considered as a "Decisionismo Institucionalista"; see: Macedo (1994, 2000).Porto Macedo, Croce and Salvatore have so far provided the most articulated attempt to think Schmitt's work in its continuity, rather than in its breaks.

chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. All law is "situational law." The sovereign produces and guarantees the situation in its totality.[45]

The sovereign is the entity (or agent) that holds the power to build and grant the normal situation, which is the minimum criterion for the efficacy of a legal order. The exception, furthermore, Schmitt suggests, is an instrument that is deployed when conflicts or dangers are the cause of an alteration of the normalcy of social life that does or could endanger the self-standing of the state. The sovereign can produce both the exception and normality and in doing so has the faculty to determine what counts as normal and abnormal, marking the limits of the community, stabilising the customs, habits and regularities that constitute the normal frame of social life.

In what follow, as part of the effort of critically assess Schmitt theory of sovereignty, I will be showing that by moving to a "concrete order thinking" the sovereign, who independently produces the normal and the abnormal (in the form of the exception), re-emerges in the figure of the leader [*Fürher*]. The transcendent God-like sovereign, who creates the order *ex nihilo*, is replaced by the image of the leader as an *immanent principle* of normality. With the elaboration of a theory of the concrete order, Schmitt did not abandon the previous conceptual apparatus of sovereign power, but rather he rendered its immanentisation.

Moreover, Schmitt's theory of sovereign power – in both 'phases' of his thought – allows for the consideration of the uneasy relationship between sovereignty and normality. Yet, by combining (and comparing) Schmitt's thought with Canguilhem's theory of normality, it will be advanced that norm and normalisation do not, in fact, escape the sovereign moment of their establishment; which is not an accessory element but a principle at the very core of the normativity of the norm. Indeed, it is suggested, here, that it is essential for a sovereign power to produce such a normalising effect.

[45] Schmitt (2005), p.13.

Exception

The notion of the "state of exception" assumes, in Schmitt's oeuvre, the function of the factual existence of an emergency – in the form of the unexpected urgency, of the contingent emergence of conflicts within the normal configuration of social and political life – and, alternatively, of a 'general concept in the theory of the State'[46] – i.e., a doctrine of public law. Thus, with the term "exception", Schmitt designates both the factuality of an event and the conceptual dimension of an element of the law. According to the first of the two, a state of exception represents the materialisation of sudden social and political (re)configurations challenging the stability of the "normal" framework of life in a given community. In this sense, the exception is, properly, the abnormal threatening the subsistence of normality. The connotation of the exception as an element of law, instead, is a more problematic insight, since the position of the exception – and in general, of the provisions regulating emergency powers – inside the boundaries of the legal is a rather contested idea.

It remains the case that one of the main merits of Schmitt's research consists in having disclosed the proper legal significance of the exception – mainly in the works of the early 1920's, *Dictatorship* (1921) and *Political Theology* (1922). In *Dictatorship*, Schmitt offers a genealogy of such a legal and political category, tracing the theoretical and historical path leading to the formation of the modern theory of the state of exception and emergency powers. The outcome of this genealogy, or its most significant result, as Schmitt claims, is the distinction between "commissary dictatorship" and "sovereign dictatorship". Commissary dictatorship – which represents a sort of prototype of the contemporary state of emergency – is a peculiar 'act of self-defence'[47], consisting of the suspension (or alteration) of constitutional provisions, for the sake of the suspended constitution. So much like an immune reaction, the state of exception, is a systemic function that allows for the protection of the constitution through its alteration. Dictatorship, therefore, presupposes a "dialectical" mechanism according

[46] *ibid.* p. 5.
[47] Schmitt (2014), p. 118.

to which the order is preserved through its negation, and the possibility of the negation is inscribed into the order as a form of self-defence.

In this account, the existence of a legal system is made possible by the internalisation of a radical negativity – in the anomic form of the exception. This characteristic, for Schmitt, is the visible symptom of an intrinsic feature of the law that entails the sometimes-cryptic relation between legal norms and reality – and in a way the significant issue of the normativity of norms and rules. Schmitt, in fact, writes that 'in terms of philosophy of law, this is the essence of dictatorship: the general possibility of a separation between norms of justice and the implementation of the law (*Rechtsverwirklichung*)'.[48] Schmitt confers to this separation the rank of general element of law, which, even if it becomes explicit in the phenomenon of dictatorship, represents an intimate element of legal functionality as such. What Schmitt asserts, at this point, is the fact that law requires an external force – which is, in any case, an element of the legal sphere – with a view to create the conditions that allow the law to operate. Dictatorship is a technique, *for* the implementation of the law, and consequently remains within the legal ambit.

In the case of the sovereign dictatorship, instead, the entire constitutional order is abolished through the action of the dictator, which 'does not suspend an existing constitution through a law based on the constitution', but 'it seeks to create conditions in which a constitution […] is made possible. Therefore, dictatorship does not appeal to an existing constitution, but to one that is still to come'.[49] The sovereign dictatorship, in contrast to the commissary, is not emanating from a constitutional order, but from a context of anomy – a legal nothingness – with the purpose to pose the basis upon which to build up a *new* legal order. In the history of Western states, there are two main cases of sovereign dictatorship: one, when a revolution has changed the social and political assets of a state and a constituent assembly assumes unlimited decisional power for the establishment of a new constitution; and, another, when a faction inside the political spectrum of the state becomes the interpreter of the people's will

[48] *ibíd.* p. xlii.
[49] *ibíd.* p. 119.

to change and acts in order to materialize such change.[50] The sovereign dictatorship is never part of the order; on the contrary, it is a challenge to the endurance of institutions, anchored to popular consent and the constituent power.

What can be derived from Schmitt's genealogy of dictatorship is a conception of the state of exception as a technical legal instrument apt to the establishment of normality. The doctrine of the exception is the legal ground of instruments in the hand of the state – or of a constituent agent more generally–, which determines the possibility of the composition of social life, legally providing the power to re-create the necessary condition of normality for the law's operation. As Agamben has put it, it is through the exception that life 'can in the last instance be implicated in the sphere of law' (HS, 27). The normality of a normal-framework-of-life, in Schmitt, then, is always the outcome of an act of normalisation, proper to a sovereign power.

The question of the legality of the exception is a central theme, also, of Schmitt's most popular text, *Political Theology*. Published a year after the *Dictatorship*, this work can be read as a continuation of the effort to determine the place of the exception in the realm of law, through the further pinpointing of a definition of sovereignty. The image of sovereignty in *Political Theology* is that of a power that exceeds the normal jurisdiction of law and includes the authority to, famously, 'decide on the exception'[51]; i.e., to decide whether a legal order is suspended – in the case of an actual state of exception, or, if a legal order is in force – hence, avoiding such a decision. The obligation of the sovereign to the law ends, when the conditions of normality are endangered. In this sense, as Kahn suggests, sovereignty is 'the point at which law and exception intersect'.[52] The sovereign is the supreme authority that marks the threshold of the legal order with its outside, opening the legal system to the possibility of the exception and all the un-formal elements necessary to the implementation of the law and for the creation of a normal situation. Being the prerogative of a sovereign

[50] *ibid.* p. 126.
[51] Schmitt (2005), p. 5.
[52] Kahn (2011), p. 34.

power, the exception is a part of the legal order, even if it excludes any form of total formalisation.

The outcome of such a theory is a blurred image of the exception, which belongs to the law, yet without being completely part of it. As Schmitt claimed, however, the exception 'is different from anarchy and chaos'[53]. Rather, it represents a borderline 'between legal order and chaos' and, as Kahn has pointed out: 'if the exception falls off that line, it disappears into law or chaos. The exception absorbed by law is discretion; the exception absorbed by chaos is mere violence'.[54] Being something placed at the limit of the legal order, the exception is a privileged standpoint for the investigation of the question of the original ground of legal reality and the efficacy of norms. The notorious statement, that Schmitt borrowed from Kierkegaard, according to which 'the exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception'[55], has to be interpreted unlike a naïve re-proposition of the dialectic between the norm and the exception, but, instead, as a summary of an entire research path into the field of legal science. The exception stands as a 'foundational concept', its function is to 'make law intelligible, without (or at least before) any reference to an existing legal system'. When examining the exception, Schmitt found 'a criterion' through which to establish 'whether or not there is an effective order'.[56]

To understand this peculiar foundational function of the exception, it is necessary to pay attention to the ambiguous essence of the famous Schmittian definition: 'Sovereign is who decides on the exception' [*souverän ist wer über den ausnahmezustand entscheidet*]. The ambiguity of this statement lies in the meaning of the word "on" [*uber*]. The sovereign decision "on" the exception, in fact, entails an 'oscillatory'[57] meaning. To decide "on" the exception means, on the one hand, to recognise and to state the existence of a situation of extreme peril for a legal order. On the other hand, the

[53] Schmitt (2005), p. 12.
[54] Kahn (2011), p. 43.
[55] Kierkegaard (1983), p. 227.
[56] Croce and Salvatore (2013), pp. 15-16.
[57] Kahn (2011), p. 41.

sovereign decision is a decision *into* a state of exception, that is to say, a decision that marks the original moment of the imposition of a legal order out of the anomic context of the state of exception.

The exception represents the fundamental 'beyond' of every order, the nothingness upon which a legal order can be established sovereignly. Like the state of nature in Hobbes, the exception constitutes the ground for the Sovereign decision, which is, in this sense, the absolute beginning. The exception precedes the norm, 'as insurmountable contingency, [it] is the origin of the legal-political form, of the efficacy and validity of norms'.[58] Furthermore, if the legal order is effective only by reference to a normal situation (the homogeneous medium) – a stabilised social frame, made of shared and common forms of life – the sovereign is the cause and, in a way, the "author" of normality.

Sovereign, therefore, is the agent who – potentially – can perform the re-evocation of the original exception. Sovereignty implies a diversion of the relationship between the inside and the outside. If, for Schmitt, the State is a 'pacified order, whose main aim is to expel and neutralise conflicts', decisionism is the possibility of disorder: the condition for the creation and preservation of order. Public law, in turn, 'is an order that remembers the emergency, the contingency, from which it was born, and the sovereign is who could activate this memory'.[59]

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[58] Galli (2008), p. 55.

[59] *ibid.* p. 56. Micahel Marder defined this specific form of dialectical relationship between norm and exception, as a 'geometry of the exception', according to which the exception represents the point and the line the rule. Referring – metaphorically – to the Hegelian *aufhebung*, Marder claims, 'just as the point dialectically negates (for Hegel) — that is to say cancels, preserves, and elevates — indeterminate spatiality, so, in the line, the point negates itself in relation to itself'. In Schmitt's idea of the relation between exception and law, 'the normalization of the exception in the norm does not do away with the exception but keeps it dormant, maintains it in a sublated form, and lives off it'. The disruptive potential of the exception stands in the geometrical space of law in a state of latency. The negation of the point of the exception in the linearity of law is not an annihilation, but conservation; see: Marder (2010), p. 19.

Decision(ism)

'Like every other order, the legal order rests on a decision and not on a norm'.[60] This remark, in *Political Theology,* stands as a sort of "manifesto" of *decisionism*, a foundational theory of law that Schmitt begun to develop in the early 1920's. Decisionism conceives the validity and effectiveness of all norms as originated in a sovereign decision. The source of law and legal regulation, in this perspective, lies ultimately with the act of a sovereign agent, on which depends the very possibility of the existence of a political community. As Schmitt writes, decisionism assumes that 'all *Recht*, all norms and statutes, all interpretations of laws', are a substantially 'decision of the sovereign, and the sovereign is not a legitimate monarch or established authority, but merely the one who decide in a sovereign manner'.[61] Sovereign is 'whoever establishes peace, security, and order', it is the agent whose decision represents 'the beginning (also in the sense of *Arché*) '.[62]

Decisionism seeks to determine the original ground of emergence of a legal order, without recurring to any further specifications. The sovereign decision, in this regard, is not deducible from a pre-existing norm, or from a higher authority: it establishes the law *ex nihilo*, becoming in this sense *absolute*.[63] Schmitt opposes his decisionism to Kelsen's "pure theory of law" and in general to normativism and liberal legalism. With his theory, he contests the assumption of the coherence and self-closure of a pure system of norms, by showing how there are elements that are not deducible from norms. Not only the exception but also decisions, that are fundamental principles of legal systems, are, for Schmitt, not deducible entirely from norms. In every legal decision, there is a fissure, an aperture, thanks to

[60] Schmitt (2005), p. 10.
[61] Schmitt (2004), p. 61.
[62] *ibid.* p. 62.
[63] Absolute in the very sense of the Latin *absolutus*: untied, unlimited with no actual restriction; but also dependent only in itself, complete. Hence, in this view, Hobbes represents the perfect example of decisionism. The state of nature is the pre-juridical, anomic state of strive and violence, is the bellum *omnium contra omnes*, and the passage to the safe order of the state is due to the act of the sovereign, whose decision shapes the juridical and political order.

which, it is never possible to derive a decision in its entirety through the formal contents of norms.[64] This peculiar non-correspondence between norm and decision 'is rooted in the character of the normative and is derived from the necessity of judging a concrete fact concretely even though what is given as a standard for the judgment is only a legal principle in its general universality'.[65] The self-closure of legal normative systems, thus, is, logically and concretely, illusionary.

By denying the place of an absolute (underived) decision, and relying upon the primacy of norms of law, normativism, in Schmitt's perspective, turns out to be a self-referential and groundless theory of law. Kelsen's pure law remains in this perspective paradigmatic. If the validity of a norm depends on the validity of a superior norm, the validity of the ground norm [*grundnorm*], the highest limit of the system remains essentially un-derived, since it cannot be referred to a yet a further norm. Consequently, the validity and the existence of the ground-norm remains unexplained. Kelsen's system lacks a proper foundation and represents, in Schmitt's perspective, the ultimate step of the nihilist trend characterizing legal and political modernity.

Against the groundlessness of normativism, Schmitt opposes the absolute and concrete existence of the sovereign decision, as the definitive departure from anomy toward the imposition and stabilization of a legal order. The sovereign decision produces and guarantees the legal and political order; it is a concrete decision in the sense that it is made by an existing agent with the intention of settling down the limit-criteria of the normal form of life for a specific community. As Schmitt affirms, the effective normal situation of a given political community, 'is not a mere superficial presupposition that a jurist can ignore; that situation belongs precisely to its immanent validity'. The entire legal order presupposes a normal frame of life composed of shared customs and habits, since 'all law is situational law'. In this schema, 'the sovereign produces and guarantees the situation in its totality'.[66]

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[64] On this point see: Salter (2012), pp. 102-111.
[65] Schmitt (2005), p. 31.
[66] *ibid.* p. 13.

What decisionism brings to the fore is an image of a God-like sovereign – supported by the general hypothesis of a "political theology" – whose fullness of powers is, properly, a creational power. Before the sovereign decision toward the order, lie the nothingness and anomy of the exception. The decision represents the absolute beginning, the putting into form of the life of a given community. If the legal order emerges from anomy through a decisional act, the normal situation, which is the ground of the efficacy of law, is created by the decision itself. The absolute decisional act of the sovereign, though, 'cuts out […] the social configuration.'[67] It states the criterion, according to which to distinguish, the normal from the abnormal – or, famously, *friends* from *enemies*.[68] The enemy, in this light, has a peculiar "biological" character. The enemy is primarily who represents a threat to the normal way of life[69] of the community, assuming peculiar "biological" essence. The decision toward the order consists in the eradication of conflict through the elimination of the 'elements or groups, which appears to alter the general homogeneity of the widespread social practices'[70]. Schmitt's normal situation, therefore, consists in 'a norm that is and establishes a "way of life", a certain form of life that, in the extreme, may also be represented as a biological norm prior to all legal and social norms'.[71] The existential reality of a normal vital substance, which functions as a decisive support for the legal and political order, thus, is the result of the sovereign foundational decision. In this way, Schmitt confers to sovereignty the faculty of delimiting the normal conditions of life for the members of a community – in the form of a concrete homogeneous support, which sustains the functioning of the legal order.

A significant explanation of what should be intended as "normal situation" and "homogeneous medium", is offered by Schmitt in the text *The Crisis of Parliamentary Democracy* when he discusses the conception of homogeneity and equality as essential features for the existence of

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[67] Croce and Salvatore (2013), p. 15.

[68] On the distinction between friends and enemies see: Schmitt (2007).

[69] As Schmitt claims in *The Concept of the Political* the enemy is the adversary that "intends to negate his opponent's way of life and therefore must be repulsed or fought in order to preserve one's own form of existence"; see: Schmitt (2007), p. 27.

[70] Croce and Salvatore (2013), p. 15.

[71] Wetters (2006), p. 38.

democracy. Here homogeneity is described as an intersection of biological and socio-economic characteristics, as a situation in which each member of the community possesses 'independence equally' and is 'similar to every other one physically, psychically, morally, and economically'.[72] However, in the same pages, Schmitt recognises that substantial homogeneity does not exist if not created through the limitation of the elements that are resisting and opposing the basic criteria of normality. It is the task of sovereign power, in this regard, to state the criteria of normality, to guarantee the necessary homogeneity, and in this way giving existence and efficacy to the legal order. Schmitt thinks of sovereignty as, properly, a normalising agent, whose principal function is to determine normality, shaping the very life of the member of the community in order to establish a certain degree of homogeneity necessary for the legal order to be effective.

Normality and concrete order thinking

In *On the Three Types of Juristic Thought*, published in 1934 after his adhesion to the Nazi regime, Schmitt marks the point of detachment with classic decisionism, when he openly criticises the insufficiency of such an approach to law. 'The decisionist type', he writes 'orients itself exclusively toward cases of collision or conflict. It is governed by the notion that a conflict or a clash of interest, thus a concrete disorder, is first of all overcome and brought into order through a decision'.[73] From the perspective of decisionism, the whole legal apparatus is oriented toward 'dispute resolution' and reduced to mere 'material evidence for the basis of juridical decision'.[74] Decisionism fails by reducing the whole spectrum of jurisprudence and norms to the base for decisions: 'there is then really no longer any systematic jurisprudence: every jurisprudential argument is nothing but a potential basis for a decision, which is waiting for a case of dispute'.[75]

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[72] Schmitt (1988), p. 9.
[73] Schmitt (2004), p. 63.
[74] *ibid.*
[75] *ibid.*

Against the reductionist inclination of normativism *and* decisionism, Schmitt opposes the "concrete order thinking", a theory of law that affirms its ultimate dependence on the concrete existence social groups and social institutions. The capacity of social groups to create normality and normal situations is what constitutes the foundational ground of legal and political orders. As Schmitt writes:

> We know that the norm presupposes a normal situation and a normal type. Every order, including the legal order, is bound to concrete concepts of what is normal, which are not derived from general norms, but rather such norms are generated by specific order and for their specific order. A legal regulation presupposes concept of what is normal, which develop so little from the legal regulation that the norming itself becomes so incomprehensible without them that one can no longer speak of a norm.[76]

Schmitt, at this point in time, seems to invert the relationship between normality, law and sovereign power – which was typical of decisionism. It is the normal situation, emerged from inside the social fabric that gives legitimacy and normative efficacy to law. In a concrete order, normality corresponds essentially to the whole set of forms of life that have been formed institutionally and are not simply reducible to technical and functional regulation. The normal is established by those institutions that have already formed in themselves their own regularities, customs and calculation, which legal norms can only ratify and serve. 'The cohabitation of spouses in marriage, family members in a family, kin in clan, peers in a Stand, officials in a state, clergy in a church, comrades in a work camp, and soldiers in an army'[77], are aspects of social life that is not the outcome of legal regulation and – on the contrary – constitute the substance of legal norms. In Schmitt's concrete order 'legal norms are based on a previous institution', which is a social product that is aimed to creates and to stabilise 'typical way of performing duties and serving tasks, which becomes a guideline for all those who are required to perform the same duties'.[78]

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[76] *ibid.* p. 56.
[77] *ibid.* p. 54.
[78] Croce and Salvatore (2013), p 37.

As explained by Croce and Salvatore, institutions are 'social entities belonging to a far broader organism that is the State', and the state is the guardian and the guarantor of the institutions that 'make a given historical community *that* community'[79]. However, not all the institutions are part of the state, but only those institutions considered functional to the continuity of political stability. Schmittian institutionalism, thus, presupposes the existence an entity stating the criterion for the selection of the institutions to be protected, that is to say, presupposes a decision.

By concluding *On the Three Types of Juristic Thought*, Schmitt renders it clear that the elaboration of concrete order thinking is functional to the theoretical legitimisation of the new political system inaugurated by National-socialist movement: the state, Schmitt claims, became an organ of the *Führer*, who gained the monopoly of the political. In this manner, decisionism and normativism are 'no longer adequate for a political unit constructed in this way'.[80] The leader, in the concrete order of Nazi Germany, is the ultimate guarantor and the principle of the political unity of the community. It is the principle of the *leader*, thus, that realises the unity and the stability of the concrete order, delimiting the potential emergence inside the social fabric of divergent institutions claiming legitimacy and recognition. As Schmitt writes:

> The acceptance of the manysidedness of spontaneous life might lead again without delay to an unfortunate pluralistic splitting of the German people into denominations, tribes, classes, estates and interest group, unless a strong state uplifts and guarantees the whole of the political unity over the multitude of forms. Every political unity needs a coherent internal logic of its institutions and normative systems. It needs a unitary idea of form to give a general shape to all the spheres of public life. *In this sense also, there is no normal State which is not total at the same time*. However numerous the viewpoints of the regulations and the institutions of the various spheres of life, a consistent main principle must be recognized firmly […] the strength of the National-Socialist State resides in the fact that it is dominated and imbued from top to bottom and in every atom of its being by the idea of leadership. [81]

[79] *ibid.* p. 51.
[80] Schmitt (2004), p. 98.
[81] Schmitt (2001), p. 37

The *Führer* is the principle that grants that the totality of the social institutions composes the inviolable unity of the community. So, despite Schmitt's emphasis on the spontaneous emergence of normality, the final decision on what counts as normal rests with the *leader*. All social institutions are subdued hierarchically to the leader, which is, as such, the expression of the unity of the people.[82] Therefore, the holder of the ultimate decision over the existence of normality lies in the hands of the sovereign-principle of the leader, which stands as a concrete criterion for the demarcation of the inside/outside (friend/enemy) in a political community. At the ground of the idea of concrete order, there is 'the assumption that a stable social order may only be based on a widespread and homogeneous institution which may be harmed by the rise of pluralism'.[83] The task of the leader is, then, to limit the instability inherent in a plural society, stabilising the main criteria of social homogeneity.

While at first glance Schmitt seems to resolutely leave behind his earlier decisionist stance – especially in light of the radical mutation of his technical terms, in the elaboration of concrete order thinking, he has essentially revived and reworked some of his basic thinking of his late decisionist phase, while keeping intact nothing less than the very logic of his conception of sovereignty. In the essay *State Ethics and the Pluralist State*, published in 1930, Schmitt attempted a deconstruction of the main traits of the pluralist theory of the state, making an unexpectedly clear opening to institutional and social pluralism. The pluralist view of the state (by authors like Cole and Laski), Schmitt sustains, is marked by an inaccurate understanding of the state unity as 'absolutely monistic and destructive of all other social groups'.[84] 'State unity', he writes, 'was always a unity of social pluralities'.[85] The state is always the non-conflictual supreme unity of a plurality of subjects and groups, 'not because it all-powerfully dictates of levels all other unities, but because it decides and can, within itself, prevent all other opposing groups from dissociating to the point of extreme hostile

[82] Porto Macedo (2000), p. 110.
[83] Croce and Salvatore (2013), p. 61
[84] Schmitt (2000), p. 306.
[85] *ibid.*

ty'.[86] Inside the shield of the state, 'social conflicts […] can be decided so that an order, that is, a normal situation, exists'.[87] In this account, the role of the state consists in containing the emergence, inside its naturally plural organism, of new conflicting social configurations, establishing a common ethic and a homogeneous identity capable of constituting the ground for the resolution of conflicts. Therefore, the state marks the limit(s) of a community; it determines what counts as normal and abnormal.

The thesis of a fundamental continuity in Schmitt's thought meets at this point its decisive confirmation. In the theory of a concrete order, the leader functions as the principle of the creation of homogeneity and therefore could be seen as taking the place of the state's sovereign power in deciding on what is to be a part of the whole (friends) and what is to remain outside (enemies). The principle of leadership [*Führerprinzip*], Schmitt claims, makes the political unity of the German state strong enough to limit the materialisation of conflicting institutions; and the decision of the *Führer*, states the criteria of homogeneity of the concrete existential order of the German people.

It can be argued, that Schmitt, with his idea of a concrete order, replicates, in fact, the Hobbesian schema of the passage from disorder to order, whereby, instead of the state of nature as an anomic context to be regulated, he thought that the original disorder is a '*condition of pluralism*'[88], which threatens the self-standing of communities with the emergence of ever new conflicting formations. Even if historically situated, the expression of a concrete order of stabile institutions, by which he shares an "ethnical identity", the leader – much like with the decisionist sovereign – is the ultimate source of the existence of law and order. As Schmitt writes in a piece that eventually marked his ultimate intellectual involvement with Hitler's regime, 'the Führer protects the law from the worst kind of abuse when, in the moment of danger, he immediately creates law by virtue of his leadership [*Führertum*] as the supreme judge'.[89] The principle of the *Führer*

[86] *ibid.* p. 307.
[87] *ibid.*
[88] Croce and Salvatore (2013), p. 45.
[89] Schmitt (1934), p. 946.

lives of its own independence: without his words neither the state-order, nor the existence of a homogenous people could exist.

Despite their similarity, the decisionist sovereign and the leader diverge on a fundamental aspect: while the sovereign decision established the order from nothingness, and found its legitimacy only in the "future" order, the legitimacy of the "jurisdiction" of the *Führer* is grounded in the very life of the German people. 'The judicial power of the Führer', Schmitt writes, 'originates in the same source of law from which the law of every Volk flows', that is to say from 'Volk's right to life [*Lebensrecht*] '.[90] However, this does not entail some form of restraint to the power of the leader, since 'the Führer himself determines the scope and content of his course of action'.[91] The German *volk*, its right to life, is the source of the legitimacy of the leader, what constitutes the jurisdiction – and therefore the legality – of his free and untied action.

In concrete order thinking, the figure of the decisionist sovereign re-emerges in the form of the immanent principle of leadership. It is in the very nature of leadership not to be a representative of the group or an appointed governor, but to be the direct expression of the group, the immanent guiding principle of a community. Schmitt stresses this substantial feature of leadership by comparing it to the Christian pastorate. The Church, he claims, 'has given to its power of domination over its faithful the image of a shepherd and his flock', central to this 'is that the shepherd remains absolutely *transcendent* to the flock. That is not our concept of leadership'.[92] Unlike the Christian conception of the pastorate, the leader does not transcend his community. Rather, as Agamben has sustained, the *Führer* is 'something like a pure expression of the movement',[93] the immanent principle of the determination of the community. Schmitt, hence, rather than keeping at bay his decisionist stance, operates an immanentisation of the sovereign decision. The leader is the expression of a concrete social organism. He is 'who decides, but not whoever decides'.[94] He belongs to a

[90] *ibid.* p. 947.
[91] *ibid.* p. 949.
[92] Schmitt (2001), p. 47.
[93] Agamben, (2005), p. 22.
[94] Maraviglia (2006), p. 72.

specific community, to a culture and to a particular historical moment. He is, as Agamben suggests, the "living norm" (HS, 172) of the normal situation: the direct expression of the German people, which in the figure of the leader is present as a whole.

Normality and normalisation

The 'Normal', Canguilhem writes, 'is that which is such that it ought to be' and 'in the most usual sense of the word, is that which is met with in the majority of cases […] or that which constitutes either the average o standard of a measurable characteristic'.[95] The terms normal and normality, as suggested by Kneale, imply a double sphere of meanings: *descriptive* and *prescriptive*.[96] The former refers to normality as something that is met in the majority of the cases; normal is an attribute of recurrent elements, common behaviour, and diffused shared values inside a given social context. The latter, instead, intends normality, as that it ought to be; in this sense, the normal expresses the idea of the set of models and standard that a subject has to follow to be considered normal.[97]

Inside the body of Schmitt's work, the term normality is used in both senses. Normality is declined in a *descriptive* sense when he refers to 'normal situation', but also to a 'homogeneous medium'[98] and 'normal person'[99], to describe the normal configuration of social relationships, shared habits and customs. In this sense, normality refers to the regularities that can be observed in a given social group. A normal element of an institution is something that could be observed in the majority of the members of a community, something predictable and measurable representing the "average". An institution, though, is a social product whose essence is represented by shared normalities. Therefore, Schmitt's definitions like "homogeneous medium" or "normal person", echoes to some extent the

[95] Canguilhem (1991), p. 125.
[96] Kneale (1969).
[97] Kneale (1969); Siniscalchi (2007).
[98] Schmitt (2005), p. 13.
[99] Schmitt (2004), p. 46.

definition of an average state of affairs that goes to constitute the specific way of life of a social group. A normal situation, Schmitt sustains, is the basic requirement for the efficacy and validity of the legal order, and represents, at least to some extent, a counterpoint to the concept of exception. In this perspective, as Wetters puts it: "norms (as laws) can be applied only on the condition of pre-existing "existential" norms (including all natural and human law and social norms)".[100]

In its *prescriptive* sense, normality entails essentially the problem of the *normativity of the normal*, the possibility of establishing norms out of normal. In this sense, normality refers to the normal as the positive content of norms and regulation, as constituting the substance of norms, and the necessary ground for the efficacy and normativity of the legal order. This second use of the words normal and normality is central to Schmitt's turn to concrete order thinking and institutionalism. A concrete order presupposes as the ground of a political community, the real existence of institutions as spontaneously emerged from within human sociality. In this schema, the regularity of the normal forms of life determines the juridical substance of legal norms; whose main purpose is 'to serve' [101] institutions. A legal regulation depends on the endurance of the normal situation; 'it controls a situation only so far as the situation has not become completely abnormal'[102], like in the case of the state of exception. Normality, thus, generates (even if not conclusively) and orients the legal order.

Schmitt seems to suggest that institutions are able to generate their own normativity and that the legal order is just an attachment to social formations. However, this is not a conclusion he would endorse. In a concrete order, normality and normativity must not be identified.[103] If social institutions regulate themselves, producing their own normativity, there would be no reason for Schmitt to continue to rely on the concepts of the legal order and norms. The normativity of the normal – and of order – is not produced in society through a kind of spontaneous entropic process, but is something that emerges within the tight relationship between institutions,

[100] Wetters (2006), p. 35.
[101] Schmitt (2004), p. 54.
[102] Schmitt (2004), p. 54.
[103] Croce and Salvatore (2013), p. 39.

norms and sovereign power. Although Schmitt did not expound this relationship sharply, it is nevertheless possible to shed some light on it.

A given norm, to be, properly, a norm, has to produce binding effects. It has to correspond to the majority of particular cases. Institutions lack the authority and the necessary power to limit deviant behaviour, since, according to a recurrent Schmittian theme, the spontaneity of the plurality of social life ever-brings about the risk of its own dissolution, that is to say, the falling into the abnormal. Therefore, institutions and social normality lack normativity, i.e., the capacity to establish norms. It seems to be implicit also in the substance of social rules and institutions the very same articulation between legal norms and the implementation of law that Schmitt – when discussing the question of dictatorship –detected as a fundamental element of the law. The moment of the implementation of norms – and the subsequent concretisation of normality – is not deducible from the positive content of norms, and depends ultimately on the concrete actualisation of such content. In other words, to produce normativity out of the normal, it is necessary that something can actualise what is to be contemplated as the, henceforth, normality.

According to what I proposed in the previous section, the sovereign/leader establishes the normal, rendering the normality of social institutions as the necessary ground for the validity of the legal order. The sovereign decision guarantees the normativity of the normal, giving to social institutions the force of law. Indeed, as Croce and Salvatore suggested, in Schmitt's institutional thought, it is the law that 'determine and stabilise what in a given context is deemed to be the normal case. Legal norms make normal cases binding and confer on them the force of legitimate authority'.[104] Normality and the subsequent normativity of institutions depend on a decision toward the legal recognition of what counts as normal; sovereign power is in this light, properly a normalising power.

It is helpful at this point to refer to the work of Canguilhem, an author whose theories had a decisive role in shaping the sociological and political understanding of the concept of normality, and whose thought

[104] Croce and Salvatore (2013), p. 39.

turns out to be particularly consistent with Schmitt's insight on norms and normality. In his now seminal work *The Normal and the Pathological*, Cangulhem, while pursuing a determination of the definition of normality in medicine and biological science, laid down a widely accepted definition of normality in the social sciences and the humanities. What is crucial to Canguilhem is that something specifically "normal" or "abnormal" does not exist. Only 'situations and conditions *called* normal' exist.[105] The normal is the detection inside the borders of specific phenomena (or scientific field) of an order called normal, which favours specific constants and regularities, according to which it is possible to categorise variations and differences. Therefore, for Canguilhem, factually the distinction between the normal and the pathological does not exist. Rather, this distinction represents a description, in relation to an organism, of the passage from a condition called normal to a different (pathological/abnormal) condition. What is considered as the normal type is nothing other than the example of an abstract point of reference, a norm, aimed at ordering the variation of status in a given context, assessing different values to different conditions.

In one of the concluding chapters of *The Normal and the Pathological*, titled 'From the social to the vital', Canguilhem tackles explicitly the question of social normality and of social norms. Both living organisms and society are organised and governed through more or less systematic normative apparatuses, but while organism's norms are provided by its living existence, in society norms are actively invented.[106] In the sphere of sociality 'the norm', Canguilhem writes, is 'what determines the normal starting from a normative decision',[107] while in an organism 'the rules for adjusting the parts among themselves are immanent, presented without being represented, acting without deliberation nor calculation'.[108] The realisation of normality, he claims, is 'the execution of the normative project'[109], the ultimate outcome of a decision toward the settlement of norms and subsequent normalisation of a given social context. It is implicit

[105] Canguilhem (1991), p. 228.
[106] Mol (1998), p.p 279; Canguilhem (1991), pp. 258-259.
[107] Canguilhem (1991), p. 245.
[108] *ibid.* p. 250
[109] *ibid.* p. 243.

in the act of imposing norms, in fact, the inclination to determine concretely the social. As Cangulhem writes a 'norm is in effect the possibility of a reference only when it has been established or chosen as the expression of a preference and as the instrument of a *will* [italics mine] to substitute a satisfying state of affairs for a disappointing one'.[110]

Indeed, it is in the very nature of the norm to be formulated with the intention to disqualify and marginalise the abnormal, the non-conforming. In this sense, it is the abnormal that has priority over the normal[111], since it is what constitutes the grounds for the imposition of a norm. As Canguilhem insists, normality is never neutral. On the contrary, it is a 'polemical concept':

> The normal is then at once the extension and the exhibition of the norm. It increases the rule at the same time that it points it out. It asks for everything outside, beside and against it that still escape it. A norm draws its meaning, function and value from the fact of the existence, outside itself, of what does not meet the requirement it serves […] To set a norm (*normer*), to normalize, is to impose a requirement on an existence, a given whose variety, disparity, with regard to the requirement, present themselves as a hostile, even more than an unknown, indeterminant. It is, in effect, a polemical concept which negatively qualifies the sector of the given which does not enter into its extension while it depends on its comprehension.[112]

Although Schmitt and Canguilhem are formulating their hypotheses from within different perspective, at different times and places and with clearly different purposes, both are sharing a common understanding of the functioning of normality and social norms, as presupposing a decisional moment toward the imposition of an order. In Schmitt's account, sovereign power states the criteria of normality and limits the potential emergence, inside of the social fabric, of elements disturbing the necessary homogeneity, stabilising what is considered the normal case. To ground a legal and political order means to give a specific form to a community. For Canguilhem the original decision is embodied in the very statement of the norm and in the implementation of the normative project that is in the will

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[110] *ibid.* p. 240.
[111] Roudinesco (2008), p. 23.
[112] Canguilhem (1991), p. 239.

to normalisation. 'The social order' he claims, 'is a set of rules with which the servants or beneficiaries, in any case, the leaders must be concerned'.[113]

The 'anthropological and cultural experience of normalisation, Canguilhem sustains, is always relative to other norms; it never happens in a socio-normative vacuum but is contextual to the historical presence of a given society. While examining this, Wetters has proposed that in positing the sovereign normative decision in a determined socio-historical context, 'Canguilhem implicitly rejects his theory of sovereignty as a metaphysical illusion'.[114] Wetters reached this conclusion by taking into consideration Schmitt's concept of sovereignty only in its decisionist phase, while neglecting his theory of the concrete order. Considered from a more comprehensive perspective, however, and while taking into account Schmitt's later phase, Wetters statement turns out to be rather untenable. The contextual relativity of the process of normalisation is exemplified by Canghuilhem when referring to the establishment of juridical norms, in a way that resembles the Schmttian understanding of concrete order:

> The law is a system of conventions and norms destined to orient all behaviour inside a group in a well-defined manner. Even while recognising that the law, private as well as public, has no source other than a political one, we can admit that the opportunity to legislate is given to the legislative power by a multiplicity of customs which must be institutionalised by that power into a virtual juridical whole.[115]

In this account, normalisation and the establishment of norms, quite similarly to the process of legislation, take place in a given socio-historical context, which furnishes the substance of the norm and the social material to be normalised. The relativity of norms and normalisation, for Canguilhem, plays the same role that institutions do in Schmitt's concrete order: it determines the ground for the sovereign normalising decision.

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[113] *ibid.* p. 250.
[114] Wetters (2006), p. 40.
[115] Canguilhem (1991), p. 249.

This chapter has sought to position the theme of sovereignty in relation to the biopower, showing – through Schmitt's concept of sovereignty, how life is implicated originally in the very function of sovereign power. Schmitt, in fact, portrays a definition of sovereignty as a normalising agent. The God-like sovereign of Political Theology, whose creational power determines the origin of the legal and political order, delineates the boundaries of the normal framework of life of a given social group. With his theory of the leader [*Führer*] Schmitt, on the one hand grounded the sovereignty in the very life of the "people", on the other "radicalises" the very performance of the sovereign. While the God-like decisionist sovereign, lays the foundation of the political unity, marking the limit of the inside/outside, friend/enemy, the leader brings the decision inside the living existence of the members of the community. The "people", thus, becomes a passive, impolitical element of the state, which constitute – in a way – the row material to be put in form – normalised – by the action of the sovereign/leader.

At this point, it is useful to summarise the main theoretical knots advanced in this chapter:

1. Schmitt's works on the notions of sovereignty, decision and normality, provide a peculiar point of observation from which it is possible to understand how sovereign power is grounded in – and in a way constitutes the ground of – the social life of a community. Sovereignty could be seen as the founding principle and the limit of a given community formation as an institution.

2. The exception, as a legal doctrine of public law, is a peculiar instrument in the hands of the sovereign that could be used to reshape – legally – the limits of a political community.

3. This chapter argued, also, that the norm – even if emerged autonomously from the life of social grouping – entails a "principle of sovereignty", as a decision stating the criteria between normal and abnormal and as essence of the authority of the norm. What Schmitt seems to suggest that normality – and in general the discourse around social norms – cannot escape the idea

of sovereignty as a form of guarantee of the self-standing the social norms composing the life of a given community; since "institutions" and "social norms" do not possess an innate normativity, and need an external entity serving them.

4. To state a norm, to *normalise*, in Schmitt's perspective, means to provide the community with a form, that is to say to determine and enforce the criteria shaping the "normal" necessary homogeneity (form) for the subsistence of the state. In this sense, normality acquires a socio-biological significance.

5. While recognising the validity of the idea of positive law – law as a human artefact – Schmitt's conception of normality allows the comprehension of the relationship between law and social-life. Law is a peculiar apparatus in the articulation of society and the state. It is working as a shield of society, as a form of recognition, fixation and enforcement of normal traits of social groups. The law, expression of state's institution, is necessary in the underpinning of normativity of norms.

To institute a community, to give it an order, in Schmittian terms, means to normalise, to choose a specific form of life for that community, rejecting or trying to lead back to normality deviant elements. Normality necessitates something like a sovereign principle – as a decision stating the norm, that is to say, the criteria between normal and abnormal –, which gives it a normative character.

Despite the tone and the terminological register of Schmitt works has never gone far beyond the language of law and politics, it is plausible to conceive his idea of normality as referring to the actual (concrete) socio-biological existence of human beings as members of a community. Normal represents, in this perspective, a certain form of life – habits, institutions, norms of conduct – structuring the living conditions of a given group. What is crucial to Schmitt, is that normality is a decisive founding presupposition of the legal and political order – which in this regard works establishing and fixing the structure of the community. However, the socio-biological

normality is not something that stands before, or beyond the order: it represents – in a way – the substance of the order; the terrain on which sovereign and governmental power are called to operate. Using the words of Rudolf Kjellén, the state consists properly of form of life [*lebensform*][116]; and the original performance of sovereign power is to produce such a form.

The "productive" essence of sovereign power is central to Agamben theory of biopolitics. As he has claimed in the introduction to the first volume of the *Homo Sacer* series: 'the production of a biopolitical body is the original activity of sovereign power' (HS, 6). Agamben reaches this conclusion, drawing upon Schmitt's theory of sovereign and the state of exception. In a way, Agamben developed further the Schmittian conception of sovereign power and law, showing how the way western thought has conceived his modality of staying together has been influenced by the way in which the very existence of human beings has been thought. The very structure of sovereign power, and the involvement of life into the calculation of politics, in fact, is for him the reflection of some basic ontological assumptions that have travelled throughout history, shaping the Western conception of law and politics. Agamben in this regard speaks of an ontological-biopolitical machine that has informed (and continues to inform) the juridical and political thought and the current triumph of governmentality. The next chapter, will try to retrace the main defining lines of Agamben's theory of sovereign power and its ontological foundation.

[116] Kjellén (1917).

Chapter Two

THE ONTOLOGICAL-BIOPOLITICAL MACHINE

Western thought, Agamben argues, imagined political life according to the coordinates of what he has called "ontological-biopolitical machine". This dispositive, which originally divided "being" in essence and existence and potentiality and actuality, also established the split and the articulation on the plane of human life of *zoē* and *bios* – of the animal life common to all living beings and qualified life, determining in this way the logical structure of sovereign biopower. It is, thus, to ontology that a critical gaze should be directed to deconstruct the theoretical and cultural linchpins of western political tradition. In this chapter, it is my intention to retrace Agamben understanding of the ontological-biopolitical machine, to shed light on the conditions that have led to the emergence of the exception as the fundamental *category* of thought that informed the sphere of politics and law. In the following pages, I will also elaborate Agamben's reading of the relationship between sovereignty and life. Moreover, I will point out, that the idea of an ontological-biopolitical machine allows Agamben to approach a proper theory of the subject – and of the process of production of subjectivities.

Archè

In the epilogue of the book *The Use of Bodies*, in addressing the question of the "destituent potential", Agamben returns over what he considers the kernel of both the Western conception of politics and ontology. 'The structure of the exception that had been defined with respect to bare life', he writes, 'has been revealed more generally to constitute in every sphere

the structure of the *archè*, in the juridico-political tradition as much as in ontology' (UoB, 264). The exception consists of a 'strategy', according to which something is divided – separated, took-out (as to the etymology of the word *ex-capere*) – excluded and 'pushed to the bottom', and through this exclusion, included as a 'foundational' element (*ibid*.). The logic of the exception represents the common ground to a number of experiences and phenomena Agamben has analysed in his philosophical effort. The *polis* – as in the first volume of the *Homo sacer* series – is founded on the scission of life in a *zoē* (animal life) and *bios* (a politically qualified life – a form of life). The human is defined through the exclusion-inclusion of animality; and law through the exclusion-inclusion state of anomy and violence (*ibid*., 264-265).

With the term, *archè* – from the Greek ἀρχή, that is principle, origin, but also command – Agamben does not intend – as the etymology of the word would suggest – neither an origin nor a foundational event. The *archè* 'is not to be understood in any way as a given locatable in a chronology', rather, 'it is an operative force within history' (ST, 110). Like the big bang 'which continue to send toward us its fossil radiation', and 'like the child of psychoanalysis exerting an active force within the psychic life of the adult' (*ibid*.), the *archè* constitutes itself as the ineffable force shaping the understanding of the concrete historical experience.[117] The *archè* toward which the archaeological research directs its gaze works like trauma in psychoanalysis. The unbearable weight of the conscience of a traumatic event is repressed to the unconscious, 'entering a phase of latency during which seems as if it had […] never taken place' (*ibid*., 100). Repressed experiences – even if not returning in the form of neurotic symptoms – have an (in)direct influence on the choices of an individual and his/her actions. Thus, both in psychoanalysis and in archaeology, the work of regression is aimed to gain access 'to a past that has not been lived through', which 'cannot be defined as past, but that somehow has remained present' (*ibid*., 102), shaping the perception of both our present and past.

[117] As William Watkin puts it: 'The *archè* represents a moment of arising of specific discursive formation - not the origin of the formation but the moment when a certain set of paradigms operate in signatory fashion to make it possible to compose a set or named discourse based on what it allows to be said': Watkin (2013), p. 45.

Like a trauma, which is inaccessible because repressed, the *archai* of archaeology remain hidden and covered under tradition, thought and knowledge. Philosophical archaeology, thus, is a work of deconstruction direct toward the discovery of something like the 'points of insurgencies' of those epistemic structures that have constituted the conditions for the arising and development in a given place (the West) and in a given time of certain form of knowledge.[118]

The *archè*, Agamben claims, echoes the idea of *historical a-priori* that Foucault has defined in the preface of the book *The Order of Things*.[119] The historical a priori represents the base upon which 'ideas could appear, sciences are established, experience be reflected in philosophies, rationalities be formed'.[120] The adjective historical does not imply the reference to an element that could be located in a determinate time and place, but to something that is heterogeneous and at the same time immanent to history. A historical a-priori is historical in the sense that refers to the facts, to an eminently factual dimension, and is heterogeneous to history in the sense that relates to the point of emergence of those systems of thought through which historical realities are perceived. Archaeology, thus, is the attempt to deconstruct tradition with the scope to bring to light the historical a-priori (*archè*) that condition the history of humanity and its epochs (UoB, 112).

With an unusual frankness in the *Use of Bodies*, Agamben sustains that what has constituted 'for centuries' the fundamental historical a-priori

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[118] Agamben's use of historical sources, as paradigms for the explanation past and contemporary political scenario has been criticised in many occasion. His philosophical method attracted criticisms, concerning especially the accuracy in handling historical facts, the selective use of sources and the validity of the very use of what Agamben calls paradigms for the critical comprehension of the present. See: Norris (2005); Rabinow and Rose (2006); Laclau (2007); Huysmans (2008); Ross (2012). For an overview of Agamben's methodology and its critical reception see: de la Durantaye (2009); Watkin (2010; 2013). It has to be said that Agamben has clarified in the volume *The Signature of All Things: On Method* the use he makes of historical material. The very use of paradigms demonstrate that it is not in Agamben's intention to write history in a canonical sense. Rather, paradigms are fragments of history whose interpretation (and sometimes de-contextualisation) allows for the comprehension of broader historical facts. The critique of Agamben's misuse of history is often due to a misunderstanding to the practice of using paradigms.

[119] On Foucault's idea of historical a-priori, see: Hacking (2002); Aldea and Allen (2016).

[120] Foucault (2002), p. xxiii.

of the West is *ontology*. Being the sphere of knowledge in which humans have thought their presence has "beings in the world", ontology had (and continue to have) a fundamental influence on the development of Western thought. In Agamben terms, ontology is the place in which the articulation between language and world – the being human of a human being – has been originally thought. Ontology, thus 'preserves in itself the memory of anthropogenesis' (*ibid.*, 111), the entrance of the human being in the world. In this regard, also the conditions for the emergence of the conception of the *polis* and sovereignty as structured upon a relation of exception, have to be found in the sphere of ontology since it constitutes the fundamental historical a priori for thinking mundane human experience.

The question of the function of ontology, as a fundamental historical a-priori of Western thought, also intersects another crucial part of Agamben's methodological strategies: the idea of the *signature*. In the volume *The Signature of All Things*, Agamben expound his interpretation of such word noting how a "signature" is not a proper concept and not even simply a sign. Signs and concepts are in relation to things; they express specific interpretations and features of the objects they are related to. Instead, the signature dislocates and displaces concepts and signs (and images), without changing the structure of the meaning of those concepts. The signature defers concepts from a sphere to another, without changing the substance of their meanings; and in displacing meanings, the signature, uncover hidden links between spheres of knowledge that in the first instance appears as unconnected. The structure of the meaning of the very idea of sovereignty – as we will see in this chapter and in the next one – has been displaced from the sphere of the theological to the one of the legal-political. Sovereignty, though, is a signature; a word that defines a phenomenon transposing on it a meaning elaborated in a different field of knowledge namely theology. And the very term "secularisation" is not the concept defining a historical development but is signature defining the process of displacement of meanings between the sacred and the profane (political). (ST 45-47)

Crucially, what is usually called "being" – the object of ontology – for Agamben is a signature pertaining to the fact that we consider "things" as existing. As he claims:

> being is not "the concept of something that could be added to the concept of a thing," because in truth being is not a concept but a signature. Hence, ontology is not a determinate knowledge but the archaeology of every knowledge, which explores the signatures that pertain to beings by virtue of the very fact of existing, thus predisposing them to the interpretation of specific knowledges. (*ibid.* 66)

To gain and elaborate a specific knowledge of something, it is necessary to state its existence, its being something. In Agamben perspective, this is tantamount to marking things with the signature of being. Being something does not add to a thing nothing other than the signature of its "being", of its existence. This explains the recurrence the different ontological determination of being in different spheres of human knowledge and more generally human life. Being is the signature that Western thought has applied to its object in order to gain access to it, and the archaeology of ontological dispositive is the study of the signature of being.

The study of the signature of being is ultimately an analogical knowledge, typical of Agamben's methodology. The signature produces knowledge by putting in contact different sphere of human culture, and for this reason, it is ultimately akin to the theoretical operation of the paradigm. With the term paradigm, Agamben describes a singular historical fact that is analysed both inside and outside its context of belonging (in a zone of indistinction) which serves, analogically, to illuminate the connection between series of phenomena and events that would remain obscure. As Agamben claims, 'A paradigm is a form of knowledge that is neither inductive nor deductive but analogical. It moves from singularity to singularity' (ST 31). A paradigm is an example that analysed in its singularity illuminate new relations between different series of event. It could be argued that the paradigm allows for the comprehension of the working of signatures, showing the displacement of meanings between different spheres of knowledge. Agamben method could be described as a form of "paradigmology": the study of specific historical events, aimed at

the discovery the signatures shaping the Western conception of law, politics and more generally of philosophy. Ontology plays in his work a crucial function since it represents the fundamental historical a-priori and the source of the signatures of being that had a vital influence on the development of the comprehension human phenomena. And the analysis of the many different paradigms (the *homo sacer,* the *Musselmann*, the *camp*, etc.) is aimed at the discovery of the hidden signatures of being, constituting the ontological (necessary) matrix of human praxis.

For Agamben, the Western culture has been profoundly influenced by Aristotle ontology, which laid down the structure of a proper ontological dispositive that had a decisive influence in the spreading of the signature of being in many different spheres of human life. For instance, Agamben finds something like the 'point of insurgence' of the relation of the exception in Aristotle's ontology, especially in the theory of the subject [*hypokeimenon*] and in his elaboration of the relation between potentiality [*dynamis*] and act [*energeia*]. Both, the theory of the subject and couple potential/act (which for Aristotle are two of the many ways in which 'being is said') are for Agamben 'ontological dispositives' and signatures, that have informed 'the horizon of human actions and knowledge'. In the following pages, I will retrace the central theoretical knots of the idea of the ontological dispositive, with the purpose of showing how, for Agamben, it has informed the conception of law and politics. In the next section, I will proceed with the analysis of the relationship between *zoē* and *bios* as in Agamben's reading of Aristotle – included in the volume *Homo Sacer. Sovereign Power and Bare Life*. I will then move in analysing what he has defined as "sovereign ban", focusing mainly on the functional relationship that Agamben detected between sovereignty, law and life. It will follow then, a section titled "political ontology". Here I will delineate the main traits of Agamben's "ontological-biopolitical machine". In the last section, I will introduce the problem of potentiality and Agamben critical engagement with Aristotle's ontology.

The 'beginning'

The point of departure of Agamben's investigation and critique of western biopolitics is the fundamental distinction between politically qualified life and natural life (*zoē* and *bios*), which he posed as the exergue of the first volume of the *Homo Sacer* series:

> The Greeks had no single term to express what we mean by the word 'life.' They used two terms that, although traceable to a common etymological root, are semantically and morphologically distinct: *zoē*, which expressed the simple fact of living common to all living beings (animals, men, or gods), and *bios*, which indicated the form or way of living proper to an individual or a group (HS, 1).

The distinction between the mere fact of living – natural life – and a qualified 'artificial'[121] way of life represents an archetypal device, which permitted to the Greeks the elaboration and the comprehension of the peculiar essence of his politics. The *zoē*, the simple-biological sphere of life with its needs and bodily functions, is something that is common to all forms of life: men, women, slaves, animals, plants. *Bios* instead is the term designating a different "qualified" kind of life, typical of the members of a given political community. The political life does not differ from *zoē* 'by degree, but is different in kind'.[122]

The difference between the mere fact of living and the special status of the politically qualified life of the *polis* appears with clarity in a passage of Aristotle's *Politics* that assumes particular importance in Agamben's archaeological critique of the Western political tradition:

> The good life is the chief end, both for the community as a whole and for each of us individually. But people also come together, and form and maintain political associations, merely for the sake of life; for perhaps there is some element of the good even in the simple fact of living […]. It is an evident fact that most people cling hard enough to life to be willing to endure a good deal of suffering, which implies that life has in it a sort of healthy happiness and natural quality of pleasure.[123]

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[121] Zartaloudis (2011), p. 154.
[122] Whyte (2013), p. 25.
[123] Aristotle (2009), p. 98.

Here, the distinction assumes the guise of the difference between a "life" and a "good life", where the "good life" is a life that has taken its leave from the mere biological existence. Men – Aristotle wrote – associate themselves, by nature, to supply solutions to physiological needs (for the sake of life). The *Polis*, we read in the first book of the *Politics*, is the 'final and perfect association' of men, which completes serves and includes other forms of basic associations. The very first form of association is 'the union or pairing of those who cannot exist without one another', man and woman, which, driven by a 'natural impulse', unite themselves 'for the reproduction of the species'. Following the male-female union, 'there must necessarily be a union of the naturally ruling element with the element which is naturally ruled, for the preservation of both', which is the relation of master and slave. By virtue of its intelligence, the master is naturally entitled to rule and make use of the slaves, which, thanks to their corporeal power, are inclined to fulfil physical work and consequently are naturally in a state of slavery. The relationship parent-child, the union of male and female and master and slave, form the *Oikos* [household], a natural institution established 'for the satisfaction of daily recurrent needs'. [124]

The second basic form of association, is the village, an assemblage of more households that gather themselves together for the 'satisfaction of more than daily recurrent needs'. The last form of association is the *polis*, a perfect form of union of different villages, which 'may be said to have reached the height of full self-sufficiency [*autarkeia*]; or rather we may say that while it comes into existence for the sake of mere life, it exists for the sake of good life'. The *polis*, emerging thanks to the natural inclinations of men, belongs to the realm of natural things. Thus, Aristotle can conclude, that man is by nature a political animal [*politicon zōon*].[125]

The good life, in this perspective, is the life of the *polis*; and *bios* is the life of its members. However, Aristotle suggests that there is some "goodness", also, in the mere fact of living. He claims at the very beginning of the *Politics* 'all associations come into being for the sake of some goods',

[124] *ibid.* pp. 8-10.
[125] *ibid.*

so there has to be, logically, some good in the biological life if there are associations, like the family and the *oikos* arising naturally for the sake of simple living. However, the goodness of the life of members of the polis is of a different kind and is the outcome of the departure from the goodness of the *zoē*. As Hannah Arendt claimed: 'the good life […] was not merely better, more carefree or noble than ordinary life, but of an altogether different quality'. The good life, she continues is good 'to the extent that by having mastered the necessities of sheer life, by being free from labour and work, and overcoming the innate urge of all living creatures from their own survival, it was no longer bound to the biological life process'.[126] The *polis*, thus, is the realm of freedom as long as its members are freed by the biological (physiological I would say) necessities.

In Aristotle's politics, the primary task of the *oikos* is to provide for the basic biological needs. According to Arendt, here lies the essential distinction between the household and the polis: the first is the ambit of necessity; the second is the realm of freedom. 'The mastering of the necessities of life in the household', she writes, 'was the condition for the freedom of the polis'.[127] The *autarky*, which is the sole conditions for the subsistence of the *polis*, is a condition of self-sufficiency: 'the possession of such materials resources and such moral incentives and impulses as make a full human development possible, without any dependence on external help, material or moral'.[128]

Therefore 'in the classical world', Agamben claims, 'simple natural life is excluded from the polis', and it is 'confined – as merely reproductive life – to the sphere of the *oikos*, home' (HS, 2). However, this confinement is not a simple exclusion. The relation *zoe/bios*, *oikos/polis* is of the order of implication: 'the Aristotelian definition of the polis as the opposition between life (*zen*) and good life (*eu zen*) […] is in fact at the same time an implication of the first in the second' (*ibid*. 7). This relation of exclusion/implication is expressed clearly in the Aristotelian conception of *autarky*. As pointed out above, Aristotle defines the polis as an association

[126] Arendt (1998), pp. 36-37.
[127] *ibid.* p. 31.
[128] Aristotle (2009), p. 320. See: Barker (1959), pp. 264-265.

of men that has reached its self-sufficiency; an association that – composed of families and villages –, 'comes into existence for the sake of mere life', and since it has reached its *autarky*, 'it exists for the sake of good life'. For this reason, Agamben claims that 'the perfect community is the result of the articulation of two communities: a community of the simple fact of living […] and a political community' (UoB, 198). *Autarky*, thus, is a dispositive 'that allows or negate the passage from the former to the latter' (*ibid.*) that is from *zoē*, to politically qualified life. The substance of the polis – the good life – though, presupposes the presence of an insufficient life, a non-political life, which has to become autarkic to get access to the political community. Although excluded from the *polis*, the mere fact of living, the *zoē*, is included as the necessary foundational element for the political community to be such. The *oikos* – the place in which this insufficient life is relegated to dwell – is thus essential through its exclusion for the subsistence of the polis (*ibid.*).[129]

The necessary implication of a non-politically qualified life, for the subsistence of the polis, is stated clearly in book VII of the *Politics*; when Aristotle goes on to discuss the parts and the "necessary conditions" for the self-sufficient standing of the city. While the components of the polis are its constitutive members – the citizens, who share the good life – the necessary conditions are 'ancillary' members, excluded from the polis, which at the same time makes a good life possible. So, 'while cities need property', Aristotle writes, 'property is not a part of the city. It is true that property includes a number of animate beings, [slaves] as well as inanimate objects.

[129] Moreover, Agamben notes, *autarky* entails a proper bio-political element. It is, in fact, neither a juridical concept, nor a political or economic one, but a biological definition. *Autarky* – among other elements like territory, the geographic position and the climate of the city – refers to the right "numeric consistency" of the population. Aristotle, in fact wrote, that the city "Like other things (animals, plants, and inanimate instruments), have a definite measure of size. Any object will lose its power (*dynamin*) of performing its proper function if it is either excessively small or of an excessive size. […] We may take the example of a ship. A ship which is only 6 inches in length, or is as much as 1,200 feet long, will not be a ship at all. […] The same is true of cities. A city composed of too few members is a city without self-sufficiency […]. One composed of too many will indeed be self-sufficient in the matter of material necessities (as a nation may be) but it will not be a city, since it can hardly have a constitution": Aristotle (2009) p. 262.

But the city is an association of equals'[130], and objects, by definition, cannot be equal.

Aristotle in the *Politics* lists six fundamental functions that the polis has to discharge to be self-sufficient: the provision of food, the practice of arts, the profession of arms, the acquisition of wealth, the cult of the Gods, and the determination of what is right and expedient for the whole society.[131] These functions are the social roles characterising the existence of the polis. However, Aristotle drew a great distinction inside this social classification. As Ernest Barker puts it, 'the farmers who is occupied with the provision of food, the artisan who practices the arts, and the trader who deals with the products of both, are all discharging functions which are subsidiary to the rest', consequently, 'they themselves are merely subsidiary to the rest of the community'.[132] According to this schema, the good life of the *polis* can institute itself only through its departure from everything that is related to the natural bodily necessities proper of the life of men. In this sense, the emergence of the political community is marked by a scission, on the plane of life, and a rejection of the natural life outside the polis – in the sphere of the *oikos* – as a necessary condition for the subsistence of the city. Therefore, the politicisation of the *zoē*, as a requirement for the emergence of the *polis*, happens through its radical exclusion.

Aristotle expresses this relation of exclusion/implication when – in defining the natural essence of the polis – asserts:

> The polis is prior in the order of nature to the family (*oikia*) and the individual. The reason for this is that the whole is necessarily prior to the part. If the whole body is destroyed, there will not be a foot or a hand, except in that ambiguous sense in which one uses the same word to indicate a different thing, as one speaks of a 'hand' made of stone.[133]

The presence of the whole is the *conditio sine qua non* for the definition and the very existence of its parts. The *oikos* and the individual, take their sense

[130] Aristotle (2009), p. 269.
[131] Barker (1959), p. 417.
[132] *ibid.* pp. 417-418.
[133] Aristotle (2009), p. 11.

only in relation to the whole: the *polis*. Consequently, the distinction between polis and *oikos* (*zoē* and *bios*), as to be understood as generated by the 'priority' of the polis as a whole. However, this does not imply a temporal anteriority of the polis. Aristotle, in fact, describes the emergence of the polis as a process of 'growth' of different basic forms of associations. Therefore, to claim the anteriority of the polis would be a contradiction. As Ernest Barker puts it, the priority is 'consistent with the posteriority in time: in time, the individual – and the *oikos* – comes before the state, though philosophically the state is to-day a prior and presupposed condition of his definition and very existence'.[134] Even if the *polis* is prior to its parts, since it is the whole that gives sense to the single elements, the *polis* presupposes a pre-political substance – the basic forms of association of the individuals –, which has to be politicised to permit the existence of the good life. Autarky is the threshold that marks the point of the separation of the *zoē* and the emergence of the good life.

In this point, Agamben seems to operate a correction of the Aristotelian conception of the relation between natural life and good life. The *zoē*, the natural life (bare life) is not something that pre-exists the *polis* but is the product – the rest – of the same emergence of the political. Thus, the *zoē* is not something more 'original' than the good life. Rather, the same separation of the two has to be seen as original. It is the exception, the inclusive/exclusion of natural life, the *archē* of Western juridical and political tradition.

Here Agamben also diverges from Foucault. For Foucault, as in his famous statement 'for millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question'.[135] Biopolitical modernity, marks, in this way, a radical departure from the old Aristotelean conception of political animal. Agamben, instead, affirms resolutely that biopolitics in modern time, is not configured as a break with the past, but regenerate, exacerbate and re-propose the "secret bond" (between *bios* and *zoē*; life and politics) that has been present in

[134] Barker (1959), p. 278.
[135] Foucault (1998), p. 143.

Western politics since antiquity. The production of the *zoē*, the scission of life, places the biopolitical threshold back in time, to the dawn of western political tradition. In Agamben in fact, the articulation of *bios* and *zoē* – exclusive inclusion (or the inclusive exclusion) –, assumes the guise of an "original" (not in a historical sense, but in the sense of *archē*) element for the emergence of something like the sphere of "politics". The process of establishment of the *polis*, for Agamben, is always the result of the "politicisation" of life, the outcome of a "primary" scission of life into a sufficient (political – happy) life, and an insufficient (non-political – non-happy) life. To be worthy of being part of the political community, life has to be separated from everything entailing basic needs. What Aristotle calls 'nutritive or vegetative life' – the needs of subsistence, reproduction, etc. – cannot be part of the *polis*. Since the political community is made of 'men', the *zoē* must be excluded because represents the animal substrata of human beings. To be a 'political animal', thus, human beings have to exclude their 'animal' part and confine it to the *oikos*, which is the substantial (necessary) element for the existence of the political community.

What is, in this way, more original in the relation of exception of *bios* and *zoē*, for Agamben is the very scission (division) of life in a sufficient and insufficient life, where the latter functions as a fundament of the former. If life to be part of the *polis* has to reach self-sufficiency (*autarky*), it has to be presupposed an insufficient life that has to reach self-sufficiency. Thus *zoē* is not, properly pre-political. What could be considered as the point of emergence of the political would be the same act of scission and the relation of the exception structuring the articulation of *bios* and *zoē*.

Sovereign ban

Much of Agamben's insight in the question of sovereignty is indebted the Schmittian lesson.[136] He takes up Schmitt's definition of sovereignty

[136] Schmitt's theories of law and politics is a stable presence in Agamben's works, especially since the beginning of his *Homo sacer* series. In line with a tendency typical of the reception of Schmitt from the "left" in Italian scholarship, Agamben uses the thought of the German jurist as a crucial source of theoretical tools for a critique of the political and juridical

claiming that in the state of exception lies the very possibility of the juridical rule and the meaning of state authority.[137] Being defined by Schmitt as a limit concept – in the sense that is on the outside and inside of law – sovereignty finds itself in the ambiguous position of being essentially the limit – or more appropriate the threshold – between the "ambit" of law and contingency of social and political reality. The sovereign, having the power to declare – or not – the state of exception is the depository of the decision on what constitutes public order and security, and hence, whether the social order has been disturbed – or disrupted.

In challenging this essential trait of sovereign power, Agamben asks: if the sovereign creates and guarantees the situation that law need for its validity, 'what is this "situation", what is its structure, such that it consists of nothing other than the suspension of the rule?' (HS, 20). For Agamben, Schmitt provides the answer to this question when he sustains that the validity of the norm it is possible only in a normal situation, where with normal is intended the regular and normalised flow of *life* of the member of a community. For this reason, Agamben writes:

> The sovereign decides not the licit and illicit but the originary inclusion of the living in the sphere of law or, in the words of Schmitt, 'the normal structuring of life relations,' which the law needs. The decision concerns neither a *quaestio iuris* nor a *quaestio facti*, but rather the very relation between law and fact. Here it is a question not only, as Schmitt seems to suggest, of the irruption of the 'effective life' that, in the exception, 'breaks the crust of a mechanism grown rigid through repetition' but of something that concerns the most inner nature of the law. The law has a regulative character and is a 'rule' not because it commands and proscribes, but because it must first of all create the sphere of its own reference in real life and make that reference regular (*ibid*., 26).

The sovereign decision and the legal regulation of the normal – as I argued in the previous chapter – consist in the delimitation, codification and

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modernity. On the reception of Schmitt in Italy see: Malgieri (1978); Galli (2010). More specifically, Agamben uses Schmitt in his works more prone to offer a critical-deconstructive approach to sovereignty and law. I could be argued that Schmitt's thought, is crucial for the *pars destruent* of Agamben's works. This is supported, also, by the absence of Schmitt in Agamben's ethically (and politically) inclined works, such as *The Highest Poverty* and *The Use of Bodies*.

[137] Mills (2008), p. 61.

defence of particular aspects of the social life, through the exclusion of what is deemed inconvenient and dangerous for the self-standing of the community. In this regard, the function of sovereign power consists in the exclusion of the abnormal, of what is deemed disturbing the normality.

As Canguilhem pointed out, the abnormal (exceptional) case represents the negation of the normal and therefore comes – logically – after normality. However, as he argues, it is the historical anteriority of the future abnormal that makes the normative intention possible.[138] The act of normalisation presupposes what it has to externalises, in the form of the transgression of the norm (ab-normality). Agamben recognises this logic also in the process of normalisation implicit in the elaboration of legal rules:

> since the rule both stabilizes and presupposes the conditions of this reference, the originary structure of the rule is always of this kind: 'If (a real case in point, e.g.: *si membrum rupsit*), then (juridical consequence, e.g.: *talio esto*),' in which a fact is included in the juridical order through its exclusion, and transgression seems to precede and determine the lawful case (*ibid*., 25-26).

The real case – the case to be sanctioned – is presupposed as a first reference for the juridical consequence, and at the same time has to be excluded as a result of its inscription into the law. The abnormal fact, the transgression, is presupposed and excluded from the rule. Consequently, it stands in a relation of the exception with the norm. This means, thus, that the normative essence of law is structured on a fundamental exception – in which something is included (an abnormal fragment of life), and at the same time excluded (as a transgression of the normal). And it is through this exclusion/inclusion of the abnormal that the normal could be stated.

The role of the law, in this perspective, consists in including life into its realm; that is to say codifying life, giving it a form. A normalised "form" of life, thus, is the unavoidable element giving the law the possibility of its efficiency and validity. As Schmitt sustained in his theory of sovereign power, the law can apply only to a normal(ised) situation, and the primary performance of sovereign power is to establish a normal life, giving life a form, through its own suspension in the state of exception. Sovereignty, in

[138] See: Canguilhem (1991), pp. 240 – 245.

this light, is a 'limit-figure', the 'threshold', in which life finds itself not yet included in the realm of law, but not ultimately untied from it. Sovereignty posits itself in the uncertain terrain of the limit-passage between the real facts of life, and the sphere of law. The exception on which Schmittian sovereign decides is the possibility of the inscription, thought a normalisation, of life into the realm of law. The life of the law, Agamben writes, 'is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the exception'. Law 'nourishes itself on this exception and is a dead letter without it', therefore it 'has no existence in itself, but rather has its being in the very life of men' (*ibid.*).

Borrowing the term from Nancy, Agamben calls the relationship between sovereign power, law and life, *ban*. Life (the mere fact of living) is not 'simply set outside the law and made it indifferent or irrelevant to it, but rather abandoned by it, where to be abandoned means to be subjected to the unremitting force of the law while the law simultaneously withdraws from its subject'[139]. As Nancy claims, 'the origin of abandonment is a putting at *bandon*', where *bandon* is:

> An order, a prescription, a decree, a permission, and the power that holds these freely at its disposal. To *abandon* is to remit, entrust, or turn over to such a sovereign power, and to remit entrust, or turn over to its ban, that is, to its proclaiming, to its convening, and to its sentencing. One always abandons to a law. The destitution of abandoned is measured by the limitless severity of the law to which it finds itself exposed. Abandonment does not constitute a subpoena to present oneself before this or that court of the law. It is a compulsion to appear absolutely under the law, under the law as such and in its totality. In the same way – it is the same thing – to be *banished* does not amount to coming under a provision of the law, but rather to coming under the entirety of the law. Turned over to the absolute of the law, the banished one is thereby abandoned completely outside its jurisdiction. The law of abandonment requires the law be applied through its withdrawal. The law of abandonment is the other of the law, which constitutes the law. Abandoned being finds itself deserted to the degree that it finds itself remitted, entrusted, or thrown to this law.[140]

[139] Mills (2008), p. 62.
[140] Nancy (1993), pp. 43-44.

Life stands in a relation of ban with the law in the sense that it constitutes its presupposition – and, thus its external reference as normal situation – and its content – since it is the object law is called to regulate. For these reasons, the life is abandoned, since to be in a ban means to be left and remitted by law, and, at the same time, to subjected (in the sense of 'to-be-subject') to the law.

To be banned (abandoned) implies the ambiguity of being in a position neither outside nor inside; 'it is literally not possible to say whether one who has been banned is outside or inside the juridical order'. In Romance languages, Agamben states, 'to be banned originally means both 'to be at the mercy of' and 'at one's own will, freely', to be 'excluded' and also 'open to all', free' (*ibid*., 29). So, if sovereignty is the operator of the inclusion/exclusion of life into law, and the ban (the exception) is the original structure of the relation between life and law, this means, that the paradox of sovereignty can be reformulated as follows: 'There is nothing outside the law' (*ibid*.). This means that life, in any case, is always in relation to the law, both when it is excluded (in the figure of the banned) both when it is included and regulated.

Agamben concludes, 'the originary relation of law to life is not application but abandonment, the matchless potentiality of the *nomos*, its originary 'force of law, 'is that it holds life in its ban by abandoning it' (*ibid*., 29). The most proper performance of law and Sovereign power is to keep life in its ban, in the sense that life it is perpetually exposed to the excrescence of power, to the decision of the sovereign. Even when life is codified and guaranteed under the shield of the law the mere fact of living is at the disposal of sovereign power in the state of exception, when contingency (or the sovereign decision) calls for a new codification of the structure normal life.

Political Ontology

In a recent book, Matthew Abbott defined the work of Agamben as a 'political ontology', a modality of carrying on philosophic enquiries that

consist of the 'the study of how our ontology – our conception of the world *as such* – conditions what we take to be the ontic possibilities for human collectives'.[141] This definition is generally correct. Since its inception, the *Homo Sacer* series oscillates between the pole of a critique of the Western legal and political thought and a re-reading of the classic ontological questions. Agamben considers ontology not as an 'innocuous academic discipline'; but rather as 'the fundamental operation in which anthropogenesis, the becoming human of the living being, is realized' (TO, 79), becoming the basin of senses for the auto-comprehension, for the action and for the interaction of humans as living beings. Thus, politics raises the ontological question (and the question of ontology) inevitably, since it conceives itself as the sphere of the life of humans as living and acting beings. Politics presupposes, necessarily, an ontological understanding of itself, 'it presupposes a political ontology'.[142]

What constitutes a problematic aspect of Abbott's critical insight of Agamben's work is the reduction – and the subsequent depreciation – of the pole of the critique of the concrete legal and political reality to the ontological question. Abbott, in fact, claims that 'the discussions of concrete politics', like in the first part of the book *State of Exception* 'appear as secondary to his real aim, as functioning to illustrate and ontological point'.[143] This reduction to 'ontology' pushes to the background Agamben's radical critique of politics, which Abbott defined as 'hyperbolic' and sometimes made of sociological exaggerations, whose proper meaning could be grasped only if transposed and understood on their ontological ground. In this light, Agamben's critical reading of Western legal and political thought is a reflection of his own understanding of ontology.

This interpretation of Agamben's intellectual effort is based on a radical distinction between ontology and politics. Abbott criticises the idea of ontology as a 'de-essentialised discursive formation that both reflects and informs political acts and historical events'[144], and political ontology as a work of deconstruction of the ontological foundation of political structures,

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[141] Abbott (2014), p. 13.
[142] Cavarero (2002).
[143] Abbott (2014), p. 19.
[144] Strathausen (2006).

which can eventually inform and engage with concrete politics. Such understanding of political ontology, Abbott claims, stems from an 'inflated conception of the relationship between thought and its object, such that ontological speculation could somehow stand in for, or even become identifiable with, material, political change'.[145] In political ontology, thus, politics is one of the objects of ontology. Political ontology thinks 'the political through the exigency of the ontological question', and cannot 'insists on the contingency of ontological concepts, or to think new ones for the sake of opening up ontic political possibilities'.[146]

The problem in Abbott's reading is that the conception of political ontology he proposes is not coherent with Agamben's research in both ontology and politics, and – most of all – it is not corresponding to the general aim of the *Homo Sacer* series, since what Abbott claims political ontology should not do, corresponds exactly to Agamben's understanding of the relation between politics and ontology. Agamben's philosophical archaeology is direct towards the "discovery" of something like an "unsaid" that shaped and continue to shape the epistemic structure of our understanding of humans as living-political-beings as well as of the legal and political institutions through which the West has organised its political life. As he claimed on different occasions, the purpose of Agamben's research is to rethink the ontological and political categories in order to open up new possibilities of political action that could escape the deadly distortions of the ontologico-political machine of the West. Therefore, in Agamben, politics is not an object of ontology, as ontology is not an object of politics. Rather the relation between the two is a relation of implication. Ontology – as Agamben suggested in the *Use of Bodies* – 'has constituted for centuries the fundamental historical *a priori* of Western thought' (UoB, 112). Using a Foucauldian term, Agamben defined ontology as an epistemic apparatus that had a crucial influence on the possibilities of development of systems of thought and knowledge. Thus, politics entails necessarily ontological assumptions. But at the same time, Agamben claims, 'each ontology cannot but implicate a politics' (P, 336), since the scission of life –

[145] Abbott (2014), p. 15.
[146] *ibid*.

the relation of the exception – on which the *polis* is erected is the concrete transposition (as an order of things and men) of something thought at the level of ontology, which oriented Western thought for two millennia.

The contiguity of ontology and politics, thus, happens on the terrain of the relation of the exception. Agamben finds something like the *archè*-type of the exception on the 'dispositive of scission of being' that defines Aristotle's ontology:

> This apparatus— which divides and at the same time articulates being and is, in the last instance, at the origin of every ontological difference—has its locus in the *Categories*. Here Aristotle distinguishes an *ousia*, an entity or essence, 'which is said most strictly, primarily, and first of all' (*kyriotatate kai protos kai malista legomene*) from the secondary essences (*ousiai dueterai*). The former is defined as 'that which is not said of a subject [*hypokeimenon*, that which lies under, *sub-iectum*] nor in a subject' and is exemplified by the singularity, the proper name, and *deixis* ('this certain man, Socrates; this certain horse'); the latter are 'those in whose species the essences called primary are present, as are the genera of these species—for example, 'this certain man' belongs to the species 'man' and the genus of this species is 'animal'' (*Categories*, 2a 10–15). Whatever may be the terms in which the division is articulated in the course of its history (primary essence/secondary essence, existence/essence, *quod est*/*quid est*, *anitas*/*quidditas*, common nature/supposition, *Dass sein*/*Was sein*, being/beings), what is decisive is that in the tradition of Western philosophy, being, like life, is always interrogated beginning with the division that traverses it (UoB, 115).

The reference here is to the canonic passage in Aristotle's *Categories* in which it has been expressed the distinction between a 'prime' and a 'secondary' *ousia* (translated into Latin as *substantia* and *essentia* [substance and essence]). The prime essence, *hypokeimenon* – term translated in 'subject', from the Latin *subjectum* [sub-jectum, 'that which lies under or at the base] – is the existentive being (existence, what something *is*), which is expressed by the singularity of the name. Secondary essence is instead a predicative being (what *is* said of it).

Much like Benveniste – who claimed that in the *Categories* 'Aristotle, reasoning in absolute terms, simply finds some of the fundamental categories of language through which he thinks'[147] –, for Agamben

[147] Benveniste (1966), p. 66. Here Agamben adheres to the idea that Aristotle's categories – fragments that are considered as a part of his works on Logic – are essentially the exposition of the fundamental category of language. See: Derrida (1982), pp. 175-206.

Aristotle's distinction refers and explicates some characteristics of language, since Aristotle's ontology presupposes that 'being is said (*to on legetai*)' and consequently that being 'is always already in language' (*ibid.*, 116). For Agamben, this distinction transposes in the language of ontology the promiscuity of the meaning of the verb 'to be', which 'has a double meaning'. The first 'corresponds to a lexical function, which expresses the existence and reality of something ('God is,' that is, exists), while the second—the copula— has a purely logico-grammatical function and expresses the identity between two terms ('God is good')' (*ibid.*, 117-118).

To predicate – 'to say' –, is always to say something of a subject. The act of the predication presupposes the existence – the *being* – of its subject. Secondary essence – what is said of something –, in this light, presupposes the existence of a primary essence – as the subject of the predication. As Aristotle writes:

> It is clear from what has been said that if something is said of a subject [*kath'hypokeimenou*, 'on the pre-sup-position of a lying-under'], both its name and its definition are necessarily predicated [*kategoreisthai*] of the subject. For example, 'man' is said on the subjectivation [on the pre-sup-position] of this certain man, and the name is of course predicated (since you will be predicating 'man' of this certain man), and also the definition of 'man' will be predicated of this certain man (since this certain man is also a man). Thus, both the name and the definition will be predicated of the subject.[148]

Thus, Agamben claims 'the subjectivation of being, the presupposition of the lying-under is therefore inseparable from linguistic predication, is part of the very structure of language and of the world that it articulates and interprets' (UoB, 118). When being is called into question in language, it finds itself in the process of subjectivation; that is the scission of being into 'what is said' and 'what exists', where the latter function as a presupposition, the existent subject of the predication. 'The primary *ousia'*, Agamben writes, 'is itself the subject that is pre-supposed – as purely existent – as what lies under every predication' (*ibid.*). The prime substance, the *sub-jectum*, is something like a limit of language, the point over which it is not possible to predicate or to signify, but only to indicate (*ibid.*, 120).

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[148] Aristotle, *Categories*, 2a 19–25. See: Aristotle (1991), p. 4.

What Aristotle has shown through his ontology, is a distinct feature of language itself: the relation of pre-supposition – which is a species of the exception – that represents the fundamental articulation between language and its object, between language and the world. 'As soon as there is language', Agamben claims, 'the thing named is presupposed as the non-linguistic […] with which language has established its relation' (*ibid*., 118). In every manifestation of language, the non-linguistic – the existent – is *sub-jectum*, is excluded (as non-linguistic) and captured as what lies at the base; as the necessary existent element that allows language to fulfil its function. For this reason, Agamben could claim that ontology represents the place of the 'memory of anthropogenesis'. Ontology formulates, actualises – and continues to re-actualise – the original articulation of language and world, constituting the ever-open chest shielding the experience of 'becoming human' of humans that is the entrance of being in history and the world, through language.

For Agamben, what Aristotle has left to the tradition of Western philosophy is an ontological dispositive in which being can only be thought through a fundamental scission, which has the form of the exception. Aristotle's dispositive informed both Western ontology (and metaphysics) and politics. As Agamben claims,

> According to the axiom formulated by Aristotle in the *De anima* 415b 13 ('Being for the living is to live,' *to de zen tois zosi to einai estin*), what holds on the level of being is transposed in a completely analogous way onto the level of living. Like being, so also 'living is said in many ways' […] and here as well one of these senses—nutritive or vegetative life—is separated from the others and becomes a presupposition to them. As we have shown elsewhere, nutritive life thus becomes what must be excluded from the city—and at the same time included in it—as simple living from politically qualified living. Ontology and politics correspond perfectly (*ibid*., 129).

Since in men 'being' is to live, Aristotle conceives life, has articulated upon the same 'exceptional' structure that defined the ontological being. Like every predication on a 'being' presupposes a subject – as a non-linguistic existent element –, political life is organised upon a division of different spheres of life, one of which is excluded and posed at the base – sub-jected – of the polis. For these reasons Agamben claims 'the ontological apparatus,

which articulates being and puts it in motion, there corresponds the biopolitical machine, which articulates and politicizes life' (*ibid*., 205). The place of this dual articulation/separation is the *logos*. To the scission of being in the *logos* corresponds in Aristotle to the division of life in the *logos*.

Logos – that in Agamben refers to language and thought – 'can divide what cannot be physically divided' that is the different aspect of the life of human beings from its biological (animal) substrate. This 'logical' division makes possible the politicization of the im-political life. Thus, Agamben could claim, 'politics, as the *ergon* proper to the human, is the practice that is founded on the separation, worked by the logos, of otherwise inseparable functions'. Politics, 'appears as what allows one to treat a human life as if in it sensitive and intellectual life were separable from vegetative life', and since this is impossible in humans, of 'legitimately putting it to death'. For Agamben, this is nothing other than the meaning of the '*vitae necisque potestas*', the right of life and death, which represents the essence of sovereign power (*ibid*., 204).

If sovereign power has been conceived as structured upon a relation of exception (as a *ban*) according to which life could enter the realm of polis (and of law) only in the form of *bare life*, it is because of a particular feature of Western thought, which has been kept and transmitted over time through the repetition and re-elaboration of the fundamental assumptions of ontology – as formulated by Aristotle.

Potentiality

Along with the dispositive of the scission of being in "essence" and "existence", for Agamben, Aristotle has left another fundamental ontological machine to Western political thought, the one that articulate and divide *potential* and *act*. In Aristotle, potentiality and act are 'central principles for the interpretation of both being and becoming'.[149] Potential – or potentiality – is the place of possibility; is intended as something that precedes the real and concrete *act*-ualisation. In this light, potential entails

[149] Altini (2014), p. 21.

the possibility to be in act, the possibility of the passage to the concrete realisation in the act. Despite being chronologically and ontologically different, potential and act are two strictly related *modalities of being*.

'being' and 'that which is' […] sometimes mean being potentially, and sometimes being actually. For we say both of that which sees potentially and of that which sees actually, that it is seeing, and both of that which can use knowledge and of that which is using it, that it knows, and both of that to which rest is already present and of that which can rest, that it rests.[150]

While the act refers to the actual doing or being something – to actually see –, potential refers to the possibility to actually see. Potential, thus, corresponds to the sphere to the *faculty* of an entity 'to assume a determinate – an actual – form'.[151] For these reasons, Agamben claims the problem of potentiality, is formulated in the question: what does it mean to have a faculty? (P, 283). In other words, what is the meaning of the assertion 'I can'? When it is claimed that humans have the faculty of seeing (humans can see) or when it is said, 'something is not in my faculties' (I can't have/do something), 'we are moving in the sphere of the potential' (*ibid.*).

To understand what is potential, thus, it is necessary to comprehend what it means to have a faculty (a capacity, a possibility). Let us focus, thus, on a fundamental passage from Aristotle's *De Anima*:

Sensation depends, as we have said, on a process of movement or affection from without, for it is held to be some sort of change of quality. […] Here arises a problem: why do we not perceive the senses themselves, or why without the stimulation of external objects do they not produce sensation, seeing that they contain in themselves fire, earth, and all the other elements, of which—either in themselves or in respect of their incidental attributes—there is perception? It is clear that what is sensitive is so only potentially, not actually. The power of sense is parallel to what is combustible, for that never ignites itself spontaneously, but requires an agent which has the power of starting ignition; otherwise it could have set itself on fire, and would not have needed actual fire to set it ablaze. We use the word 'perceive' in two ways, for we say that what has the power to hear or see, 'sees' or 'hears', even though it is at the moment asleep, and also that what is actually seeing or hearing, 'sees' or 'hears'. Hence 'sense' too must have two meanings, sense potential, and sense

[150] Aristotle (1991), p. 68.
[151] Altini (2014), p. 21.

actual. Similarly 'to be a sentient' means either to have a certain power or to manifest a certain activity.[152]

In this passage, Aristotle distinguishes the 'faculty'(the power) to see and to hear, from the actual act of hearing and seeing. The faculty of perception is defined as the non-actual-existence of the perception itself. But, even if not in act, a faculty, is not 'nothing'. What human beings have in the form of a faculty is not a simple absence, but is a 'privation' [*sterēsis*], which attests the presence of something [*hexis*] that is (actually) missing.[153] A faculty, thus, is the 'name that Aristotle gives to this in-existence of sensation' (*ibid*, 284). To have a 'potential, to have a faculty' means 'to have a privation' (*ibid.*). Potentiality, thus, is defined 'essentially by the possibility of its non-actuality' (*ibid*., 285), and represents the modality of being that is not actual. Potential is one of the many ways in which being is said; more specifically a potential being refers to the presence of what it is not *actual*.

Aristotle advances his distinction between potentiality and actuality against those who, like the Megarians, believe potentiality and actuality coincide and that a faculty is possessed only when is enacted:

There are some who say, as the Megaric school does, that a thing can act only when it is acting, and when it is not acting it cannot act, e.g. he who is not building cannot build, but only he who is building, when he is building; and so in all other cases. It is not hard to see the absurdities that attend this view.[154]

If this is true, it could not be said that an 'architect is an architect even if he is not building, or we cannot define a doctor, a doctor who is not enacting his art' (*ibid*.). For Aristotle to have a faculty, thus, means to have both the possibility to act and not to act. An architect is an architect because he also has the possibility of not to act as an architect.

Potentiality, thus, has a dual character, which renders this specific modality of being both active and passive. If potentiality was only the

[152] Aristotle (1991), p. 29.
[153] Altini (2014), p. 32.
[154] Aristotle (1991), p. 125.

potential of doing or becoming something, if it existed only to pass to the act, then there would be no possibility of the privation [*sterēsis*] that is the basis for human beings to state 'I can not', be or do, this or that.[155] Aristotle expresses this as a fundamental relation between potentiality and impotentiality: impotentiality [*adynamia*] is a privation contrary to potentiality. Thus, all potentiality is impotentiaility of the same and with respect to the same' (*ibid*., 289). Therefore, Agamben could claim that the living beings, 'who lives in the modality of potential, are capable of their own impotentiality, and only in this way they can have possession of their potentiality' (*ibid.*). Impontentiality here does not mean the absence of potential, but the possibility to not act. To every potential belong its own im-potential that is the possibility 'to not'. As Aristotle affirmed:

> Every potentiality is at one and the same time a potentiality for the opposite; for, while that which is not capable of being present in a subject cannot be present, everything that is capable of being may possibly not be actual. That, then, which is capable of being may either be or not be; the same thing, then, is capable both of being and of not being.[156]

At this point, a series of questions arise: how could it be possible to think the 'act' of not to do, not to think, not to build, etc. entailed in every conception of potentiality? What happens in the act, to the potentiality not to act? What happens to the potentiality not to play music, when music is actually played? Going against the common understanding of the relation between potential and act that sees a kind of 'nullification' of the potential in the passage to the act, Agamben claims that the actualisation keeps – in a certain way – intact a relation with the potentiality to not act. 'If a potential to not be, belongs originally to every potential', Agamben writes, 'then will be truly potential only who when, in the moment of the passage to the act, will not nullify its own potential to-not' (*ibid*., 294). The act, in its proper sense – as the realisation of a potential – conserves the potential in the form of potential to not. This passage/conservation is described by Agamben as

[155] Altini (2014), p. 33.
[156] Aristotle (1991), p. 132.

a form of suspension[157] of the potentiality not-to in the act. The act, thus, keeps its (suspended) impossibility as its utmost possibility.

With his theory of *potentiality*, Agamben claims, 'Aristotle actually bequeathed the paradigm of sovereignty to Western philosophy' (HS, 46). The relation of the ban (exception), in fact, finds in the articulation between potentiality and actuality its speculative correspondence. 'For the sovereign ban, which applies to the exception in no longer applying', Agamben claims, 'corresponds to the structure of potentiality, which maintains itself in relation to actuality precisely through its ability not to be' (*ibid*., 46). The relation between potentiality and actuality 'is that through which being founds itself sovereignly […] without anything preceding or determining it […] other than its own ability not to be. And an act is sovereign when it realizes itself by simply taking away its own potentiality not to be' (*ibid*.). The elaboration of a theory of potentiality in the plane of ontology left to Western thought the schema according to which it became possible to think sovereignty as an act of creation that does not need anything other than its own negation to be such. The schema of potentiality, in which to act means to be always in relation to the possibility to not act (to act, thus, takes the form of the not-not-to act), represents the act as capture and conservation of the possibility not-to act. The proximity of this schema with the Schmittian conception of sovereignty is quite clear since sovereignty finds its proper determination in relation to as supposed "original" exception – like a state of nature – which as to be kept present to make sovereignty Sovereign, in the sense of the exergue of *Political Theology*.

The relation between constituted and constituting power mirrors the complexities of the one between potentiality and actuality. Like potentiality, constituent power precedes and conditions constituted power, and in doing so, it has to remain to some extent heterogeneous it. Constituted powers exist only as a formal expression of a state order, as an expression of a given

[157] The term suspension along with *indistinction* is a crucial one in Agamben's philosophy. On the ontological level the idea of a suspension or indistinction of potentiality and actuality is what renders the very existence of potentiality thinkable. If in fact all "being" is manifested in reality as a form of nullification of potentiality, to talk about potentiality becomes a sort of non-sense. In this work I have preferred to not get into the question of "indistinction" because it is not functional to the general argument of the thesis. What remains crucial from the point of view of this work is the logic of "presupposition".

constitutional order. Constituent power instead exists outside the state and represents the 'source' of every constituted power.

As Agamben pointed out, two are the main interpretation of the relation between these two kinds of power. The constituent power is radically different from the constituted; this means that once a legal and political order emerges, the constituent power ceases to exist and remains outside the order as the possibility of a revolutionary act of a collectivity to decides – freely – to organise itself in a different form. The opposite thesis, instead, proposes to see constituent power as reduced – and thus passed – to the formal juridical order as the power of constitutional revision. In both cases what is at stake is the thought a relation between something potential (the constituted order is potentially present in the constituent power), and something actual (constituted order as the realisation, determination of constituent power). If in the first thesis the relation is denied, constituted power and sovereign power are something other than constituent power; the second seems to replicate the Megarian idea of potentiality as reduced to actuality.

The relationship between potentiality and actuality (constituted and constituent power), for Agamben, entails the understanding of the autonomy of potentiality in its relation to actuality – in Aristotle's words the faculty 'to not' pass to act, that is inherent to every potentiality. Thus, it is not possible to 'think the potentiality of constituent power' as untied to constituted (sovereign) power, since the actualisation (the creation of a legal-political order) would entail the disappearance of the relation (and of the potentiality to-not pass to the act). 'Pure potentiality, and pure actuality', Agamben claims, 'are indistinguishable' and 'sovereignty is precisely this zone of *indistinction*' (HS, 47). It is not simple to think a constituent power that has broken its bond with sovereignty. To demonstrate that 'constituting power never exhausts itself' in constituted power 'is not enough' to conceives it as untied to constituted sovereign power, since it is a faculty of Sovereign 'the power to not passing over into actuality'. Sovereign power, for Agamben, can maintain itself in its own suspension, in its own no-actuality. Being sovereign means to possess the sovereign-absolute power to pass and to not pass to actuality: 'the

troublemaker is precisely the one who tries to force sovereign power itself into actuality' (*ibid*.). Power is sovereign, thus, when it maintains both the possibility to act and not to act.

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Agamben defines the idea of dispositive as follow: 'anything that has in some way the capacity to capture, orient. Determine, intercept, model control or secure the gestures, behaviours, opinions, or discourses of living beings' (WA, 14). In light of this definition, it is easy to comprehend how the logic of the exception (or presupposition), structuring the very experience of human language, which ontology ratifies and fixes in the form of a specific knowledge of 'being', works properly as an apparatus, shaping the way human beings have conceived their being human. The ontological-biopolitical dispositive divides and articulate being in 'essence and existence', 'potentiality and actuality'; and since for humans to be is to live, this division is also reflected in the sphere of life. The distinction between the mere fact of living (*zoē*– vegetative life) common to all living beings, and a qualified life (*bios*) properly of men is, thus, the transposition operated by the *logos*, of the ontological distinction on the plane of life. Ontology, for Agamben, shaped western politics in the sense that has provided the foundational 'logic' according to which the very idea of politics has been thought. It is, in fact, the exclusive/inclusion of the *zoē* into the *polis* that has allowed the Greek to think politics, and it is the same presupposition of the life of men to constitute the core of sovereign power.

What ontology has conserved and bequeathed – in the form of a tradition – is the very process of subjectivation – as the creation of subjects (*hypokeimenon* – substance). The ontological difference, according to which the act of predication presupposes the existence of an entity that is the subject of the inference represents the materialisation of something like a subject. The process of subjectivation, thus, divide and articulate essence and existence: the latter is separated and pushed to the bottom (according to the very meaning of the word *subject*), establishing, in this way, the foundation of what could be inferred – as essential – of an entity.

In the next chapter, I will scrutinize further the influence of the Aristotelean ontological dispositive had on the development of western political thought. While in this chapter, I have introduced the question of how Agamben has thought ontology as determining the logical structure of sovereign power, in the following chapter I will look at the ontological dispositive has shaped the very history of the ideas of sovereignty – and politics more in general.

Chapter Three

THE GOVERNMENTAL MACHINE

In this chapter, I interrogate Agamben's concept of the bi-polar governmental machine, as elaborated in the volume *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*. This work represents a crucial step in the development of the *Homo Sacer* series since it attempts to rethink the functional link between sovereign power and governmentality – under the shield of the idea of political theology. In this book Agamben's genealogical enquiry, demonstrates that the structures and the exercise of power is articulated upon the dialectical distinction between an "absolute power", embodied in the idea of kingship (or *reign*), and an "ordinary", administrative power, represented in what it is usually called "government". These two forms of power despite referring to different political paradigms are functionally connected and emerged from the common ground of the theological speculation over God's power, forming the double structure of the governmental machine of the West. This chapter retraces Agamben's inquiry into political theology focusing mainly on the distinction between absolute power and government trying to show how his theory of the governmental machine recomposes what Foucault has separated (sovereign power and government). Sovereignty and government are different but strictly dependent upon each other. Their distinction is, in fact, the reflection of a fundamental ontological problem, the one related to the difference between God's being and acting (between his potentiality and actuality). The government of "men and things" and sovereignty (or the Kingdom) are two elements in a machine, which – tied in a tight bond – cannot function without each other.

Political Theology

In 1871, Michail Bakunin in the polemical pamphlet *La Théologie Politique de Mazzini et l'International* wrote:

> Who are now found under the banner of God? From Napoleon Third to Bismarck; from the Empress Eugenie to Queen Isabella; and between them the pope with his mystical rose which he gallantly presents, by turns, to the one and the other. There are all the emperors, all the tings, all the official, officious, aristocratic, and otherwise privileged world of Europe, carefully enumerated in the Gotha almanac; there are all the great leeches of industry, of commerce, of finance; the licensed professors and all the functionaries of the State; the high and the low police, the gendarmes, the jailers, the executioners; without forgetting the priests, constituting today the black police of souls for the benefit of States; there are the generals, those humane defenders of public order, and the editors of the venal press, such pure representatives of all the official virtues. Behold the army of God! Behold the banner under which Mazzini is ranged today, doubtless in spite of himself, drawn by the logic of his ideal convictions, which force him, if not to bless all that they bless, at least to curse all that they curse. […] In the opposite camp, what is to be found there? The revolution, the audacious deniers of God, of the divine order and the principle of authority, but, on the other hand, and for that very reason, the believers in humanity, the affirmers of a human order and of human liberty.[158]

The polemic, directed only partially toward the figure of Mazzini, is an attack on all the forms of authority and traditional powers that are to be found under the banner of God. In denouncing the theological shield of state's and economic power, Bakunin introduced in the political lexicon the term "political theology", to denigrate and to characterise negatively the enemy he was combating.[159] Surely, he could not foresee that this pejorative label would have migrated the sphere of the polemics to go to define a specific brunch of research. Most of all, Bakunin could not predict that half a century later, this epithet will be appropriated by his adversaries.[160]

Against the enemies of the traditional ideas of Western European culture, against the Russian barbarity and the atheist-anarchic evil, Schmitt adopts the concept of political theology in 1922 – in response also to

[158] Bakunin (1871), p. 4.
[159] Meier (1998), p. 8.
[160] See: Schmitt (2005), chapter 3.

Bakunin's anarchism. Since then the idea of political theology has been linked to his name, rendering this initially polemical concept a distinctive mark of his own scholarly identity. With the famous statement 'all significant concepts of the modern theory of the state are secularised theological concepts'[161], Schmitt asserts what Bakunin vigorously negates. While for Bakunin outside the banner of God and religion lies the land of human liberty and revolution, for Schmitt beyond the faith in revelation and the legitimate power of the mundane sovereign of Christian Europe lies anomy, iniquity and disorder.

Schmitt's assertion of the paradigm of political theology aims at bringing to light the concealed (but fundamental) relationship between the systems of thought of "theology" and "politics". If the conceptual apparatus of politics (and law) owes its features to theology, Schmitt claims, it is not only for 'their historical development' according to which theological concepts were transferred to politics but also for 'their systematic structure'.[162]

However, political theology does not imply – necessarily – a Christian theological origin of politics. As it has been demonstrated, among others by Francis Oakley[163], the sacredness of kingship and political power is something that Europe has inherited from the ancient pagan world. Schmitt seems more prone to refer to the fact that politics entails in its own constitutive process the relation to a sphere of divine transcendence, and it cannot be reduced, only, to its mundane manifestation. The two spheres interacted in a centuries-long interplay, which has shaped the way the West has conceived law as well as politics.

In a recent work, Emanuele Castrucci has detected at least four modalities according to which political theology could be thought. The first, political theology as a politicisation of the theological is the 'theology […] of political power or the concept of truth which is held by [the] sovereign of the moment'.[164] The second consists in political theology as 'theologisation of the political', and is 'what theology says about the nature of political

[161] Schmitt (2005), p. 36.
[162] *ibid*.
[163] See: Oakley (2006).
[164] Castrucci (2016), pp. 95-96.

power'.[165] The third interpretative level is represented by political theology as a theory of 'transformation, based on the principle of analogy, of theological concepts reformulated as legal concepts (especially constitutional law and the doctrine of the state) and political ones'.[166] The last level of interpretation of political theology consists in the general theory of the 'foundation of legitimacy in politics' aimed at stating an 'ultimate relationship' between the 'political and the *Veritas*'.[167]

These four semantic levels generally expound the main traits of the idea of political theology – as thought by Schmitt. Theology does not stand only as a land of origin of the conceptual framework of Modernity but represents one of the poles of the intellectual system that underpin the development of the Western understanding of law and politics. There is not – in the perspective of political theology – something like a process of disenchantment and abandonment of the sphere of theology and the sacred, toward the triumph of rationality and instrumental reason, as in, for instance, Weber.[168] The traces of theology continue to be a part of what can be called the auto-comprehension of Modernity, as secularisation.

Keyword in Schmitt's definition of political theology, the term secularisation refers not simply to a passage, from theology to politics, or to a process of removal of the theological-sacred from predetermined conceptual structures. Secularisation refers, also, to a process of translation and transposition of meanings and epistemic apparatuses, from one field to another. As Agamben writes, secularisation works like a *signature*, that is, 'something that in a sign or concept marks and exceeds such a sign or concept referring it back to a determinate interpretation or field, without for this reason leaving the semiotic to constitute a new meaning or a new concept'. The work of signatures moves and displaces 'concepts and signs from one field to another […] without redefining them semantically […] in this sense, secularization operates in the conceptual system of modernity as a signature that refers it back to theology' (KG, 4).

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[165] *ibid*.
[166] *ibid*.
[167] *ibid.* p. 98.
[168] See: Weber (2005).

The archaeological (and genealogical) approach, which aims at the deconstruction of the legal and political tradition, thus, cannot avoid the interrogation of the sphere of the theological, which represents a 'privileged laboratory' (*ibid*., xi) for the understanding of the governmental machine of Western politics. Within Agamben's research path, in fact, theology represents the place in which the models, according to which political, legal and governmental power, were elaborated.[169] From Christian theology derive two 'political paradigms, antinomical but functionally related to one another': political theology, 'which founds the transcendence of sovereign power on the single God', and the 'economic theology', which replaces this transcendence with the idea of an *oikonomia*, conceived as an immanent ordering-domestic and not political in a strict-sense of both divine and human life' (*ibid*., 1). The first paradigm marked the path toward political philosophy and the theory of sovereign power; from the second paradigm instead, derives 'modern biopolitics up to the current triumph of economy and government over every other aspect of social life' (*ibid*.). These two paradigms correspond to two different configurations of power, which are strictly related, so that the economic (immanent) administration and government of "men and things", is the execution of something that is disposed and ordained sovereignly. The two poles of the machine cannot operate by themselves but work in synergy. The government, thus, is always thought as emanating from a transcendent, sovereign power, while the latter can be thought as effective only if actualised in immanent government.

The theological model of the scission (and articulation) between power and its exercise, is based on the opposition (and articulation) between *potentia dei absoluta* and *potentia dei ordinata*, between what God can possibly do, and what God has actually done.[170] Considered in itself, God's

[169] The confrontation with theology for Agamben is constant and disseminated throughout his whole body of work, and in a way goes far beyond the paradigm of political theology and the use of theology as the ground for excavating genealogically and archeologically contemporary politics. For a general overview of Agamben's approach to theology see: Dickinson (2011); Zartaloudis (2011); Kotsko and Dickinson (2015).

[170] In the perspective of political theology and from the point of view of the history of political ideas, the question of *potentia dei* had assumed the vest of a central paradigm for

power is absolute, in the sense that God could do – actually – everything. If God's power is found in its actual, real and mundane manifestation (according to his *potentia ordinata*), he could do only what he has decided (willed) to do. This distinction replicates, in a way, Aristotle's ontology of potentiality; the etymology of the term is a further confirmation of this.[171] According to its absolute power, God can do everything; instead, according to his *potentia ordinata,* he could do only what originates from his will. Inside the articulation of the two powers of God, the fundamental term is "will". It is, in fact, God's will that makes possible the division and the articulation between the absolute transcendence of his divine power and its actual manifestation. The fundamental division between the two paradigms of power, Agamben claims, represents a philosophical-theological attempt to come to terms with a radical separation, on the level of ontology between being and practice (act), which has been fostered by the introduction of the concept of "will" (*voluntas*), in the interpretation of the relation between a transcendent God and its immanent government of mundane reality.

This distinction/articulation between the absoluteness and the mundane (limited) essence of God's power, in the history of legal and political ideas, assumed a crucial role since it has been invoked to legitimise, in the wake of modern time, temporal political power. The model of God's power migrated outside the theological discourse, becoming the fundament of the legitimacy of princely power. In this chapter, I will analyse Agamben's notion of a bipolar governmental machine as the basic configuration of political power. I will argue, then, that the very idea of the articulation of the two poles of a sovereign, transcendent power and an immanent mundane government that Agamben has elaborated mends what Foucault has separated that is the idea of sovereign power and government. The next section will be dedicated to the theological distinction between *potentia absoluta/ordinata*. It will follow a section on Agamben's genealogy of the terms *oikonomia*, which is the technical term that theologians have used to describe the earthly action of God's power.

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the legitimation and explanation of temporal power. See, on this matter: Courtenay (1990); Oakley (1998; 1999; 2012; 2015); Shogimen (2007); Schütz and Traversino (2012).

[171] *Potentia*, in fact, is the Latin translation of *dynamis*.

The chapter turns, then, to the analysis of the concept of "providence" and in the last section, with an outline of the main traits of the idea of "governmental machine".

On *Potentia Dei*

In the book *Dictatorship*, Schmitt sustains that theological discourse around the role and the power of the pope, should be seen as the initiator for the evolution of the state form towards a so-called secular direction; whereby recognizing the Church as a political institution, whose reformation establishes a model for the modern concept of sovereignty and of bureaucratized state. The process of formation of Modern European nations, structured on the central control of the territory, and on extended bureaucratic offices, has been initiated by the institution of the Church as autonomous political reign. As Schmitt wrote:

> In the history of constitutional law, the transition from the medieval to the modern concept of state could be marked by the fact that the notion of papal *plenitudo potestatis* [full power, omnipotence] became the base of a great reformation [*reformatio*], which restructured the entire organization of the church. The legal expression of this concept was the fact that the centralized power of the sovereign established a new form of organizing, without respecting the vested privileges and the rights to the office that were characteristic of the medieval state, and that it offered the exceptional example of a legitimate revolution […] that was executed by an organ formed according to the law. […] What was perceived as revolutionary in *plenitudo potestatis* was the termination of the medieval idea of an unconditional hierarchy of function. This hierarchy could not have been changed, not even by the highest authority.[172]

The pontificate of Innocent III (1198-1216) initiated a process of reformation in the direction of the *plenitudo potestatis* [plenitude of power], which made the pope sovereign-like and the Church an organic centralised state. From this moment onward, the Pope is more than the supreme lord of the Church; he became the sole head of the Church, acquiring discretion over every aspect of the life of the ecclesial institution. The Church and the theological

[172] Schmitt (2014), pp. 34-35.

legitimisation of the papal plenitude of power represented the prototype of the modern conception of absolute sovereignty and that of a bureaucratized state.[173]

The mention Schmitt made to Innocent III is indicative, as he was 'the first European monarch for whom a sophisticated theory of kingship was developed'.[174] Innocent III has definitively secured the definition of *vicar of Christ* as the exclusive title of the Pope himself. The Pope's plenitude of power, thus, derives from a sort of concession (commission) of Christ. The pope 'received from Christ the extraordinary right to exercise in certain cases nothing less than the divine authority on earth'.[175] The pope acquired in this way 'two types of authority': an ordinary one, according to which 'his powers […] were those of any prince and were circumscribed by custom, law and tradition', and an extraordinary one, deriving directly from his being vicar of Christ, which gives him the authority to act 'outside his normal jurisdictional competence and above the law' to which his ordinary power is bound.[176]

The legitimacy of the divine character of the pope's office has been articulated through the invocation of the famous distinction between *potentia Dei absoluta/ordinata*; a theological categorisation, elaborated in late middle age, to come to terms with riddles entailed in the discussion over God's attributes.[177] This bi-partition has been thought as a systematisation of what is ultimately feasible for God. *Potentia absoluta* refers to God's power considered from the point of view 'of the total absence of any potential restriction', while *potentia ordinata* considers 'God's power as actualised or realisable in the realm of the temporal according to the order of nature'.[178]

This distinction appeared between the thirteenth and the fourteenth century, in the context of the theological speculations over God's power, to find a solution to the conundrums brought about by the relationship

[173] On this matter, see: Berman (1983); Prodi (1988).
[174] Oakley (2012), p. 172.
[175] *ibid.* p. 175.
[176] *ibid.* pp. 175-177.
[177] See: Oakley (1998).
[178] Traversino (2011), p. 65.

between God's attributes and the divine creation.[179] How can God possess the quality of goodness if he has created a world in which men are prone to sin? Another order of questions entailed in the elaboration of a theory of *potentia dei* regards the relationship between God's omnipotence and the order of nature: can God do things *contra naturam*? If the omnipotence of God allows him to change the eternal laws of nature, this implies that those same laws are not perfect and eternal, and therefore that God's creation is not perfect. The question that logically arises in this context is thus: which is the relationship between the limitless power of God, and the limited existence of what he has created? Can God do impossible things, going against his will and the order of nature?

The debate on God's power can be summarised schematically into two models: God as the omnipotent being who has the faculty of contradicting himself breaking the same eternal laws of his own creation; God as 'master' whose power resents a sort of logical a-priori for the legitimation and comprehension of his creation. In the latter sense, God's power is subjected to the auto-limitation of his own perfect creation, which is the highest manifestation of its will and power. These two models are exemplified peculiarly by the authors who have thought the distinction between absolute and ordained power with more intensity that is Duns Scotus and William of Ockham.

In Scotus absolute and ordained power, represent two different forms of God's actions. As the *Doctor Subtilis* writes in the distinction 44 of his *Ordinatio*:

> In every agent acting through intellect and will, with the power to act in conformity with a governing [*recta*] law and yet with the power not necessarily to act in conformity with that law, one distinguishes ordained power from absolute power; and the reason is that [the agent] can act in conformity with that governing law, and then it is acting according to its ordained power (for [power] is ordained in as much as it is the basis for carrying out some [act] in conformity with governing law), and [the agent] can act outside that law or against it, and in this there is absolute power, exceeding ordained power. And therefore not only in God, but in every free agent—who can act according to the dictate of a

[179] The first author to have used the distinction between absolute and ordained power is Alexander of Hales. However, the trace of such a dual formulation of God's power could be traced back to Augustine. See: Randi (1987).

governing law and outside or against such a law—one distinguishes between absolute and ordained power; therefore, the jurists say that someone can act *de facto*, that is, from absolute power,—or *de jure*, that is from ordained power according to law.[180]

Potentia absoluta and *potentia ordinata* are two concrete possibilities of action in relation to the divine order; the first – as to its extension – contains the latter, and the latter could be considered as a subset of the first. Whoever acts according to an act of volition, Scotus, claims has both an absolute and ordained power that is the possibility to decide to act in conformity to the rules that guide his action, or to overcome them or event to break those laws.

If ordained power is the faculty to act in accordance with a certain number of dispositions characterising the order of things, the sense of *potentia absoluta* is represented by the extent of power-with-no-restrictions. Thus, this power can manifest itself in a not-ordained manner (dis-ordained). This would entail the fact that God has among all his attributes the faculty to act disorderly. This is not the case since Scotus claims that every order is due to God's will. Thus, all God's actions – which do not entail contradiction – are 'ordained', and when exceeding the actual order should be considered as creating a new order. For an agent, it is possible to act legitimately against the rules of a given order, if those rules are dispositions of the same agents that is when the agent has the power to create new *lex recta*.

In Ockham's interpretation, the distinction assumes a quite different form than in Scotus. As he writes in his *Quodlibet VI*:

[180]In omni agente per intellectum et voluntatem, potente conformiter agere legi rectae et tamen non necessario conformiter agere legi rectae, est distinguere potentiam ordinatam a potentia absoluta; et ratio huius est, quia potest agere conformiter illi legi rectae, >et tunc secundum potentiam ordinatam (ordinata enim est in quantum est principium exsequendi aliqua conformiter legi rectae), et potest agere praeter illam legem vel contra eam, et in hoc est potentia absoluta, excedens potentiam ordinatam. Et ideo non tantum in Deo, sed in omni agente libere - qui potest agere secundum dictamen legis rectae et praeter talem legem vel contra eam - est distinguere inter potentiam ordinatam et absolutam; ideo dicunt iuristae quod aliquis hoc potest facere de facto, hoc est de potentia sua absoluta, - vel de iure, hoc est de potentia ordinata secundum iura. See: J. Duns Scotus, *Ordinatio I*, d. 44, n. 3; in Gelber (2004), pp. 312-313.

… some things God can do from his ordained power and some from his absolute power. One should not interpret this distinction as saying that in God there are really two powers of which one is ordained and the other absolute, because the power in God as it is directed outward is unique and is in every way God himself. Nor should one interpret [the distinction] as saying that God can do some things in an ordained way, and some things absolutely and not in an ordained way, because God can do nothing inordinately. But one should so interpret 'to be able to do something' such that sometimes it is taken according to the laws ordained and instituted by God, and these God is said to be able to do from ordained power. 'To be able' is taken differently [when it is taken] for the ability to do everything that does not include a contradiction to carry out, whether God were to ordain that this should be done or not, because God can do many things that he does not will to do; … and these God is said to be able to do from absolute power. Just as the Pope cannot do some things according to the laws he enacts, which he can yet do absolutely.[181]

The distinction between absolute and ordained power does not describe the existence of two different forms of power, one of which higher and more extensive. For Ockham, God's power is one and is expressed in the creation of the eternal divine plan and its order. Differently, than Scotus, Ockham in distinguishing two different characters of God's power is not interested in legitimising God's omnipotence, but he meant to reaffirm the radical contingency of the mundane reality as a consequence of an 'absolutely' free act of God's will. God cannot do things according to (alternatively) his ordained or absolute power. Ockham is not referring to the possibility for God to act miraculously. His absolute power represents the dimension of his absolute freedom. The divine action of his absolute power situates itself in a time preceding 'the choice' of the mundane order, which is – since expression of God's will – eternal and immutable; and miracles, thus, are

[181] Ockham, Quod. VI, q. 1: '*Circa primum dico quod quaedam potest Deus facere de potentia ordinata et aliqua de potentia absoluta. Haec distinctio non est sic intelligenda quod in Deo sint realiter duae potentiae quarum una sit ordinata et alia absoluta, quia unica potentia est in Deo ad extra, quae omni modo est ipse Deus. Nec sic est intelligenda quod aliqua potest Deus ordinate facere, et aliqua potest absolute et non ordinate, quia Deus nihil potest facere inordinate. Sed est sic intelligenda quod "posse aliquid" quandoque accipitur secundum leges ordinatas et institutas a Deo, et illa dicitur Deus posse facere de potentia ordinata. Aliter accipitur "posse" pro posse facere omne illud quod non includit contradictionem fieri, sive Deus ordinaverit se hoc facturum sive non, quia multa potest Deus facere quae non vult facere; … et illa dicitur Deus posse de potentia absoluta. Sicut Papa aliqua non potest secundum iura statuta ab eo, quae tamen absolute potest*.' See: Ockham, Quod. VI, q. 1, in Gelber (2004), pp. 322-323.

part of the mundane order, and do not refer to the dimension of absolute power.

For Ockham, the *potentia absoluta* is not a real divine faculty, but is a logic *prius* that makes the contingency of this world – since God's could have done otherwise – intelligible. The definition of the distinction, thus, is a fiction, a theoretical assessment, aimed at making explicit the absolute freedom of God's will.[182] The absolute power of God is, thus, an 'epistemic' and 'heuristic' construct that makes possible to consider God's creation as dependent on a limitless, omnipotent and free will. This implies that there is nothing real outside the mundane order. For example, God is not obliged to introduce gravity in the world, since the proposition 'it does exist the world without gravity does not entail contradictions'; however, since gravity is part of this world – and the world without gravity is out of what God has decided – the absence of gravity will never happen. A temporary-miraculous suspension of the law of gravity should be intended as belonging to the dimension of *potentia ordinata*; it would be a demonstration of God's omnipotence, but with no ties to *potentia absoluta*.[183] In Ockham perspective, though, God can do the infinite things that he will never do because his *ordinatio* does not contemplate them: but if he would do them, they will belong to the sphere of ordained power.

What the historical development of the speculations on the question of the *potentia Dei* has established is a dual image of God. On the one hand, we have the idea of a sovereign God, whose power exceeds the ordained reality he has created; a God intervening according to his will in the mundane affairs. On the other hand, there is, instead, the idea of God as a "clockmaker", a divinity that assists the mundane events, while letting them happen according to the divine law of the eternal plan of his creation. These two images correspond to "absolute" and "ordained" power. The first is the absolute, infinite and free power of God, who according to his will can change or modify the actual worldly order – and can even create infinite possible other worlds. The latter, instead, is the power of God, in its

[182] Randi (1987), p. 67.
[183] *ibid.* p. 72.

immanent manifestation, as 'ordained' power, disposed of according to an eternal plan that governs with perfect regularity the course of all things.

When the canonists and lawyers between the fourteenth and the sixteenth century began to legitimise temporal power applying this distinction to explain the nature and articulation of temporal power, they moved a properly theological definition into legal and political theory. Bodin is maybe the most popular theorist who has used this distinction to characterise king's power. He defines sovereignty as 'the highest, absolute and perpetual power over the citizens and subjects in a commonweale'; the power that constitutes the proper fundamental element of the whole community. The sovereign is subjected only to God and is, therefore, *legibus solutus*. 'Invoking the authority of no lesser canonist that Innocent IV', as Oakley claims, 'Bodin drives that point home by deploying the old theological and canonistic distinction between the two powers […] Thus he discriminates between those acts which the prince could do of his absolute power and those he did of his ordinary, civil, or regulated power'. Therefore, Bodin argues 'that the prince is able of his absolute power to derogate from the ordinary right, that is to say, from the laws of the country'.[184]

For Agamben, this distinction represented the 'theological model of the separation of power from its exercise', (KG, 104), between sovereignty (*potentia absoluta*) and government (*potentia ordinata*) – and more generally the fracture working as a paradigm for every separation of power. Wherever the accent is posed, on absolute (Scotus) or on ordained power (Ockham), God's power is articulated upon a scission of his power (which is also an articulation) according to which the immanent (actual) government of the world is the manifestation of an absolute power, which in its current expression as government of the mundane experience has to be in a way silent (or powerless). The absolute power, instead, without its concrete, limited (ruled) actualisation into the world, would just 'not be', making God's attributes disappear. Thus, when the distinction, moved from a proper theological terrain to the legitimisation of temporal power – under the shed of the idea of the sacredness of kingship – it has brought

[184] Oakley (2015), pp. 144-145. See: Bodin (1986), vol.I, chapter 9.

with the idea of a separation, in the very body of power, 'between a sovereignty inseparable from its exercise and a regality that is structurally divided and separable from government (or, in Foucault's terms, between territorial sovereignty and governmental power)' (KG, 107). And this is nothing other than the separation between Kingdom and Government.

Oikonomia

'Through the distinction between legislative or sovereign power and executive or governmental power,' Agamben writes,

> the modern State acquires the double structure of the governmental machine. At each turn, it wears the regal clothes of providence, which legislates in a transcendent and universal way, but lets the creatures it looks after be free, and the sinister and ministerial clothes of fate, which carries out in detail the providential dictates and confines the reluctant individuals within the implacable connection between the immanent causes and between the effects that their very nature has contributed to determining (KG, 142).

The division of powers – one of the main features of legal and political Modernity and of the very modern idea of justice – represents the resurgence of a hidden bond – embodied in the distinction between an absolute and an ordained power – which connects God's sovereignty with his salvific-governmental actions in ruling the world through his eternal plan. This fundamental distinction, Agamben suggests, emerges in early middle age in the field of the speculation on the doctrine of the Holy Trinity, when theologians – involved in the attempt to resolve the presence in a monotheistic religion of many different figures without falling again into polytheism – have elaborated the concept of God's *oikonomia*, to define God's action in the earthly reality.

When early Christianity made use of the term *oikonomia*, this word did not have any theological tone. *Oikonomia* as outlined by Aristotle and Xenophon – as *technē oikonomikē*, economic art – is the practical activity of the administration of the house. It is, thus, not an epistemic paradigm, but a managerial activity; the art of guiding the house, a complex and

articulated organism, on the base of decisions and dispositions, which come to term occasionally with specific problems regarding the *functional order* (*taxis*) of the different parts of the *oikos*.[185] As in Xenophon, the house should be governed as an army or a ship, and the *oikonomos* should act as a commander or as a 'pilot'; this activity is defined as 'control' – *episkepsis*, from which it is derived the term *episkopos*, 'superintendent' and later 'bishop'. *Oikonomia* thus is a form of practical knowledge for the administration of the house, a "functional organisation" of the parts of the house (*ibid*., 17).

The term *oikonomia* entered definitively into the theological lexicon thanks to Paul. The task God gave to the apostle is economic. Paul 'does not act freely', he is tied 'to a bond of trust (*pistis*) as *apostolos* (envoy) and *oikonomos* (nominated administrator). *Oikonomia* is here something that is assigned; it is, therefore, an activity and a task:

> If I preach the Gospel [*euangelizomai*], I have nothing to glory of; for necessity is laid upon me; for woe is unto me, if I preach not the Gospel. For if I do this of mine own will, I have a reward: but if not of mine own will, I have an *oikonomia* entrusted to me [*oikonomian pepisteumai*, literally: 'I have been invested fiduciarily of an *oikonomia*'].[186]

Economic, in this sense, is the task Paul has received. The act of telling the 'good novel' of the Gospel, the activity of witnessing Christ, his death and the preaching of messianic time is an economic task the apostle has received. The term *oikonomia* does not have here an immediate theological meaning; it maintains a practical sense, referring to the apostolic activity spreading the Gospel and announcing the word of Christ.

Even when the term *oikonomia* has been coupled with term *mystērion* – an occasion that has eventually led readers to talk about of a theological meaning of *oikonomia* – the term does not refer directly to the sphere of the divine:

> Now I rejoice in my suffering for your sake, and in my flesh I complete what is lacking in Christ's afflictions […] according to the *oikonomia* of God, the one which was given to me

[185] See: Aristotle (2009)
[186] Paul, I Cor., 9, 16-17, in KG, 21-22.

[*dotheisan*] to make the word of God fully known, the mystery hidden for ages and generations but now made manifest to his saints.[187]

To me, though I am the very least of all the saints, this grace was given, to preach to the Gentiles the unsearchable riches of Christ, and to make all men see what is the *oikonomia* of the mystery hidden for ages in God.[188]

Let a man so account of us, as of servants [*hyperetas*] of Christ, and treasurers [*oikonomous*] of the mysteries of God. Here, moreover, it is required in *oikonomoi* that a man be found faithful [*pistos*].[189]

Mysterious is the mystery or his word, which now can be disclosed and announced. *Oikonomia* of God is something that has been assigned to the apostle, the task of announcing the mysterious action of salvation and redemption. Therefore, Agamben claims, 'the relation between *oikonomia* and mystery is here clear: it is a matter of carrying out faithfully the task of announcing the mystery of redemption hidden in the will of God that has now come to completion' (*ibid.*, p. 23). Thus, in Paul, the term *oikonomia* refer to the semantic sphere of the *oikos* and the activity of "well-administering" and making of functional orders. Only later, the word begins to be used to describe God's government, the divine action that through the eternal laws of the creation direct the mundane experience.

It is widely accepted, Agamben claims, that with the thought of Hippolytus and Tertullian the term *oikonomia* ceases to be a transposition of a domestic vocabulary into a religious one, acquiring a proper theological meaning and usage. Through a reversal of the Pauline 'economy of mystery' into 'mystery of economy' the term *oikonomia*, without a substantial semantic mutation, acquires a strategic-technical sense, becoming the operator that allows the conciliation of the Trinity with the divine unity. Against the Monarchians, who predicated the absolute unity of God claiming that the 'personal distinction between the Father and the Word' represents a risk of a resurgence of polytheism, it was advanced the concept of *oikonomia* as a strategic tool to articulate the Trinity with a unique

[187] Paul, Colossian I: 24-25, in KG, 22.
[188] Paul, Ephesians 3:9, in KG, 23.
[189] Paul, I Corinthians 4:1, in KG, 23.

monarch-like God. The argument advanced to solve the question is that God is one in its potential [*dynamis*], but in terms of his *oikonomia*, its manifestation is triple. As Hippolytus puts it:

> So even an unwilling person is obliged to confess the Father as God Almighty, and Christ Jesus, the Son of God, as the God who became man […] and the Holy Spirit; and that these really are three. But if he wants to learn how God is shown to be one, he must know that this [God] has a single Power [*dynamis*] ; and that as far as the Power is concerned, God is one; but in terms of the *oikonomia*, the display [of it] is triple.[190]

The strategy through which Hippolytus gives to the word *oikonomia* a new theological meaning, Agamben notes, is the reversal of Paul's definition of 'economy of mystery', into 'mystery of economy', which implies a new categorisation of God's economy, as God's practice:

> So the statement 'In thee is God' revealed the mystery of the economy—that once the Word had taken flesh and was among men, the Father was in the Son and the Son in the Father, while the Son was living among men. So this, brethren, is what was being pointed out-that the mystery of the economy really was this very logos proceeding from the Holy Spirit and the Virgin, which the Son had brought to completion […] for the Father.[191]

While for Paul economic is the activity of revealing and showing God's mysterious praxis – his word and his salvific plan – now economic is the very same divine action, embodied in the figure of the son. 'There is no economy of the mystery, that is, an activity' aimed at fulfilling and revealing the divine mystery', Agamben claims, 'it is the very '*pragmateia*' the very' divine praxis, that is mysterious' (*ibid.*, 39). Economic, thus, is the very action that articulates God's action in the world as a trinity and in the same time harmonises his Trinitarian action with the unity of his substance.

Oikonomia as characterising the divine articulation of the unity of God in a unique substance and Trinitarian action is present also in Tertullian whose work, Agamben claims, provides a sort of theological paradigm of administration:

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[190] Hippolytus, *Contra Noetum*, in KG, 37.
[191] *ibid.*

The simple people […] not understanding that while they must believe in one only [God] yet they must believe in him along with his *oikonomia*, shy at the economy. They claim that the plurality and ordinance [*dispositio*] of trinity is a division of unity-although a unity which derives from itself a trinity is not destroyed but administered by it [*non destruatur ab illa sed administretur*] […] But while Latins are intent on shouting out 'monarchy,' even Greeks refuse to understand the economy. But if I have gathered any small knowledge of both languages, I know that monarchy indicates neither more nor less than a single and sole rule [*singulare et unicum imperium*] yet that monarchy because it belongs to one man does not for that reason make a standing rule that he whose it is may not have a son or must have made himself his own son or may not administer his monarchy by the agency of whom he will. Nay more, I say that no kingdom is in such a sense one man's own, in such a sense single, in such a sense a monarchy, as not to be administered also through those other closely related persons whom it has provided for itself as officers [*officiales*]: and if moreover he whose the monarchy is has a son, it is not *ipso facto* divided does not cease to be a monarchy.[192]

The Monarchy might be administered by a number of different figures – *officiales* – that despite being other than the Monarch, by virtue of being appointed, rule and govern without fracturing the unity of the substance of Monarchical power. Tertullian suggests that God's *oikonomia – God's* manifestation in the son, God's salvific plan – does not imply a plurality of substances, but is in a way the 'immanent' manifestation of the single and only substance in the mundane activity of administering the world. As to his *oikonomia*, God is triple, as to his substance God is one; in the administration of men and things, God can manifest his power in many different dispositions, while the source of them remains unique.

In Tertullian's perspective, 'divine monarchy now constitutively entails an economy, a governmental apparatus, which articulates and, at the same time, reveals its mystery' (*ibid.*, 43). The Trinitarian articulation is defined, here, principally as a governmental activity, which does not entail necessarily a scission in the plane of being. God's economy, thus, involves, primarily, the problem of the relationship between God and his creation, the problem of the reconciliation of his transcendence and the immanence of his governmental action of the mundane reality.

[192] Tertullian's, *Treatise Against Praxeas*, in KG, 42-43.

'The divine being', Agamben claims, 'is not split, since the triplicity of which the Fathers speak is located on the level of the *oikonomia*' and not on the level of being or substance. However, despite the whole effort to not fall again into polytheism maintaining a division into God's essence, the 'caesura' that has been avoided on the level of being 're-emerges' as a 'fracture between God and his action, between ontology and praxis' (*ibid.*, 53). Dividing the 'substance or the divine nature from its economy', Agamben affirms, 'amounts to instituting within God a separation between being and acting, substance and praxis' (*ibid*.). The scission, thus, does not concern divine being, but divine action, since Trinity is an economic, administrative matter. Only this separation, for Christian theology, makes possible the divine practice of government and the accommodation of God's single substance and God's Trinitarian manifestation.

The economic praxis through which God 'governs the world is, as a matter of fact, entirely different from his being, and cannot be inferred from it' (*ibid*, 54) thus, being radically different from his substance (essence), God's economic government is other than God's being, and does not find its foundation in it. God's government, as Agamben suggests, is in this sense without foundation: anarchic. And anarchy is 'what government must presuppose and assume as the origin from which it derives'; (*ibid.*, 64) *oikonomia* has always been without foundation: an-archic.

It is the speculation over the Trinitarian manifestation of God in world, the introduction of the idea of a divine managerial-economic administration of the world, Agamben claims, that has introduced a radical fracture between 'being' and 'acting' (which has eventually had a decisive influence in the elaboration of many riddles of modern ethics). Christianity has introduced the idea of God's will, in an attempt to conciliate being and acting – ontology and praxis. The order of things is as such not because of a 'necessity' to be such, but because God has willed it. The appeal to the 'will' of God is a stratagem to re-brace God's infinite potential and his action in the mundane order. However, the attempt – Agamben sustains – demonstrated to be 'desperate', since the introduction of God's will consists in reasserting the groundlessness of divine action. God's will – as stated above – is infinite (and even wider that his omnipotence) and free and

inscrutable; this implies, thus, that it is not possible to find a stable foundation for his government, outside the abyss of his infinite power.

As in the previous section, also in the speculation over the idea of *oikonomia*, it is the opposition to another element – in this case, God's being (substance) – that makes possible to think about the God's government. The idea of a divine economy, thus, is the thought of God as in action, as manifested in the order of things. *Oikonomia* is, therefore, a manifestation of God's ordained power, of his mundane expression; and vice-versa God's ordained power is "economic" by definition.

Providence

'Providence', Agamben claims, 'is the name of the *oikonomia*' when considered as the government of the world (KG., 111). Therefore, a recognition of the work of the bi-polar governmental machine needs the understanding of the main traits of the debate on providence: God's government of men and things. As stated in the previous sections, kingdom (sovereignty) and government, stands in a relationship of mutual determination, and the conceptualisation of providence, inside Christian theology, represents a further decisive explanation of the governmental machine. Providence – as much as the thought of God's will – 'presents itself as a machine that rearticulates the two planes of the fracture'[193] between God's being and acting, giving a peculiar reason for the understanding of the relationship between sovereign power and its exercise: between the two planes of transcendence (kingdom) and immanent administration (government).

The idea of God's providence involves the question of whether God governs the world through general and universal principles or – on the contrary – his government includes every single acts or element of his creation. The position sustaining the impossibility of a 'particular providence' is that of Aristotle and ultimately of deism. The opposite position – which affirms the existence of both a "general" and a "particular"

[193] Zartaloudis (2011), p. 81.

providence – is the view of the Stoics and is the main tendency inside Christian theology.[194]

The first appearance of the 'providential machine' is located by Agamben in Chrysippus' *Peri Pronoias* (*On Providence*), in which the question takes the shape of the relation between of God's government of the world and the justification of the presence of evil. 'Did the nature of things, or the providence that made the world and the human kind, also make the diseases to which men are subject?' The answer given by the stoic philosopher is one that had eventually a decisive influence in the Christian conception of providence. The design of Nature does not intend to make humans suffer. The presence of "sickness", suffering and evil, 'came as a result […] not in conformity with the original design and purpose; they came about as a sequel to the work, they existed only as consequences which were somehow necessary' (*ibid.*, 115). God's creation, the primary cause of the world order, made the best of the possible worlds. The presence of evil is a form of "collateral effect" of his creation; as a secondary cause, as a side effect – independent by God's intentions – generated, in a way, necessarily by the very relations between the elements of God's creation.

In the Stoic tradition, the concept of providence is strictly related to the idea of fate: if providence represents 'the order of transcendent primary causes […] fate corresponds to that of the effects or immanent secondary causes' (*ibid.*, 126). This conception of world's government presupposes a binary ontology, which structures and suspends reality on a double level: transcendence and immanence. The first could be seen as the realm of being, the latter, instead, is the ambit of praxis. These two planes, Agamben claims, work together 'like a two-stroke machine, in which the destinal connection of the effects (fate as *causa connexionis*) carries out and realises the providential effusion of the transcendent good' (*ibid.*).

One of the places in which the relationship between providence and fate, as the elements of the bi-polar machine for the divine government of the world, has been made more explicit is Boethius' *De Consolatione Philosophiae*. Here, the divine government of the world takes place in two main modes:

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[194] *ibid.* p. 75.

This plan, when we think of it as the purity of God's understanding, we call providence. But when we think of it in reference to all the things in motion that it controls, we call it fate. And if you look at these two things and examine their meaning, you will see that they are different. Providence is divine reason itself, established by the highest ruler of all things, the reason that orders everything that exists. But fate is the disposition that is inherent in each of these things, through which providence binds all things together, each in its proper order. Providence embraces all things together, even though they are infinite in number and different from one another; but fate arranges the motions of separate things, distributed in various places, forms, and times. The unfolding of the order of time is united in the foresight of the mind of God, but that unity when distributed among things in the unfolding of time is what the ancients called fate. 'Now, while these are different, one depends on the other, for the order of fate comes from the simplicity of providence.[195]

As Agamben claims, this passage makes explicit how the divine government of the mundane reality is always divided – and articulated – in two distinct moments forming a unitary machine composed of two polarities: a transcendent principle, unique, simple and eternal, and an immanent economic order that takes place in space and time. The two principles are mutually interdependent because fate emanates from providence, and in the same time without the ordering action of the fate 'those things which the stable order now protects/ Divorced from their true source would fall apart' (*ibid.*, 128). 'Providence', Boethius writes, is 'God's unchanging plan for what is to be done' however, it is through fate that he 'accomplishes these things in the course of time'. The fate could be worked out by the many different elements of divine creation: 'fate is the intricate, moveable, interconnected, and temporal working out of these things according to the divine plan of what is to be done'.[196] All the elements of the divine plan are subject to providence and fate, where the first is the transcendent element, which decides for the order and the second, is the element that 'concretely' organise the divine plan. In Boethius' account of providential government, Agamben stresses out, 'providence and fate appear as two powers that are hierarchically coordinated', where the God's sovereign, absolute power (providence) 'determines the general principles

[195] Boethius (2008), pp. 131-132.
[196] *ibid.* pp. 132-133.

of the organization of the cosmos, and then entrusts its administration and execution to a subordinated, yet autonomous, power (*gestio* is the juridical term that indicates the discretionary character of the acts carried out by one subject on behalf of another)' (*ibid.*, 128).

The government of men and things, of the concrete reality, is the better when the 'divine mind' leave the 'destinal connection of causes' be; that is to say the more the sovereign providence leave the actual government of the world to the fate, the more the world is well administered. Agamben summarises the main essence of this governmental machine as follows:

> Although they are clearly different, they are nevertheless merely two aspects of a single divine action, the duplex modus of a single activity of the government of the world that, with a knowing terminological ambiguity, presents itself now as providence and now as fate, now as intelligence and now as *dispositio*, now as transcendent and now as immanent, now as contracted in the divine mind and now as unfolded in time and space. The activity of government is, at the same time, providence, which thinks and orders the good of everybody, and destiny, which distributes the good to individuals, constraining them to the chain of causes and effects. In this way, what on one level-that of fate and individuals--appears as incomprehensible and unjust, receives on another level its intelligibility and justification. In other words, the governmental machine functions like an incessant theodicy, in which the Kingdom of providence legitimates and founds the Government of fate, and the latter guarantees the order that the former has established and renders it operative. (*ibid.*, 129)

The clearest theological paradigm of government, for Agamben, is contained in Aquinas treaty, *De Gubernatione Mundi*. Here, God's governmental action in the world assumes the shapes that were already present in Boethius. Aquinas sustains that divine government coincides integrally with nature. Divine government and auto-government of nature correspond and 'governing can only mean-according to a paradigm that the physiocrats and the theoreticians of the '*science de l' ordre*'[…] would rediscover five centuries later knowing the nature of things and letting it act' (*ibid.*, 132).

This thesis, though, entails the risk of denying every form of connection to God's power. The claim of the coincidence of nature and

government, lead to separate God and his creation completely. To solve this contradiction, Aquinas has introduced the strategic distinction between primary and secondary causes, between *'primum agens* and *secundi agentes*'. The world and the order of things, understood from the point of view of the primary cause, is something eternal that cannot be changed even by God Himself; intervention in the order of primary causes would mean, for God, to act against his will and the perfection of his creation. The 'space' proper for government is not the necessary '*ordo ad Deum*' of the primary causes but is the contingent *ordo ad invicem* of the secondary causes. 'If we take the order of things as it depends on any of the secondary causes', Aquinas writes, 'then God can act apart from it; he is not subject to that order, but rather it is subject to him, as issuing from him not out of a necessity of nature, but by decision of his will'.[197] The Kingdom of God, his sovereignty, Agamben claims, concerns the *ordo ad deum*, the relation of creatures to the first cause. In this sphere, God is impotent or, rather, can act only to the extent that his action always already coincides with the nature of things. God's Governmental action, instead 'concerns the *ordo ad invicem*, the contingent relation of things between themselves. In this sphere, God can intervene, suspending, substituting, or extending the action of the second causes'. (*ibid.*, 133-134)The two orders are functionally related, since is God's 'ontological relationship with his creation that legitimates and works as a foundation of the acts of the government of the secondary causes.

The divine management of the mundane reality, for Aquinas, therefore, is composed of two moments: the power of 'rational deliberation' and 'executive power, which necessarily entails a plurality of mediators and ministers' (*ibid.*, 134). In Aquinas God's ruling presupposes a providential plan for governing the world [*ratio gubernationis*], and the actual carrying out of this plan [*executio*]. In order to govern, to order his creation, God possesses 'governmental rationality', the knowledge of how practically organise things and men, this God has a direct grasp on the world. However, God governs things through the actions of other things; He could govern through the action of others: this is the executors of his '*ratio gubernationis*'. Aquinas, Agamben stresses out, 'illustrates his hypothesis by

[197] Aquinas *Summa Theologiae*, I, q. 105, a. 6. In KG, 133.

means of a genuinely political paradigm' reinforcing the analogical connection between the theological and the political plane: ': just as the power of a *rex terrenus* who uses ministers for his government is not for this reason diminished in his dignity, but is rather made more illustrious by it […] so God, leaving to others the execution of his governmental ratio, makes his government more perfect' (*ibid.*, 135). Not surprisingly, Aquinas in question 116 describes the articulation of the divine governmental machine in the same terms of Boethius. The order of things,

> with respect to God himself, and from this point of view the ordering of effects is called Providence. Second, with respect to the intermediate causes ordered by God to bring about certain effects, and from this point of view it has the character of fate [*rationem fati*].[198]

The fate, here, is nothing other than God's *oikonomia*, the *dispositio* or the order of the secondary causes. Thus, the government is never related to the primary causes, to God's substance, to the eternal plan of providence; but emanating from it, fate (or government) entails the series of secondary causes, the contingency, and the collateral effect of the relationship between the things that God has created and disposed of.

On the bi-polar governmental machine

In *Security, Territory, Population*, Foucault described the relationship between the transcendental dimension of the 'divine' and the mundane organisation of power and men, as a 'sort of theological-cosmological continuum in the name of which the sovereign is authorised to govern'. The sovereign has the right and duty to exercise his government only 'insofar as he is part of this great continuum extending from God to the father of a family', which is 'nothing else but the translation of the continuum from God to men in the […] political order'.[199] Up until the sixteenth century, Foucault sustains, the (theo)cosmological continuum of legitimate power,

[198] Aquinas, *Summa Theologiae*, I, q. n6, in KG, 136.
[199] Foucault (2009), p. 234.

worked to justify kingship and sovereign power. With the emergence of new scientific discoveries, this continuum is 'broken': the evolution of scientific knowledge shown 'that ultimately God only rules the world through general, immutable, and universal laws, through simple and intelligible laws that are accessible either in the form of measurement and mathematical analysis'.[200] Therefore, if God governs the world only through eternal and stable laws, he is not administering his creation 'in a pastoral sense'. Rather, he acts as a sovereign, who governs through 'principles'.[201] Here lies – in Foucault historical account – the distinction between sovereign and government; in the fracture operated by the emergence of particular knowledge that led to the elaboration of a body of an 'art' of government independent by the very same idea of sovereignty.

From this perspective, Agamben's archaeological effort indicates a missing link between the problematic separation (on both theoretical and practical level) between sovereignty and government that has been characteristic of Foucault's theory of biopolitics. Under the umbrella of the paradigm of political theology, for Agamben, the separation between sovereignty and government – which implies a distinction between two modalities of exercising power – has to be found in the medieval speculation on God's government of the world (*oikonomia*); separation that has worked as a model for the organisation of state's power in late middle age and early Modernity. When the theorists of the absolute state have legitimised the earthly power of Kings through a direct reference to the distinction between ad ordained and absolute power, they brought into the political and legal knowledge a fundamental theological characterisation of God's omnipotence. The difference between an immobile-transcendental-absolute sovereign and non-sovereign efficient administration of things and men is the reflection of the divine model of God's kingship and government. Agamben's critique-correction of Foucault hypothesis is not only a backdating of the emergence of the separation in the body of power between its substance and its concrete application but is also a critique of the separation itself.

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[200] *ibid.* pp. 234-235.

[201] *ibid.*

Sovereignty (the reign – the kingdom – the *auctoritas* – the absolute power) is divided and – in a way – opposed to government (the exercise of power – the *oikonomia* – the *potestas* – the ordained power). However, this opposition can work only as articulation, where sovereignty represents the legitimating element of the concrete actualisation of power as the government, and government consists in the very possibility of the existence of sovereignty. If 'Kingdom and the Government are separated in God by a clear opposition', Agamben claims, 'then no government of the world is actually possible'; there would be, 'on the one hand, an impotent sovereignty and, on the other, the infinite and chaotic series of particular (and violent) acts of providence. The government is possible only if the Kingdom and the Government are correlated in a bipolar machine', (KG, 114) through which the administration of the ordinary earthly experience can only be deployed. The unity of the governmental machine is characterised by the presence of its two poles. What makes possible the exercise of power is other than the exercise of power itself; but – in the same time – the other of the exercise of power can be explicated only through its very actualisation (concretisation). There is no sovereignty without government and vice-versa: a government with no kingdom is just series of acts – inherently purposeless – unable to create order, that is to say, unable to govern.

Kingdom and government – the sovereign and its administrative apparatus –, stand in a relationship of vicariate. The relationship has its paradigm in Christ himself: 'the power of Christ', Agamben writes, 'is, in its relation to the Father, an essentially vicarious power, in which he acts and governs, so to speak, in the name of the Father' (*ibid.*, 138). The relationship between the Father and the Son, thus, could be considered as 'the theological paradigm of every *potestas vicaria*, in which every act of the vicar is considered to be a manifestation of the will of the one who is represented by him' (*ibid.*).

It is useful, at this point, to give a brief look at the very idea of the vicariate. To act vicariously, in fact, means to act 'in the name of'; as if the action would have been done by an absent agent. The vicariate, thus, does not imply a difference in the *praxis* (the action) and it purposes between who

appoints and who execute. The action of the vicar entails, instead, a necessary difference in the substance of the executer. And in fact, the Son does not share the same substance of the father (since he is a man). As Agamben claims, the an-archic character of the Son, who is not founded ontologically in the Father, is the essential character of the Trinitarian economy. Therefore God's economic government turns out to be '*the expression of an anarchic power and being that circulates among the three persons according to an essentially vicarious paradigm*'. (*ibid*.) The vicar, thus, finds its authority in an 'absent' – transcendent – entity, becoming, consequently, an anarchic agency. Every vicar function – in the name of God, the people, the chief or simply in every case in which an entity is representing another entity – brings about the anarchic essence entailed in the same vicariate. Thus, the structures of power are in their essence vicar, since remanding to the sphere of a supposed transcendental other, which by way of its absence, legitimates them.

The way in which the West has conceived the legal and political power 'has the structure of a *gerere vices*', a structure in which 'the term *vices* names the original vicariousness of sovereign power, or, if you like, its absolutely insubstantial and economical character'. (*ibid*., 139) Since hinged upon a 'twofold structure', '(Kingdom and Government, *auctoritas* and *potestas*, *ordinatio* and *executio*, but also the distinction of powers in modern democracies)', in which the two polarities depend on each other – always acting vicariously with respect to a higher authority – the governmental machine finds its foundation not on a stable substance, but on a dynamic (insubstantial) relation. 'Vicariousness', Agamben claims, 'entails an ontology-or better, the replacement of classical ontology with an 'economic' paradigm-in which no figure of being is, as such, in the position of the *archè*'. What represents the original element 'is the very Trinitarian relation, whereby each figure *gerit vices*, deputizes for the other'. The inner mechanism of the bipolar governmental machine, thus, is formed by the economic relation (transcendence/immanence; kingdom/government; Father/Son) and not by a unique substance of a stable being. This means , however, that 'there is no substance of power, but only an economy on1y a government' (*ibid*.).

'The modern State', Agamben claims, inherits the structure of the 'theological machine of the government of the world' (*ibid.*, 142). The distinction between legislative (or sovereign) and executive (governmental) power, one of the hallmarks of the modern state, is the reflection of the bi-polar governmental machine of God's power, which as I argued priviously entered the political and legal mindset in early modernity. For these reasons the modern state, Agamben claims, 'wears' both

> the regal clothes of providence, which legislates in a transcendent and universal way, but lets the creatures it looks after be free, and the sinister and ministerial clothes of fate, which carries out in detail the providential dictates and confines the reluctant individuals within the implacable connection between the immanent causes and between the effects that their very nature has contributed to determining (*ibid.*).

Therefore, 'the providential-economical paradigm is, in this sense, the paradigm of democratic power, just as the theological-political is the paradigm of absolutism' (*ibid.*). Form this point of view, contemporary states, based on the principle of the rule of law represent the highest evolution of the governmental machine, since the two polarities overlap. The rule of law, in fact, presupposes that 'the law regulates the administration and the administrative apparatus applies and implements the law' (*ibid.*).

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According to Agamben's genealogy of *oikonomia* and of divine government, the models of God's absolute power that have been elaborated by theology through centuries-long speculations had a decisive influence on the way sovereignty and government have been thought. The secularisation of theological thought, in this light, working properly as a signature, bequeathed to the legal and political thought the very ontological structure upon which to construe a theory of sovereignty and government. Temporal power, thus, mimicking the divine distinction between God's absolute power and ordained power, God's being and God's economic praxis, transcendence and immanence, God's infinite potentiality and God's willed creation, has constituted and organised its manifestation in the form of a bi-

polar machine that constantly divide and articulate the plane of the transcendence legitimisation and the immanent praxis and administration. In this schema, the immanent government of humans and things is – logically and practically – the manifestation of an external, transcendent cause, whose original position functions as a legitimating instance.

In the bipolar governmental machine, influenced by the signature of being of the ontological dispositive of potentiality, the very idea, the implementation and the practice of power are trapped in the dialectical articulation between the two poles of an absolute sovereign power, which works as a legitimate foundational authority, and an immanent government, as a form of conservation of power. Sovereignty and government are, thus, separated on the plane of their essence (in the sense that government is not sovereignty – and vice-versa), but are functionally linked, on the plane of their existence (where the government is the actualisation of a transcendent, external cause). In this light, Agamben operates a mending of what Foucault has radically separated. As in fact I have argued previously, something like a proper art of government, in Foucault's perspective, emerges in the form of care of the population in the moment of the waning of sovereign power, and the emergence of biopower. Agamben, instead, recognises an essential separation between sovereign and governmental power, but this separation does not tantamount to opposition or repulsion; it is rather – according to the very relation of exception – an implication.

Being structured upon the ontological dispositive, the governmental machine of power is affected by the same paradoxes. The practice of an immanent government, in fact, is made possible only by the externalisation of a transcendent cause; while, in the same time sovereign power, is made possible only through its actual manifestation in the praxis of government. As Thiers's famous statement 'the sovereign reigns but does not govern'; it is this peculiar inactivity of sovereign's reign – as a primary cause of the order – that makes possible the immanent implementation of power (and vice-versa). In this regard, Agamben has claimed that the bipolar machine is better represented by the idea of the relationship between God's creation and God's conservation: the moment of the conservation is other than the

moment of creation; however, without something created the very act of conservation would be inconceivable.

This ontological aporia has survived the evolution of Western thought and re-emerged at the core of the democratic conception of popular sovereignty. When the people replaced the divine as the primary legitimising cause of temporal power, it has brought with itself the very aporetic structuring of its power. The people, thus, became the sovereign entity the absence of which allows its concrete ruling. And democracy – as long as it is considered as the government of the people – is that form of organisation of power that to be such is founded on the perpetual absence of a sovereign. The next chapter will be devoted to this question.

Chapter Four

ADEMIA: ON GOVERNMENT AND THE (BIO)POLITICAL BODY

In this chapter, I will examine the notion of *Ademia*; a term Agamben has elaborated to describe the perpetual "absence" of the "people" from constituted orders. As he has pointed out in his text *Stasis*, the "people" is an entity that exists as such only in the moment of the decision toward the establishment of the order – in the event of the creation of the political community. Outside of the decisional moment, once a constituted order has been laid down, the people recedes leaving the stage of the political to the "passive", manageable population (or multitude). The people remain only as "represented", in the figure of a transcendent and absolute sovereign decisional power. The aim of the sovereign power is, thus, the creation of the docile and secured impolitical body of the population, whose care is delegated to the practices of government. Following the argumentative line of the previous chapter, through a reading Agamben's concept of *ademia*, I will claim that the idea of population and the governmental care of it, originates not in opposition, as Foucault suggests, but inside the classic theorisation of popular sovereignty. The emergence of the biopolitics of population, though, is not a rapture, a break, as in Foucault, but represents the natural development of the theory of popular sovereignty.

People's difficult presence

In the volume *Stasis. Civil War as a Political Paradigm* Agamben advances the thesis that *ademia* (a-*demos*) that is the absence of people is one the constitutive elements of the modern state. When confronted with the fact

that since its outbreak, the modern political thought has considered the *people* as the principal constituent element and the ultimate source of the legitimacy of legal and political orders, this thesis turns out to be rather problematic. The idea of people is one of the central concepts to think a constitutional order, as an expression of a political will. As notoriously stated by Georg Jellinek, the state is a composition of three elements: a determined people, a defined territory and the monopoly of state's power (and the legitimate exercise of violence).[202] The essential bond that ties the state with people is even more central in democratic constitutionalism, in which the people as a unitary subject represents the ultimate source of power. The *Demos* of democracy is the author of its own organisation.

Notwithstanding its counterintuitive essence, Agamben's thesis highlights a problem that is seldom taken into consideration in the political discourse and in the common understanding of popular sovereignty (especially in its more "populist" version), namely the fact that in its main sense and its concrete existence, the people lack a univocal identity. 'Every interpretation of the political meaning of the term people', Agamben claims, 'must begin with the singular fact that in modern European languages, "people" also always indicates the poor, the disinherited, and the excluded' (HS, 176). The idea of the people in the Western juridical and political tradition entails a radical split that by 'dividing it into people and multitude, *dēmos* and *plēthos*, population and people, *popolo grasso* and *popolo minuto*, prevents it from being entirely present as a whole' (S, 50). The very concept of people refers to 'both the constitutive political subject and the class that is, *de facto* if not *de jure*, excluded from politics' (*ibid*.), constituting, in this way, the signifier for both the political subject *par excellence* (the people as author of the constitution) and the unpolitical mass of individuals that are excluded and not politically organised. People, thus, is an "eccentric" idea: it is a concept entailing different and opposed semantic levels that do not have a common centre.

This semantic eccentricity is further complicated by the fact that the people are considered as the bearer of the constituent power. From the perspective of legal and political thought, constituent power represents the

[202] Jellinek (1914), pp. 180-181.

ultimate source of constitutional norms and institutional arrangements. As Antonio Negri claimed, constituent power is configured as 'an all-powerfull and expansive power', that 'rising from nowhere organizes law', and to do so must be 'reduced' to a normative apparatus for 'the production of law'.[203] Therefore, constituent power, to work as the source of the legal order, has to be 'perverted' in its nature and restrained into a constituted, formed power. From the point of view of jurisprudence, though, constituent power, exists as long as it is negated, and the people: after the act of constituting itself in a politically organized community, has to be logically (and practically) posed outside the realm of constituted order. In this sense, the appearance of a constituted power corresponds to the oblivion of its origin – of its author. For these reasons, Agamben suggests that the people 'to the extent that it is the bearer of this power it must find itself outside all juridical-constitutional normativity' (S, 50). Consequently, modern states, while electing the people as the source of its own organisation, lives in a constant condition of *ademia*.

Carl Schmitt has expressed the difficulty of thinking the people in relation to its own constituent power, with the distinction between 'the people *anterior to* and *above* the constitution' and the 'people *within* the constitution exercising constitutionally regulated powers'.[204] By definition, the people as the holder of the constitution-making power stands 'outside and above'[205] the legal order and the organization of the state. And even if a constitution assigns to the people certain regulated competences, the people's 'potential for political action' is not 'exhausted or settled'.[206] In a proper democracy, Schmitt claims, the people have to be present as a decisional-unrestrained agent, as 'an entity that is unorganized and unformed'.[207] However, liberal-bourgeoisie democracies have embedded, over-regulated and limited the decisional role of the people, whose possibility of expression can be exercised within the boundaries of specific regulation; and this is equivalent to making the people vanishes. In the very

[203] Negri (1999), pp. 2-3.
[204] Schmitt (2008), p. 268.
[205] *ibid*. p. 271.
[206] *ibid*.
[207] *ibid*.

act of giving itself a constitution, though, the people have to give away its being, potentially, a decisional agent, letting space to the emergence of a depoliticised body as the main subject-object of state's power. The 'realization' of the people as the author of its own constitution, as Agamben puts it, 'coincides with its own abolition'; the people 'must negate itself […] in order to be' (MWE, 31).

The *aporia* implicit in the idea of popular sovereignty raises the central questions of the place and role of the people as a founding agent, in relation to its own creation. If the "people" are systematically excluded from the constituted organisation of the state, which is the subject (and the object) of modern state power? Through a reading of Hobbes, Agamben provides an answer to this question: the city, the state, is the place of the multitude, of the unpolitical body, which much like a population, is composed by the disorganised mass of individuals under the governmental care of political power. For Agamben, thus, Hobbes offers the theoretical model of the relationship between the people, as a founding agent, and the Modern state. Moreover, he suggests that the Hobbesian theory of the people/multitude distinction shows the awareness of the substantial emergence of the population as the political subject of modern power, which Foucault posed as one of the primary symptoms of the entrance of modern power into the era of biopolitics. The passage from the ancient sovereign-centered power to the regulatory system of modern governmentality, Foucault sustained, has been marked by the establishment of the population as the primary subject/object of state's government. Much like Foucault's conception of the population, the multitude in Hobbes does not have a proper political significance. Rather, it represents the sum of passive, docile bodies of the people.

This chapter, following Agamben's idea of *ademia*, will be challenging Foucault's position. As I will argue, in fact, the idea of the population appeared inside the borders of the discourse over the sovereignty of the people. The population, in this perspective, consists in a form of de-politicisation – or passivation – of the *people* as a founding-sovereign agent. The population is what remains of the people once it has deposed its political potential – once it has spoken. This chapter, in light of

Agamben's idea of the bi-polar machine, will also argue that the scope of government is to keep the people apart from its potential creational essence that is to say to depoliticises the people. Moreover, I will suggest that for Agamben the absence of the people and the emergence of the population as a biopolitical body of the state, are the product of the bi-polar governmental machine.

In the next section, I will introduce Foucault conceptualisation of the emergence of the population – as a subject/object of governmental power – in relation to the concept of "people". Then I will move in analysing Agamben's idea of people (and of *ademia*), and his reading of Hobbes theory of sovereignty. It will follow a section of Rousseau's theory of popular sovereignty. In this part, I will try to show how also in Rousseau – who notoriously sustained the inalienable presence of the people and the general will as a determinant element of the political order – the people remain absent in the organisation of state's power and the population emerges as a key factor for the maintenance of the state. In the last section, instead, I will pose the idea of popular sovereignty in relation to the bi-polar governmental machine, showing how the impossible presence of the people is due to the very ontological structure of the relationship between sovereignty and government.

People and Population

In Foucault's genealogy of governmentality, the answer that modern political thought (and praxis) offered to the question of the preservation of its power and wealth resulted in the elaboration and the implementation of an "art" of government. This led to the establishment of the 'population'[208] as a new category of political thought and as the new subject upon which exercise governmental power. 'One of the great innovations in the techniques of power of the eighteenth century', Foucault claims, in the first volume of his *History of Sexuality*,

[208] On Foucault's concept of population see: Curtis (2002); Legg (2005); Pandolfi (2006).

was the emergence of 'population' as an economic and political problem: population as wealth, population as manpower or labor capacity, population balanced between its own growth and the resources it commanded. Governments perceived that they were not dealing simply with subjects, or even with a 'people,' but with a 'population,' with its specific phenomena and its peculiar variables: birth and death rates, life expectancy, fertility, state of health, frequency of illnesses, patterns of diet and habitation.[209]

The population is an entity at the crossroad between 'life and institutions': it represents an object of government and management and a political subject, 'since it is called upon to conduct itself in such and such a fashion'.[210] Moreover, being the object of government, the management of the population (its wealth) represents the fundamental activity for the maintenance and the strengthening of the state.

An explicit elaboration of the concept of population is offered by Foucault in his course at the Collège de France *Security, Territory, Population* of 1977-1978, in which the appearance of this subject-object of Modern bio-power, is traced in more details. Foucault begins by observing that in the eighteenth century, with the development of political economy and the modern theory of government, 'the population covers the old notion of people'.[211] The people, instead, become to be regarded as

those who conduct themselves in relation to the management of the population, at the level of the population, as if they were not part of the population as a collective subject-object, as if they put themselves outside of it, and consequently the people are those who, refusing to be the population, disrupt the system. […] the people are generally speaking, those who resist the regulation of the population, who try to elude the apparatus by which the population exists, is preserved, subsists at an optimal level.[212]

Despite the 'symmetry' with the people, the object 'population' diverges from the 'collective subject created by the social contract'[213], called "people". The population as 'subject' – that orients itself and is oriented through the action of government – is not an entity capable of any form of activity: 'if

[209] Foucault (1998), p. 25.
[210] Foucault (2009), pp. 42-43.
[211] *ibid*.
[212] *ibid*. pp. 43-44.
[213] *ibid*.

one says to a population do this', Foucault claims, 'there is not only no guarantee that it will do it, but also there is quite simply no guarantee that it can do it'.[214] The population is essentially different from the people while being composed of the same "substance": the single lives of the members of a given community. The people, in Foucault's account, pretend instead to be an active force exercising a certain power over itself, declaring for itself the faculty of self-determination, opposing to the constituted order, the will to escape the tangles of state's governmental practices. The population, on the contrary, is a passive object, produced through the implementation of specific governmental techniques.

A first aspect, distinguishing people and population, thus, could be resumed in the opposition political activity/passivity, where the 'people' represents an assemblage of individuals that actively oppose a resistance to governmental techniques, which is, eventually, capable of disrupting the system (assuming, in this way, the faculty of self-determination). The population instead is an assemblage trapped in the system of government and disciplinary regulation; is a passive object/subject whose existence depends on a specific way of observing the multitude of individuals composing the state. 'The population is not a primary datum', but is an entity 'dependent on a series of variables'[215], which is independent from the sovereign will, but at the same time can be subject to manipulation and management. The object 'population', thus, is not something given, rather is the product of a calculating analytic strategy. The population, Foucault claims, appears as a 'kind of thick natural phenomenon'[216], composed of a 'set of elements in which we can note constants and regularities'[217], which goes to produce a sort of harmonic framework in which it is possible to identify tendencies that could be made target of intervention for the benefit of all.

What is important to note is that the population as the subject-object of politics appeared gradually along with the development of specific forms of knowledge and specific ways of observing human phenomena. It became

[214] *ibid*. p. 71.
[215] *ibid*. p. 70.
[216] *ibid*. p. 71.
[217] *ibid*. p. 74.

a political problem in Modernity when the necessity of the administration of large-scale States brought about the need for their maintenance and their government. The notion of population and government, though, are tightly bound. Indeed, the population appears as the 'final end of government':

> to improve the condition of the population, to increase its wealth, its longevity, and its health. And the instruments that government will use to obtain these ends are, in a way, immanent to the field of population; it will be by acting directly on the population itself through campaigns, or, indirectly, by, for example, techniques that, without people being aware of it, stimulate the birth rate, or direct the flows of population to this or that region or activity. Population, then, appears as the end and instrument of government rather than as the sovereign's strength: it is the subject of needs and aspirations, but also the object of government manipulation.[218]

To govern, thus, means to give shape to a population, to provide it with the necessary elements to its prosperity, through the implementation of techniques and strategies aimed at its flourishing. From this perspective, the same act of governing the mass of the individual members of the state gives existence to the passive subject of the population, demarcating the limits of the body-unpolitical as the main subject of the care of the state.

It is with the invention of the *police* that, for Foucault, the population properly speaking appears. While the first germs of the art of government as the power 'to structure the possible field of actions of others' – has to be found in pastoral power, it is only with the theory of the *raison d'état* and the subsequent idea of "police" that the population became properly the subject/object of state's government. It is only with the establishment of the political apparatus of the 'police' that the 'population' became the subject and the object of the governmental care of political power. The concept and the practice of the police, in Foucault account, is part of the broad horizon of the raison d'état; the police is, in fact, the 'apparatus' that make the 'raison d'état function'.[219] It is, thus, in the wake of the reflection on the conservation of the state that the police and its subject of intervention 'the population' emerge.

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[218] *ibid*. p. 105.
[219] *ibid*. p. 278.

In its early manifestation, the police concerned 'everything that gives ornament, form, and splendour to the city'[220], the ordering of everything you can see in the city. As Foucault claims, the police is 'the entire art of government'.[221] The police – and the 'science of police' – was directed to the wealth and well-being of the population is the broad sense: from the education of children and young people to financial subsidies to poor and to market regulation. In general, the police was concerned with the balancing – at the level of the whole population – of all the vital aspects in order to avoid discontent and risks of the disintegration of the social and political assets.

This is not the place for a complete survey of the Foucault understanding of the police; what is crucial for the purpose of this chapter, is that with the appearance of the police, the art of government – as the practice of preservation of the state's power – takes up as its target the population. The whole set of governmental practices, in this renewed scenario, becomes directed not to the wealth of the state (or the Prince) but are implemented for the sake of the same population. The art of government is directed to making the single members of the community part of the population. This is the point in which, Foucault's conception of the difference between sovereign power and governmentality is more explicit. The art of government is directed to the wealth (and health) of the population and not of the sovereign or the prince. The population becomes in this way the main subject of state's power and of governmental practices.

In his genealogical reconstruction of governmentality, Foucault recognises an essential distinction between the people and population. The people remain an active agent capable of determining its own existence, opposing to the governmental practice the will to shape its own existence. The people, as he writes, tend to pose itself outside the practices of government. The population, instead, is a passive entity, the ultimate political subject of the modern state. It represents the unity of the members of the state, considered from the point of view of their biological needs. The population is the docile body (bio)political that grows and prospers under

[220] *ibid*. p. 319.
[221] *ibid*.

the shelter of governmental practices. The population shares with the people the same biological and social substance. The difference between them lies rather in the capacity of acting politically: in the faculty of expressing a will to self-determination and in the attitude to resists power. The difference between people and population could be formulated as the "difference" between an active political actor and a passive biological-unpolitical object.

Divided People

As Agamben has noted on different occasions, the semantics of the term "people" is composed of a dual layer. It can be used to describe the agent giving legitimacy to legal and political orders, and at the same time, it is employed to specify the social groups that are excluded from political (and also economic) participation. The idea of a radical scission (division) as constitutive of the *people* is recurrent in Agamben works at least since the inception of the *Homo Sacer* series.[222] Relying on a work by Reinhart Koselleck[223], Agamben highlights how the meaning of the term people – in ordinary language – is marked by 'an internal split, which, by always already dividing it into people and multitude, *dēmos* and *plēthos*, population and people, *popolo grasso* and *popolo minuto*', impedes it 'from being entirely present as a whole' (S, 50).

Agamben returns upon the thematic of a divided people in the book *The Time That Remains* in which it is sketched the 'philological and theological path that the term people has taken'[224] through a reading of the conception of people in reference to the biblical existence of Israel. 'The principle of the law' in the Jewish biblical tradition, Agamben claims, 'is division' (TTR, 47). The grounding of Jewish law brings about a radical division between Jews and non-Jews, between *Ioudaioi* and *ethnē*; for this

[222] The final section of the volume *Homo Sacer*, contains a section dedicated to the idea of a "divided people" (HS, 176 – 180).
[223] The polysemy of the term people has been highlighted by Koselleck in the text Volk, Nation, Nationalismus, Masse.' In Brunner, Conze and Koselleck, (1992), pp. 141–431.
[224] de la Durantaye (2009), p. 300.

reason, in 'the Bible, the concept of 'people' is in fact always already divided between *am* and *goy* (plural goyim)'. Inside this division, '*Am* is Israel, the elected people, with whom Yahweh formed a *berit*, a pact; the *goyim* are the other peoples. The Septuagint translates *am* with *laos* and *goyim* with *ethnē*' (*ibid.*). This division for Agamben is something like an 'an originary theological-political fault' (*ibid.*) that traverses the history of the term people. In this light, in fact, original is not the identity of the people with itself, but the fracture that divides the people from its counterpart.

The image of a divided people, in Agamben, plays the role of the paradigmatic figure of the radical impossibility for the people to think itself as a perfect whole. The idea of the people – and its real manifestation as the body of members of the state – resists the reduction to the logic of the principle of identity; finding its existential dimension on the one hand in the tension between the unity of its political representation, and the disunited singularity of its members, on the other with the opposition to the "other" people.

The essential fracture in which the concept of people is articulated, for Agamben, has a decisive political meaning that corresponds to a particular ambiguity in the political use that it is made of this concept. As Agamben writes,

> It is as if, in other words, what we call people was actually not a unitary subject but rather a dialectical oscillation between two opposite poles: on the one hand, the *People* as a whole and as an integral body politic and, on the other hand, the *people* as a subset and as fragmentary multiplicity of needy and excluded bodies; on the one hand, an inclusive concept that pretends to be without remainder while, on the other hand, an exclusive concept known to afford no hope; at one pole, the total state of the sovereign and integrated citizens and, at the other pole, the banishment—either court of miracles or camp — of the wretched, the oppressed, and the vanquished. There exists no single and compact referent for the term *people* anywhere: like many fundamental political concepts […], *people* is a polar concept that indicates a double movement and a complex relation between two extremes. This also means, however, that the constitution of the human species into a body politic comes into being through a fundamental split and that in the concept *of people* we can easily recognize the conceptual pair identified earlier as the defining category of the original political structure: naked life *(people)* and political existence *(People),* exclusion and inclusion, *zoe* and *bios. The concept of people always already contains within itself the fundamental biopolitical fracture* (MWE, 31-32).

In the idea of the people is reflected the original biopolitical fracture that separate *bìos* and *zoe*; the politically qualified subjects of the *polis* and all those "people" that are *de facto* and/or *de jure* excluded from having a full and proper place in the political membership. This capital separation, for Agamben, is what renders possible the constitution of something like a political community, and the idea of people brings with itself the mark of this separation.

The people, thus, oscillates between the two existential forms of the "politically qualified life" and the "impolitical-excluded biological life". To create a "people", recomposing the original biopolitical fracture, for Agamben, is the task of sovereign power, which (eventually with the physical elimination of who resists the assimilation to the body-political) has in this way the crucial faculty of giving the people a determinate form. However, such a task turns out to be ultimately delusional. The bio-political fracture, in fact, constitutes the necessary ontological ground on which it becomes possible to think a political community; and it is through the same inclusive exclusion of a determinate "people" that something like a sovereign power becomes thinkable. Sovereignty, thus, can never provide a definitive mending of the fracture, since it is itself a product of such a fracture.

Thus, if the people are never present to itself as a whole with no remainders, who is dwelling the city? Who is the subject of state power, and the object composing the existential dimension of the community? Agamben answers these questions through a reading of the frontispiece of Hobbes's *Leviathan*. His exegesis begins with an interpretation of the symbolism of the traditional representation of the '*Leviathan-colossus*', noting that the 'artificial Man called Common-wealth or State does not dwell within the city, but outside it' (S, 34-37). The Leviathan is placed beyond the limits of the city and over the territory of his domain. This implies, thus, that the body political 'does not coincide with the physical body of the city' (*ibid.*). Another significant aspect of the Leviathan's emblem is the fact that the streets of the city represented in the frontispiece 'are perfectly empty, the city is uninhabited: no one lives there' (*ibid*., 37),

the city seems to be not populated, except for some guardians. A possible explanation, Agamben claims, is that 'the population of the city has been fully transferred to the body of the Leviathan'; therefore, 'not only the sovereign' but also the "people" has no place in the city (*ibid.*). The representation of the Leviathan, thus, brings about an enigmatic question: who is dwelling the city? Which are the subjects composing the states?

As Agamben suggests, in the *De Cive*, Hobbes provides a possible answer to this problem, when he advanced the fundamental distinction between 'people' and 'multitude'. The people, Hobbes claims

> is something single [*unum quid*], which has one will and to whom one action can be attributed. None of these can be said of the multitude. The people reigns in every city [*Populus in omni civitate regnat*]; even in a monarchy the people commands, for the people wills by the will of one man. The citizens, that is, the subjects, are the multitude. In a democracy and an aristocracy, the citizens are the multitude; but the council is the people [*curia est populus*]. And in a monarchy, the subjects are the multitude, and (although this is a paradox [*quamquam paradoxum sit*]), the king is the people [*rex est populus*]. Common men, and others who do not notice these things, always speak of a great number of men, that is, of the city [*civitate*], as the people; they say that the city rebels against the king (which is impossible), and that the people will and nill what troublesome and murmuring subjects will and nill; under the pretext of the people, they rouse the citizens against the city, that is, the multitude against the people.[225]

While composed of the same substance – the individual existence of the subjects of the "commonwealth" – the people (as *rex* that is to say, as unite and unique union) is different from the number of single citizens that go to form the 'multitude'. In this regard, as Agamben writes, the people can be thought as sovereign only 'on the condition of dividing itself, of splitting itself into a multitude and a people' (*ibid.*, 43).

In chapter 7 of *De Cive*, Hobbes explains that in the act of choosing a sovereign, in the very moment of uniting themselves into the same body-politics, the people dissolves itself 'into a confused multitude' (*ibid.*). Under the command of the Sovereign, after having instituted a state, the people 'is no longer one person, but a dissolved multitude [*populus non amplius est persona una, sed dissoluta multitudo*], since it was a person only by virtue of

[225] Hobbes *De Cive*, in S, 42

the sovereign power [*summi imperii*], which it has now transferred to him' (*ibid.*, 45). The people are a "people" only in the singular moment – the "event", I would say – of deciding to appoint 'one Man, or an Assembly of men, to beare their Person', but this very moment is also the point of oblivion of the people. In this regard, 'the body political is thus an impossible concept, which lives only in the tension between the multitude and the *populus-rex*: it is always already in the act of dissolving itself in the constitution of the sovereign' (*ibid.*).

As a result, Hobbes's schematisation of the difference between "people" and "multitude" in the process of constitution of the political body of the state, turn out to be a cycle that connect a 'disunited multitude' that pre-exists the covenant and the creation of the community, and the 'dissolved multitude' that follows it. The constitution of the *populus- rex* appears in the exact moment of the decision for the entrance in the covenant that is the point of passage between the disunited and the dissolved multitude. The constitution of the people as a political actor, Agamben claims, is 'a process that issues from a multitude and returns to a multitude'; this cycle that connects 'the disunited multitude– people-king–dissolved multitude is broken in a point and the attempt to return to the initial state coincides with civil war', (*ibid.*, 46) which constitutes a moment of reformulation of the coordinates of a community.

In this cyclical constitution of the Common-wealth, in the very same moment of the covenant, Agamben writes, 'what disappears is instead the people, which is transposed into the figure of the sovereign and which thus rules in every city, yet without being able to live in it' (*ibid.*, 47). In distinguishing the people from the multitude, and in describing the state as inhabited by a dissolved multitude, Hobbes – for Agamben – is, in a way, conscious of the difference between the political agency of the people and the unpolitical essence of the population – difference that will be fundamental in the emergence of modern biopolitics, as Foucault suggested. The multitude, in fact, has no political function; the multitude 'is the unpolitical element upon whose exclusion the city is founded' (*ibid.*), and upon which it is possible to exercise something like a bio-political power.

The biopolitical significance of Hobbes's multitude, Agamben sustains, is further witnessed by the symbolism of the *Leviathan* frontispiece.[226] The presence of the 'plague doctors' wearing the 'beaked mask' remind 'the selection and the exclusion, and the connection between epidemic, health and sovereignty' (*ibid*., 48). The multitude, 'like the mass o plague victims' could be 'represented only through the guards who monitor its obedience and the doctors who treat it'. The multitude, therefore, 'dwells in the city, but only as the object of the duties and concerns of those who exercise the sovereignty' (*ibid*.); *Salus populi suprema lex* – the health of the multitude is the primary aim of the institution of sovereign power and the city.

The government of the multitude has, in Hobbes perspective a further, decisive, purpose. In a passage in which the English philosopher refers to the epidemic of the plague of Athens, as in Thucydides, the plague and the individuals affected by it, is considered as the cause of the emergence of anomy and the dissolution of the city. The government, the care, the health and the happiness of the multitude, is a necessary activity to maintain and to conserve the city and the political unity of the state. This implies, however, a blockage of the cycle of the constitution of the city, which is concretised in the necessity of keeping the "people" at bay. The people are what constitutes and legitimise the institution of the Commonwealth, but is what should be put aside by all means in order to preserve the standing of the same Commonwealth. The government is what should make impossible for the people (and the political) to re-emerge.

If we put it in relation to the distinction between *bios* and *zoe*, the absence of people and the emergence of the multitude/population could be considered as the signature of the bio-political condition. In fact, if *bios* and *zoē* stand for a politically qualified and unpolitical mere-biological-life (relegated to the sphere of the *oikos*), the emergence of the population – which is by definition passive and non-political – could be seen as a radical *zoēfication* of the *polis*, a biologisation of the existence of the community. The body-political, the union of the members of the political community, becomes a unity with a strictly biological essence. In this light, the

[226] See: Falk (2011).

population is what remains when the people-sovereign has instituted itself. The population, thus, is the un-political side of the people-sovereign; which in the very moment of giving itself a determinate form, is destined to fade away. The motto *salus populi suprema lex est*, in this light, assumes a renewed meaning. In the moment of entering in the body-political of the Leviathan, the proper "political" activity becomes the care of the members of the community, which – as *suprema lex* – is the ultimate aim of the institution of state power.

The endurance of a political community and the State is conditioned by the necessary removal of the principle of its origin: the "people", the conceptuality of which has been placed as the source of legitimacy of every constituted power. It seems, thus, as if once the creational force of the people has been absorbed and instituted in the community, it has to be kept at bay in order to ensure the existence of the community. In this schema, the activity of government oriented to the conservation of the state, that is to say, to keep the force of the political subjectivity of the people in the sphere of the potential.

The people 'above' the State and the law, as Schmitt claimed, is different from the people inside the boundaries of a constituted organism. The people disappears and remains as the entity giving legitimacy to the institutional actions, risking – in this way – to fall into the sphere of the mythological; as that fiction (whose reality does not have to be questioned) giving sense to the whole apparatus for the administration of power.

In this regard, Foucault's statement of the detachment between the population and sovereign power appears untenable. The population appears as the result of a process of the institution, in which the principle of sovereignty is held by the people. In line with the idea of a bi-polar governmental machine, the people in the act of creation of the community exhausts its political potential in the institution of its life. If in governmental regimes – as Foucault claims – the care of the population is for the sake of population and not of the prince (sovereign), this does not rule out any possible link between the population and sovereign, since the population turns out to be the un-political side of the people-sovereign.

Sovereign-Absent-People: Rousseau

As it has been pointed out above, the decisive category of legal and political modernity, the *people*, entails a series of contradictions that render the ground of the legitimacy of the state quite unstable. However, despite its inconsistency, this category continues to be a fundamental one. The institutional life of the state, according to modern and contemporary constitutional law emanates from the act of a popular will. Therefore, state's power is ultimately rooted in a categorical absence.

The 'people' as the political 'author' of its own institutional life, is not the people as the 'members' of the body-political of the state: this is nothing other than the peculiar paradox of representative democracy. Differently, from antiquity, modern-large-scale-democracies have been thought as organised upon popular's representation; this implies, however, that 'the people were to be absent from the people's government'.[227]

An author who has struggled to overcome this paradox was certainly Rousseau, whose idea of the impossibility of the representation of the general will is symptomatic of the puzzling essence of the concept of popular sovereignty. However, his attempt to not to make the people – as the primary political agent in the constitution of the state – disappear, to some degree failed. In Rousseau's *Social Contract* the position and the function of the people incur[228] – even if in different forms – in the *aporia* entailed in the concept of people and replicated its inner logic.[229]

Rousseau's *Social Contract* moves on suggesting that 'before examining the act by which a people elect a king, it would be well to examine the act by which a people become a people; for this act, being necessarily anterior to the other, is the real foundation of the society'.[230] Before the institution of a kingdom, a Republic or a political body, there should be an "act" of the institution of the "people", which – notoriously – for Rousseau is the holder of Sovereignty and the main subject in the constitution of the state. This act of constitution of the people is a 'social

[227] Canovan (2005), p. 107.
[228] Cranston (1972); Putterman (2010).
[229] On this issue, see also: Simpson (2006).
[230] Rousseau (2002), p. 162.

pact' for the union of free individuals, who for the sake of 'self-preservation' decide to join their forces together. In the act of constituting the people, it is presupposed

> the total alienation to the whole community of each associate with all his rights; for, in the first place, since each gives himself up entirely, the situation is equal for all; and, the conditions being equal for all, no one has any interest in making them burdensome to others.[231]

This union – under the shield of a *general will* – does not consist in a giving away individual freedom and rights, but is a qualitative transformation of the individual freedom: 'each giving himself to all, gives himself to no one; and since there is no associate over whom we do not acquire the same rights which we concede to him over ourselves, we gain the equivalent of all that we lose, and more power to preserve what we have'.[232]

The nature of the pact – in Rousseau's terms – reflects the juridical form of the contract, in which the contracting parties (recipient) stipulate a binding agreement. The pact is summarised in this way: 'each of us puts in common his person and all his power under the supreme direction of the general will, and in return, each member becomes an indivisible part of the whole'.[233] The general will, under which the individuals unite themselves, should reconcile the 'individual and the collective aspect of the people'[234]; that is the necessity of the individual to perceive his/her interest and the need for preservation of the whole. The general will is the concept that Rousseau has elaborated to reconcile the two aspects. The general will 'is directed to the common good and is ideally just', and is 'willed by the people (both as individuals and as a body assembled)'.[235]

However, Rousseau was conscious that the unification of the singular interests into a universal will, would bring some difficulties. The figure of the lawgiver, thus, is 'conjured up', to 'form individual citizens

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[231] *ibid*. p. 163.
[232] *ibid*. p. 164.
[233] *ibid*.
[234] Canovan (2005), p. 115.
[235] *ibid*.

into a cohesive people that can be counted on to will it'.[236] 'In order to discover the rules of association that are most suitable to nations', Rousseau writes 'a superior intelligence would be necessary who could see all the passions of men without experiencing any of them; who would have no affinity with our nature and yet know it thoroughly'.[237] The legislator should be an 'extraordinary man' capable

> of changing human nature; of transforming every individual, who in himself is a complete and independent whole, into part of a greater whole, from which he receives in some manner his life and his being; of altering man's constitution in order to strengthen it; of substituting a social and moral existence for the independent and physical existence which we have all received from nature. In a word, it is necessary to deprive man of his native powers in order to endow him with some which are alien to him, and of which he cannot make use without the aid of other people.[238]

The entity 'people', thus, since being the source of state's legitimacy – forming the source of the state form – finds itself in the process of perpetual constitution (and re-constitution). The legislator, in Rousseau terms, as the agent whose voice is the law, also has the role of interpreter of the general will. Its task is to mediate between the general will and the single individuals, with the purpose of strengthening the unity of the community. The people, thus, create its proper institutions to be such; it is the legislator, in fact, the entity that should "alienate" the individual into the whole. Therefore, the original moment of the institutional structure (the general will) is brought into the structure itself. The people can exercise its deliberative power only as "the people"; however, to be the people, the individuals, need to be able to legislate over themselves, that is to say, needs to be (or to have) a legislator capable of cementing the singular into the universal of the general will.

Rousseau opposed any principle of representation in structuring his ideal political edifice.[239] The general will can never err, and cannot be represented. All its power emanates and has to be exercised only 'directly'.

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[236] *ibid*.
[237] Rousseau (2002), p. 180.
[238] *ibid*. p. 181.
[239] Fralin (1978); Manin (1997); Wintgens (2001).

For these reasons also the legislator that is – to a certain extent – the most proper expression of the general will, has no rights to legislate, but should erect the edifice of the law in accordance with the characteristic of the general will; according to the peculiarity of the union he has to institute.

The efficacy of the dictates of law, in Rousseau's theory, is a task assigned to government. The conservation of the *res publica* and state's institution is delegated to an agent acting as executive power, which cannot be direct expression or possession of the general will of the 'people':

> the legislative power belongs to the people and can belong only to them. On the other hand, it is easy to see from the principles already established, that the executive power cannot belong to the people generally as legislative or sovereign, because that power is used only in particular acts, which are not within the province of the law, nor consequently within that of the sovereign, all the acts of which must be laws.[240]

The governing agents that Rousseau calls magistrates or kings, and the body as whole bears the name Prince[241], are not representative of the general will; their role depends on 'nothing but a commission'.[242] The government is a sort of employee, a 'simple officers of the sovereign', that exercises 'in its name the power of which it has made them depositaries, and which it can limit, modify, and take back when it pleases'.[243] The government, thus, act through an absolute delegation of power; it acts, so to speak, "vicariously"; and the content of its action is what has been decided by the general will.

At this point, it is necessary to challenge a crucial problem: if the union of the people is not the government, and it is not the legislator – which despite being an expression of the general will does not coincide with it – which is the people's role in the organisation of state's power? What is the people place in Rousseau's idea of the state? The people is the Sovereign, whose will lays down the ground for the organisation of the Nation. However, without an external agent (the legislator) the people cannot gain the necessary unity to express a general will. Therefore, as in the previous

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[240] Rousseau (2002), p. 193.
[241] *ibid*. p. 194.
[242] *ibid*.
[243] *ibid*.

section, also in Rousseau's case, we should conclude that in the concrete and real life of the Nation the people has no place, and disappears in the symbolic sphere of a transcendent legitimisation. This is suggested by the same Rousseau when he writes that

> Every free act has two causes which together produce it; one is moral, that is, the will that determines the act; the other is physical, that is, the power that executes it. When I walk toward an object, first I must want to go toward it; in the second place, my feet must take me to it. Should a paralytic wish to run, or an agile man not wish to do so, both will remain where they are. The body politic has the same driving forces; in it, we discern force and will, the latter under the name of legislative power, the former under the name of executive power. Nothing is, or ought to be, done in it without them.[244]

The people's role (as legislative will) is reduced to the 'moral' source of the 'physical' act of administering the Nation. The two are inseparable, and the second actualise the first, while the first is the original point of motion of the machine. Rousseau, in this way, reformulates the structure of the governmental machine, in which a legitimising rationality represents the source of the legitimacy of a concrete administration of the mundane human existence; and in which the administrative apparatuses realise what has been thought at a transcendental level.

In Rousseau's theory, the maintenance and the subsistence of state's institutions – the function of the political association – is due to the security and prosperity of the members of the community as a "population". He summarises this point as follows:

> What is the object of political association? It is the security and prosperity of its members. And what is the surest sign that they are safe and prosperous? It is their number and population. Do not, then, go and seek elsewhere for this contentious sign. All other things being equal, the government under which, without external aids, without naturalizations, and without colonies, the citizens increase and multiply most, is infallibly the best. That under which a people decreases and decays is the worst. Statisticians, it is now your affair; count, measure, compare.[245]

Moreover, he adds,

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[244] *ibid*. p. 193.
[245] *ibid*. p. 213.

Populate the territory uniformly, extend the same rights everywhere, spread everywhere abundance and life; this is how the State will become simultaneously the strongest and the best governed that may be possible.[246]

A good government, a good care of the population, is the necessary requisite for the endurance of the state – the proper sign of a wealthy and prosper state. This implies, though, that it is the care of the population (at the level of the basic biological needs), by a delegated government the crucial factor in the conservation of state's power. The growing number of the population intended as the sum of the single individuals is the decisive evidence of a good government and a good political administration.

In Rousseau's diagram of state's power, though, there is no room for the people. The political agency of the founding sovereign-people is relegated to the sphere of a transcendental origin. It is the wealth of the population (the whole amount of singular lives), which counts as a crucial element to strengthen the state. Again, the scope and the purpose of the association and the creation of the institutions of the state is the security of the population, which is the subject and the object of the action of the government. It is the "quantity" of the population – its prosperity and fecundity –, which determines the strength of the state; and the people in the concrete life of the state represents a *sovereign absence*.

Vox Populi, vox Dei

The difficult presence of the "people" in relation to its own creation reflects in a way the ontological paradoxes upon which Agamben has built the image of a bi-polar governmental machine. The ontological dispositive of potentiality has survived the signature of secularisation and re-emerged at the core of the democratic conception of popular sovereignty. The voice of the people supplanted the will of a sovereign God as the ultimate source of legitimacy of temporal power. As Zartaloudis writes:

[246] *ibid*.

In late modernity when God 'dies', the world must continue to be commanded and ruled and the relation between the two powers must survive its crisis. The indifference of absolute power towards its creation must confront the indifference of the created towards its master. In order for the imperative power that supposedly commands this world to survive the consequences of its creation or commands-in-action, it must continuously be confronted with its duality, its scission: between law and fact, cause and action, state of exception and norm. Nihilistic immanence is turned into itself, into a zero degree of self-reference, yet appearing as still commanded by a transcendent phantasmagoria.[247]

When the people replaced God as the primary legitimising cause of temporal power, it has brought with itself the very aporetic structuring of divine power. The people, thus, became the entity the absence of which allows its concrete ruling; and democracy – as the power-government of the people – is that form of power that to be as such as to negate its origin. In the biopolitical machine, thus, the people is placed on the pole of the potential all-powerful entity that must be presupposed as sovereign creator. The government of the population, instead, represents the actual concrete side of the bi-polar machine – whose presence is the necessary actualisation of a transcendent cause.

Probably there is no better example to understand this relation than the theological link between God's 'creation' and 'conservation.' The following passage from Aquinas' *De Regno* – to which Agamben refers – represents a summary of such a relationship:

Looking at the world as a whole, there are two works of God to be considered: the first is creation; the second, God's government of the things created. […] Of these works, the second more properly pertains to the office of kingship. Therefore government belongs to all kings (the very name *rex* is derived from the fact that they direct the government), while the first work does not fall to all kings, for not all kings establish the kingdom or city in which they rule but bestow their regal care upon a kingdom or city already established. We must remember, however, that if there were no one to establish the city or kingdom,' there would be no question of governing the kingdom. The very notion of kingly office, then, comprises the establishment of a city and kingdom, and some kings have indeed established cities in which to rule; for example, Ninus founded Ninevah, and Romulus, Rome. It pertains also to the governing office to preserve the things governed, and to use

[247] Zartaloudis (2015), p. 170.

them for the purpose for which they were established. If, therefore, one does not know how a kingdom is established, one cannot fully understand the task of its government.[248]

The sovereign power of the people and the governmental praxis, stand in the same relationship as God's creation and conservation; the second necessary implies the first – since if one governs, the governed has to be thought as created. Moreover, Aquinas suggests, it is to be proper for a king the faculty to create and to found a city since the knowledge of the origin is a crucial element for good government. Rousseau's idea of the legislator, in this point, mirrors Aquinas idea of kingship, and the providential machine of God's government. The legislator – which consists of the people – is the crucial figure in the establishment of the community, in giving shape to the 'unrepresentable' will of the people, and it should be a superior figure, with the necessary knowledge to create and to put in form people's will. Moreover, in this perspective, sovereignty, having the prerogative, the knowledge and the power to "establish" a city, entails an absolute creational power, which allows the sovereign, at limits, to create a political community anew.

In this perspective, much like the idea of God's power, the place of the people in relation to its own creation follows the logic of the presupposition. As pointed out in the previous chapter, theologians divided themselves between who sees the *conservatio* [government] as a direct intervention of God in the world, and who sees – like in the Deist position – God as essentially inoperative, governing the world through the eternal laws of his divine plan (or through secondary causes). The two positions diverge in conceiving the relationship between creation and

[248] Sunt autem universaliter consideranda duo opera Dei in mundo. Unum quo mundum instituit, alterum quo mundum institutum gubernat. […] Horum autem secundum quidem magis proprie pertinet ad regis officium. Unde ad omnes reges pertinet gubernatio, et a gubernationis regimine regis nomen accipitur. Primum autem opus non omnibus regibus convenit. Non enim omnes regnum aut civitatem instituunt, in quo regnant, sed regno ac civitati iam institutis regiminis curam impendunt. Est tamen considerandum quod nisi praecessisset qui instituerat civitatem aut regnum, locum non haberet gubernatio regni. Sub regis enim officio comprehenditur etiam institutio civitatis et regni. Nonnulli enim civitates instituerunt, in quibus regnarent, ut Ninus Ninivem, et Romulus Romam. Similiter etiam ad gubernationis officium pertinet ut gubernata conservet, ac eis utatur ad quod sunt constituta. Non igitur gubernationis officium plene cognosci poterit si institutionis ratio ignoretur. [Aquinas, *De Regno*, lib. I, ch. 14], in Aquinas (1949).

preservation: the deist idea sees conservation (God's government) as radically different from creation; on the opposite side we find a conception of conservation as continuous act of creation; 'that the world owes its continued existence to the uninterrupted exercise of the divine power' [249], to the *continuata creatio* of God. The fact that the idea of God's creation and conservation could be considered as a prototype for the relationship between kingdom and government is witnessed by the fact that the art of government arises in the ambit of the literature of "Reason of State" with the same terminology. The modern idea of 'government', in fact, refers to those apparatuses apt to the *conservation* of the kingdom and the sovereign power. It is not by chance, though, that in facing the emergence government as an *art*, Foucault could define the act of government as 'the continuous act of creation of the republic'.[250] This (in)direct reference to the definition of God's conservation of world is a further confirmation of the genuineness of the paradigm of political (and economic) theology.

It should be by now clear in which sense the conception of popular sovereignty has been affected by the same ontological aporia that formed the ground of the understanding of sovereign power more generally. In the process of secularisation, when God dies, the articulation on two level – absolute and ordained power; transcendence and immanence [251]– that has characterised sovereign power, became also applied to the idea of the people, in the forms of constituent and constituted power. As Schmitt has put it:

> The idea of the relationship between *pouvoir constituant* [constituent/ constituting power] and *pouvoir constitué* [constituted power] finds its complete analogy, systematic and methodological, in the idea of a relation between *natura naturans* [nature nurturing/creating] and *natura naturata* [nature natured/created]. And even if this idea has been integrated into Spinoza's rationalistic system, this demonstrates even more that this system is not exclusively rationalistic. The theory of the *pouvoir constituant* is incomprehensible simply as a form of mechanistic rationalism. The people, the nation, the primordial force of any state – these always constitute new organs. From the infinite, incomprehensible abyss of the force [*Macht*] of the *pouvoir constituant*, new forms emerge

[249] Hodge (2014), p. 559.
[250] Foucault (2009), p. 259.

incessantly, which it can destroy at any time and in which its power is never limited for good. It can will arbitrarily.[252]

The people is the absolute and almighty source of power, which arbitrarily can decide which form is more apt to its organisation. However, people's absolute power becomes intelligible only in the moment of its putting into a form, only in the moment of the creation, which is also the moment of the oblivion of its absolute power. The people rests, thus, as a founding agent, which like God could exercise its absolute power only at the cost of remaining alien to its own creation.

At this point, having offered further clarification of the place of the sovereign-people, it is necessary to spend some words on another crucial question. What does it mean for the state, the king or the sovereign to conserve (preserve) its status? Put in other words: what does it mean to govern? What is the purpose of the art of government? According to what stated previously in this chapter, the main objective of the governmental machine is the construction of a "passive" body politics that is the unpolitical body of the population (or multitude), keeping the "people" as the author of the constitution entity at bay. Following Agamben's conception of *ademia* (a-demos, absence of 'people), Rousseau's understanding of the people as in the *Social Contract*, and Foucault genealogy of Government – it is possible to conclude that the primary purpose of the art of government is the composition of a bio-political body (as a "subject" of the bio-political regime and as an "object" of the care of sovereign power), which takes the shape of a de-politicised population.

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Foucault's statement that in modern biopolitical regime the government as the art of the care and conservation of the state for the sake of the prince or the sovereign is supplanted by the idea of government as care of the population for the sake of population turns out to be critical. The concept of population, in fact, appears at the moment in which emerged the idea of people's sovereignty; in the process of secularisation that led to the

[252] Schmitt (2014), p. 123.

displacement of the ultimate source of legitimacy of temporal power from the hands of God, to the will of the people. The population is what remains of the sovereign-people, once it has deposed its political faculty of self-determination, once it has come the moment of taking care, conserve – in other words, govern – the created community. When Foucault claims that one of the main traits of biopolitical regimes is the fact that the care of the population is a practice implemented for the sake of the population and not of a Prince or sovereign, he is essentially right. The problem is that he does not take into account the fact that the question of the population arose – as I have tried to explain in this chapter – in the process of secularisation of political power; in the moment of emergence of the idea of popular sovereignty. The population is the main object and subject of the governmental care of a "popular" sovereign. Keeping the point of view of the bi-polar governmental machine it can be argued that the population represent the actual (existential) dimension of the people, which in the moment of being appointed with a sovereign power is relegated to the sphere of the transcendental legitimisation; on the plane of the "mythical" creation of the community: the sovereign-people reigns but does not govern.

Part Two:

FORM(S) OF LIFE

We fill pre-existing forms and when we fill them we change them and are changed.[253]

Frank Bidart
- BORGES AND I

For when it happens that Gentiles, which have not the law, do by nature the things of the law, these, having no law, are a law unto themselves; in that they show that the requirements of the law are written on their hearts. [254]

Paul
- EPISTLE TO THE ROMANS, 2: 14-15

[253] Bidart (2003)
[254] *The Holy Bible*. Washington: The University Place.

Chapter Five

FORM OF LIFE

The second part of the thesis will be discussing Agamben's idea of "form of life". As already suggested in the introduction, Agamben uses such a concept to describe all those legal and social configurations constituting the stable forms through which humans experience their life. A form of life is the sum of all those rules, social roles and habits, which institute and constrain the subject to a particular way of being, determining ultimately the very existence of individuals. However, even if representing the "most properly human" (qualified) life, forms of life do not coincide entirely with the whole of the existence of the subject. The many different forms through which life is experienced are leaned on the hidden core of the organic animal existence, which like the Aristotelean subject represents the substance (the existence) of human life. A form of life, thus, is something accessory, something that never coincides with the entire living existence of the subject, and at the same time, it represents the crucial dimension through which human life is lived (and perceived). A form of life is one of the elements – with animal life (and bare life) – that goes to constitute subjectivities.

Setting the question

Agamben's critique of the legal and political tradition of the West entails the awareness of the radical precariousness of the *modus vivendi* of human beings under the so-called sovereign ban. With the definition of the concept of bare life, Agamben has offered a philosophical portrayal of the bond that

ties the subject to the possibility of the exercise of sovereign power in the foundational form of the right over life and death. When he claims that the many different 'forms of life abstractly recodified as social-juridical identities (the voter, the worker, the journalist, the student, but also the HIV-positive, the transvestite, the porn star, the elderly, the parent the woman) […] all rest on naked life' (MWE, 6-7), he is exposing the idea that the subject of rights – with its peculiar existence, identities and social-legal roles – exchanges its degree of formalized freedom and recognition, with the possibility of having what constitutes its very person revoked – or at the limit, annihilated.

Bare life, for Agamben, is essentially an existential dimension: the very possibility of being killed without committing a crime by a power that is in this regard, sovereign. The whole set of juridical and social roles and identities are grounded on the subject's exposition to such possibility. Agamben opposes to the dimension of life under the sovereign ban, according to which every form of life is tied to and separated from a bare life, the idea of a form-of-life: a form of existence from which it is not possible to separate something like a bare life. The form-of-life,[255] in this manner, would be the overcoming of every "form of life", as represented and institutionalised by social and juridical systems. Agamben dedicates to the explanation of the idea of form-of-life the third section of both volumes, *The Highest Poverty: Monastic Rules and Form-of-Life* and *The Use of Bodies*. The picture that emerges out of the conception of a form-of-life is a way of existence that has deposed the architecture of sovereign power. Having severed its ties to sovereign power, a form-of-life is, crucially, a life that cannot be reduced to bare life. Agamben defines the form-of-life as follow:

> It defines a life—human life—in which singular modes, acts, and processes of living are never simply facts but always and above all possibilities of life, always and above all potential. And potential, insofar as it is nothing other than the essence or nature of each

[255] The idea of form-of-life has been developed by Agamben more substantially in the last decade, through the volume *The Highest Poverty*, *The Use of Bodies* and more recently in the volume *Pulcinella ovvero Divertimento per li Regazzi*, Agamben (2016). The term form of life appeared in the first volume of the *Homo sacer* series. The seeds of the conception of an "ethics to come", are already present in *The Coming Community*, Agamben (1993). On the concept of form-of-life, see: Bailey, McLoughlin and Whyte (2010); Smith (2012); Prozorov (2014); Watkin (2014); Zartaloudis (2015); McLoughlin (2016).

being, can be suspended and contemplated but never absolutely divided from act. The habit of a potential is the habitual use of it and the form-of-life of this use. The form of human living is never prescribed by a specific biological vocation nor assigned by any necessity whatsoever, but even though it is customary, repeated, and socially obligatory, it always preserves its character as a real possibility, which is to say that it always puts its very living at stake. That is, there is not a subject to which a potential belongs, which he can decide at his will to put into act: form-of-life is a being of potential not only or not so much because it can do or not do, succeed or fail, lose itself or find itself, but above all because it is its potential and coincides with it (UoB, 207-208).

In this perspective, a form-of-life is the form human life takes in the moment it deposes the legal and social obligation that constitutes the different forms of life in which human beings find themselves living. Therefore, the idea of form-of-life implies the consideration of a renewed political *ethos*, in which the isolation of bare life is not anymore a concrete possibility. The form-of-life appears when the whole systems of politics and law have been dethroned and deprived of their violent means, through the *praxis* of a "destituent power".

This chapter will be an analysis of the idea of a 'form of life', as a legally and socially codified way of living. What I will be arguing in this chapter – and more generally in the second part of the thesis – is that Agamben thinks of law as essentially institutionalizing life in specific forms (e.g. the voter, the worker, the journalist, the student, but also the HIV-positive, the transvestite, the porno star, the elderly, the parent, the woman), which are a fictional elements (social products) "shaping" and orienting the life of subjects. Under the sovereign ban, the life of the members of the community is subsumed under artificial-abstract categories through which individuals recognise them-selves finding a position in the structure of the community. The substance of these forms of life, I will suggest, is biological (animal) life: the mere fact of living. And the key performance of sovereign power is to guarantee the attachment (or detachment) of such life from its form.

In Agamben's perspective thus, the law has a performative essence: it contributes to the regulation of life, through the creation of determined fictional categories. And, bare life is what results in the articulation, produced by sovereign power, between the mere-fact-of-living (animal life) and the different forms of life characterising the existence of human beings.

Bare life is the third element, a product of the-putting-in-form of animal life, of the entrance of humans into the sovereign ban.

Before proceeding with the chapter, a preliminary remark is due. In Agamben (unlikely its counterpart 'form-of-life'), the idea of "form of life" is not developed systematically, but remains sketched out in different moments of the *Homo sacer* series. The very first occurrence of the idea of life as the substance of law appears in the first volume of the series, when in discussing Schmitt's theory of sovereign power, Agamben claims that: 'The law has a regulative character and is a 'rule' […] because it must first of all create the sphere of its own reference in real life and make that reference regular' (HS, 26). However, the theme of the relationship between law and life becomes more explicit in the volumes *The Highest Poverty: Monastic Rules and Form-of-Life* and *Opus Dei. Archaeology of Duty*.

Something approximating a definition of a form of life is given by Agamben in the first of these two volumes when he writes that a 'form of life would thus be the collection of constitutive rules that define it' (THP, 71). This definition, which does not add much to what has been already suggested, acquires a fuller sense when accompanied with the few lines preceding it: 'paraphrasing the scholastic saying *forma dat esse rei* ('form gives being to the thing'), one could state here that *norma dat esse rei*[256] ('norm gives being to the thing')' (*ibid*.). In such a statement, Agamben expresses the 'creational' capacity of the law, whose performative character gives to norms and rules the faculty of putting in form the world: to 'institute' (as in the very meaning of the Latin *instituere*) persons and things. Moreover, the reference to the scholastic adage is a further clue that the direction this chapter is taking – that is to say biological life as a presupposition (substance; subject) of forms of life and ultimately of legal regulation – is correct. *Forma dat esse rei* is a scholastic translation of the Aristotelean theory of the relationship between form and substance, where the form – acting upon and in relation to a substance – gives being to things. It is implicit in the equivalence *forma=norma* (form = norm), the idea of a constitutional power entailed in the action of norms. As I will argue in the next pages, what constitutes the substance (the subject) of the f/norm is

[256] Agamben takes this definition from Conte (1995), p. 526.

"life"; and the law has in this sense a peculiar capacity of creating subjects, out of the very raw material of human organic (or vegetative) life.

As claimed in chapter two, the process of subjectivation operates through a scission on the plane of being, between essence and existence. While the latter is the concrete, mundane existence of the subject, the former represents what is predicated on that subject. What is thought on the plane of ontology – according to the very idea of ontology as *arché* – is reflected, also, on how human beings are conceiving themselves as real subjectivities. As I will argue in the chapter, the scission of being, correspond on the level of the subjectivities, to the separation between animality – humans being as actual real bodies, with their functions and needs – and forms of life. The animal part of the human being, in this schema, represent the sub-strata (the sub-jectum) common to all humans, while the form of life represents the composition of the whole set of attributes that go to constitute the way of being of the single subject. The form of life, thus, stand with the animal substrata of human life in a relation similar to the one stated by Aristotle between form and matter (substance). The simple fact of living, with its natural needs and necessities, much as the Aristotelian matter, is the element common to all living beings, while the form of life is the attribute that goes to define the essence of the individual subjectivity.

Agamben – with a move typical of his philosophical manner – locates the paradigmatic explanation of the relationship between law and life in an earlier theological-philosophical context. The particular image of a constitution (and institution) of life that he has in mind has been expounded in his archaeological reconstruction of Monastic rules. Hence, this chapter will interrogate Agamben's reflections on the notion of a form of life, starting from his analysis of monasticism in particular. The focus will then move to the idea of a constitutive rule – i.e. as the particular faculty (power) of norms to constitute and determine their reference to the 'real' world. Then, I engage with Wittgenstein's to an extent comparable idea of *lebensform* [form of life]. Wittgenstein, in fact, is for Agamben, a crucial interlocutor for his understanding of the idea of the form of life and the relationship between life and the normative apparatus. The concluding part

will provide a reading of the concept of a form of life, through Aristotle's conception of the relationship between matter and form.

Rules of monastic life

'Monasticism', Agamben claims 'has clearly been […] the most extreme and rigorous attempt to achieve the Christian's *forma vitae* and define the figure of the practice in which it is worked out' (THP, 86). Since its inception, between the fourth and the fifth century A.D., a number of literary testimonies that goes under the category of *monastic rules* tried to set the conditions to be followed to live a life according to the precepts of the gospel. Birth as a form of voluntary and solitary exile in the tradition of Eastern Christianity (mainly in Egypt), monasticism became, in a short time 'a model of total communitarian life' (*ibid.*, 9). What represents the most proper characteristic of the monastic rule is the thought of a way of life, structured upon the regulation of almost every single aspect of life. The proliferation of norms invaded the whole existence of the monk, so much so that the definition of monastic rule (in Christian literature) as *vita vel regula*, *regula et vita* and *forma vitae*, more than circumscribing a relationship between two terms, sanction their definitive indistinction and the establishment of a way of living in which rule and life are not distinguishable.

Monastic rules open up the possibility of a way of existence in which life is conceived as inseparable from its f/norm. This is for Agamben the novelty brought forth by the paradigm of the monastic rule: rather than setting the rules of a particular form of life, or in the contrary, making of life (more specifically, Christ's life) the source of rules, it tries to reach a new plane in which life and rule(s) overlap and become indeterminate. Yet, it represents also a favourable access to the comprehension of the relationship between law and life.

In his reading of the monasticism, Agamben highlights four formative elements of the rule of monkhood: (1) the common life – or life in common – (*koinos bios – cenobio*); (2) the *habitus*; (3) the *horologium*; and (4)

the *meditatio* (meditation). The life in common, in the form of a 'communal habitation' represents the 'necessary foundation of monasticism' (*ibid*, 13). This aspect of the monastic life finds its paradigmatic expression in the *Book of the Acts* where the life of the apostles is 'described in terms of unanimity and communism'. The life of the apostles and of those who follow their words does not concern any claims to ownership and possession, everything, instead, should be owned in common (*ibid.*, 10). For this reason, the primary purpose of monasticism is 'that you dwell in unity in the house, and that you have but one soul and one heart in God' (*ibid.*). The theorisation of a communal life tries to offer a morally valid alternative to the original idea of monkhood as separate living, paradigmatically embodied in the figure of the anchorite. The actual coenobitic life – the living in common – allows the monks to live a life closer to the predicament of the Gospel. Communal living, in fact, is not only the actual living at the same place, but, as Agamben notes, the term *habitatio* seems to indicate not so much a simple fact as, rather, a virtue and a spiritual condition (*ibid.*, 13).

The *habitus* (which constitutes the second formative element of monastic life) is caught between two semantic layers. The strict regulation of dress for the monks entails a particular ambiguity since the rules regulating the garments also reflect moral values. 'The habit of the monk', Agamben writes, 'is instead a *morum formula*, an example of a way of life', reflected in the single components of clothing: 'the small hood (*cucullus*) that the monks wear day and night is an admonishment to hold constantly to the innocence and simplicity of small children', while the 'short sleeves' of the tunic (*colobion*) signify 'that they have cut off the deeds and works of this world'; and the small mantel 'symbolises humility' (*ibid.*, p. 14). In this sense, the shape of the exterior vests mirrors the interior, moral, way of being: the *habitus* as a habit. Therefore, the importance of the ritual through which a neophyte disrobes himself of the 'secular clothes' is due to the fact that this act represents the acceptance of a new habitus, a new life lived according to the dictates of the rule.

Furthermore, the monastic rule, shaping the existence of the cenobites, prescribed 'for exclusively moral and religious ends, a temporal scansion of the existence of the monks' (*ibid.*, 19), which was defined as

horologium (clock).[257] The daily life of the monastery was organised according to a temporal scansion regulating the various activities of the day, and it was so strict and rigid that 'the whole life of the monk is modelled according to an implacable and incessant temporal articulation' (*ibid.*, 21). The monk became a sort of living clock, whose existence coincided with the organisation of the ascertained time for prayer, labour and reading. 'In the cenobitic *horologium vitae*', Agamben writes, 'time and life were for the first time intimately superimposed to the point of nearly coinciding' (THP, 24), rendering the life of the monks indistinguishable from time as such and, thus, from the rules regulating it.

The last element that Agamben detects as structuring the life of the Cenobites is the *meditation,* which was initially the '(solitary or communal) recitation by memory of the Scriptures, as distinct from reading' (*ibid.*, 24). Later, it began to refer to the continuation of the particular practice of reading silently. '*Meditatio*,' Agamben suggests, 'is the continuation of this practice without any further need for *lectio*, because by this point the text is available in the memory for an uninterrupted and in any case solitary recitation' (*ibid.*, 25). Meditation became a vital part of the daily life of monks, as a form of interior dialogue accompanying and articulating temporally 'from the inside the entire day' (*ibid.*). Meditation assumed the function of the temporal regulation of monk's interiority; a sort of inner reflection of the (regulated) exterior temporal scansion as imposed by the rule.

In front of the quasi-hypertrophy of rules organising the many aspects of the life of the cenobites, Agamben poses the question regarding the very nature of the monastic rules. What is the essence of those rules? Are they legal norms, or just precepts to be followed? The presence of a precise set of penalties, among which the *excomunicatio* [excommunication] represents the hardest, along with the conception of the 'profession of monastic life' as determined by a 'pledge of wow', renders the elaboration of an answer a quite difficult task. Agamben, in fact, notes that even though it is correlated with a system of penalties, 'in an epoch when punishments

[257] The term *Horologium* refers, in the Christian oriental tradition the "book that contains the order of the canonical Offices according to the hours of the day and night" (THP, 19).

had an essentially 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' (*ibid.*, 31). However, the diffusion of the rule of *Saint Benedict* as a prototype for the monastic life bequeathed to European culture the of monkhood as a legally delimited role by a type of contract. In any case, Agamben suggests, the whole debate on the legal or extra-legal nature of the monastic rule, does not offer a satisfying answer to the question of the nature of the rule, and is generally anachronistic since it uses concepts such as 'legal' and 'juridical,' the existence of which, in late antiquity and early middle age, is questionable.

A better comprehension of the essence of the monastic rule depends on the investigation of the relationship between norms and life as such. 'In reality', Agamben sustains,

> what is decisive here is not so much the problem of the more or less juridical nature of the rules […] but more generally that of the peculiar relation between life and norm that comes to be established in the rule. What is in question is thus not what in the rule is precept and what is advice, nor the degree of obligation that it implies, but rather a new way of conceiving the relation between life and law, which again calls into question the very concepts of observance and application, of transgression and fulfilment (*ibid.*, 54).

In fact, the monk who promises to live according to the rule is not – as in law – to 'obligate himself' to the 'fulfilment' of every letter of the rule, but rather to 'put into question his way of living'. As long as the monk is living according to the customs of the monastery, in the case of omission of single aspects of the rule, he will still be considered as 'truly living the rule' (*ibid.*, 55). Therefore, Agamben sustains that 'the decisive core of the monastic condition is not a substance or content, but a *habitus*, or form. To understand this situation correctly requires a turn toward the task of confronting the problem of 'habit' and 'form of life' (*ibid.*, 57), rather than the speculation as to the precise legal nature of the rule.

This last point is crucial for the purposes of this chapter and in general for the comprehension of the concept of "form of life". Here, Agamben relates the terms *habitus* and form with the words 'habit' and

'form of life'. What constitutes the life of the monk is not *his* individual and concrete life (its substance), but the *form*, the *habitus*, according to which he lives. In this case, it is the rule defining the *habit* – the custom and regularities of the monastery – of the monk, instituting his/her form of life. 'The rule', in fact, 'is not applied to life, but produces it and at the same time is produced in it' (*ibid*., 69). The *habitus* would be the form the life of the monk: a specific product of monastic rule.

However, Agamben sustains, in the case of monastic *habit* the relation between the life of the monk and its form (as a habit) is rendered more complex by the fact that what should be considered as the 'result' of the rule represents, on the contrary, its necessary foundation. If, on the one hand, in fact, it is the rule that produces the actual form of life of the monk – his habit – on the other hand, it is the cenobitic life, the practices of the common life, that constitute the necessary ground for the emergence of the rule and the subsistence of the life of the cenobites as an *habitus*:

> What is decisive in any case is that the form of life that is in question in the rules is a *koinos bios*, a common life. […] life is not the object that the rule must constitute and govern. […] it is the rule that seems to be born from 'cenoby,' that (to use the language of modern public law) seems to be placed with respect to cenoby like constituent power with respect to the text of the constitution (*ibid*., 58).

In this perspective, the *life* in common correspond to the potential – the foundation – of the 'habit' of the monk; it is something, in other words, that is presupposed by the monastic rule. The *koinos bios* is the very condition of possibility for the monastic form of life. Consequently, in the case of the *habitus* – the form of life – of the monk, what is presupposed as a foundational element is a certain kind of life (*koinos bios*) – common to all the members of the community.

Therefore, a form of life – codified (formally) in a set of rules, would be the actualisation of something potentially present: the putting-in-form of a presupposed-life. The life of the monks, with a rigidly ordered existence, is the actualisation, the fixation into a *habitus*, of a 'possibility' of life. The form of life, from this point of view, stands in a 'relation' of determination with the communal life, which represents its substrate. However, it is in the

determination of its form, as a *habitus*, that the *koinos bios*, could find its real manifestation.

Constitutive rule

Looking back to the argument of the previous section, we reached the conclusion that the life of the monk is determined – in its near totality – by the rule. The *habitus* of the cenobites turns out to be the result of the formulation of the precepts of the rule, and the practice of the "communal life" represents the necessary presupposition for the establishment of such rule. The form of life of the monk and the 'communal life' enter here in a sphere of reciprocal indifferential suspension; where the *koinos bios*, can be realised only through the monastic rule, which is an expression and 'constitution' of the *koinos bios*.

To shed light on this logical and practical relationship, between norm and life, Agamben refers to what is known as a "constitutive rule".[258] A constitutive rule is defined as 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' (*ibid*., 71) by itself. To exemplify the performance of this kind of rules, their power to constitute the reality they are called to regulate, Agamben refers to Wittgenstein's example of the game of chess (*ibid*.). As Wittgenstein claimed, pieces like the king or the pawn consist of the sum of the rules defining its moves; since 'chess is the game it is in virtue of all its rules'.[259] The rules of chess, thus, constitute the very existence of the game –

[258] Constitutive rules, in the philosophy of language, and in the philosophical understanding of norms and institutions, are, along with regulative rules (which Agamben defines as pragmatic), the two main categories according to which the very concept of a rule is understood. This distinction appears clearly in Searle: "I want to clarify a distinction between two different sorts of rules, which I shall call regulative and constitutive rules. I am fairly confident about the distinction, but do not find it easy to clarify. As a start, we might say that regulative rules regulate antecendently or independently existing forms of behaviour; for example, many rules of etiquette regulate inter-personal relationships which exist independently of the rules. But constitutive rules do not merely regulate, they create or define new forms of behaviour. The rules of football or chess, for example, do not merely regulate playing football or chess, but as it were they create the very possibility of playing such games": Searle (1969), p. 33.

[259] Wittgenstein (2009), p. 86e.

and of all the pieces composing it. In the concept of constitutive rule, Agamben writes, the

> common representation according to which the problem of the rule would consist simply in the application of a general principle to an individual case—that is, according to the Kantian model of determinate judgment, in a merely logical operation—is neutralized. The cenobitic project, by shifting the ethical problem from the level of the relation between norm and action to that of form of life, seems to call into question the very dichotomy of rule and life, universal and particular, necessity and liberty, through which we are used to comprehending ethics (*ibid.*, 71-72).

While not presenting interpretative ambiguities, the concept of constitutive rule, however, 'hides a difficulty' (UoB, 241). As Agamben, in the *Use of Bodies*, writes:

> A pawn is the sum of the rules for its moves': thus, the pawn does not follow the rule but is the rule. But what can it mean to 'be' its own rule? Here one again finds the same indetermination between rule and life that we have observed in monastic rules: they are not applied to the monk's life but constitute it and define it as such. But precisely for this reason, as the monks had at once understood, the rule is resolved without remainder into a vital praxis, and this coincides at every point with the rule. […]. Can one say, then, of the monk, as of the pawn in the game of chess that 'it is the sum of the rules for its moves'? (*ibid.*).

The concept of a constitutive rule describes a situation in which it is not possible to separate a given entity from the rules that define it. In the case of the monk (or the piece of chess), it is not possible to differentiate the set of norms constituting his *habitus* from his very existence. The monk is a living rule and vice versa, the rule could be such only through the life of the monk. However, even if we accept the paradigm of the constitutive rule, it remains quite problematic to conceive a perfect coincidence between the life of a monk and a set of norms, since the nature of monk – with his bodily presence – is, in some respects, different from a written rule. Similarly, a piece of wood, with its specific form, which is used to be called king, is other from the set of rules that are known as defining the king in a game of chess.

In this regard, Agamben writes that as long as we consider the constitutive rule 'as a formal whole of which the rules describe the structure

(or furnish the instructions for use)' it is possible to separate the set of rules from the entities they inform. However, when we consider the constitutive rule as in action 'if in a word, we regard the game from the perspective of use and not from that of instructions, then the separation is no longer possible' (*ibid.*, 242). Like in the case of language 'if we regard language from the point of view of grammatical rules, one can see that these define the language as a formal system while remaining distinct from it'; however, 'if we regard language in use […] then it is just as true if not more so to say that the rules of grammar are drawn from the linguistic usage of the speakers and are not distinguished from them' (UoB, 242). The idea of the constitutive rule, then, consists of a particular point of view according to which it is possible to observe the relationship between rules and the world. A point of view that privileging the moment of the 'use' of a rule (or of language), more than the prescriptive (instructive) moment, allows the observation of the 'constitutive' faculty of a rule. The idea of the constitutive rule does not represent the essence of norms and rules exhaustively; rather it points out the moment of the rule in action.

At stake in the very idea of a constitutive rule, Agamben suggests, is the 'inadequate' attempt at proving, 'something like a process of autoconstitution of being' that is the principle of the 'immanence of being to it-self'. The constitutive rule 'expresses this auto-hypostatic process, in which the constitutive is and remains immanent to the constituted' (*ibid.*, 243). The piece that is called a King, that we hold in hand and that we use according to a given set of rules, is the "actualisation" of that set of rules. Only when the game is played, then, the constitutive rule and the reality it concurs to create, find their actual expression. Wittgenstein expresses this poignantly when he writes:

> What idea do we have of the king of chess, and what is its relation to the rule of chess? The chess player has an idea of what the king will do. But what the king can do is laid down by the rules. Do these rules follow from the idea? Can I deduce the rules once I get hold of the idea in the chess player's mind? No. The rules are not something contained in the idea and got by analysing it. They constitute it. I can give all rules of chess in the form of diagram illustrating the moves of the different pieces. Everything a piece does can be deduced from

this, and an illegal move will disagree with this. The rules constitute the 'freedom' of the pieces.[260]

Why, thus, Agamben claims for the inadequacy of the concept of the constitutive rule in explaining the immanence of rules and the objects they constitute? Why is the idea of a constitutive rule an 'inadequate' mode of representation of the auto-constitution of being? The answer to this question is, at this point, crucial to the understanding of the relationship between norms and facts, rules and life.

A possible solution to this problem has been found by Agamben in Spinoza's idea of *causa sui*. With such a concept, Spinoza describes the existence of the 'substance' (God), as auto-determined; as caused by itself. 'By that which is self-caused', Spinoza claims at the inception of his *Ethics*, 'I understand that whose essence involves existence, or that whose nature cannot be conceived except as existing'.[261] In the idea of *causa sui* essence and existence, thought and matter, coincide. Once the substance is thought, it exists. In the case of a constitutive rule instead, existence and essence are separated and cannot entirely coincide. What is represented and expressed at the level of a set of rules creates its mundane (real) referent, but it cannot coincide with it without a reminder. The idea of a constitutive rule seems, thus, hinged upon the Aristotelian ontological dispositive of the subject, according to which an essence presupposes the existence (a 'real' subject), and in doing so, it creates and separates itself from its real substrate (which functions as its presupposition or foundation).

Most predictably, the very idea of a 'rule', as the representation of a linguistic practice, can only re-propose the ontological device of the scission between essence and existence, since (as we have seen in chapter two), the ontological distinction is due to a particular characteristic of the linguistic experience. This aspect of presupposing the existence (its reference in the world), as entailed in the idea of a 'rule', is well expressed by Wittgenstein when he points out that the rules describing what the king can or cannot do, do not derive from the idea of the king, but constitute the idea as such.

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[260] Wittgenstein (2001), p. 86.
[261] Spinoza (2000).

This means that the rules as "idea of the king" presuppose the existence of something like the king from which it is possible to derive the rules (and the idea) of the king. The idea (the word and the rules) of the king presupposes something like the subject-king. The fact that the idea of something, as well as the set of rules for its use, presupposes a subject in the real world (and thus remain structured upon the functioning of the ontological device) finds its most explicit explanation in paragraph 31 of Wittgenstein's *Philosophical Investigations*:

> Consider this further case: I am explaining chess to someone; and I begin by pointing to a chess piece and saying 'This is the king; it can move in this-and-this way', and so on. – In this case we shall say: the words 'This is the king' (or 'This is called 'the king'') are an explanation of a word only if the learner already 'knows what a piece in a game is'. That is, for example, he has already played other games, or has watched 'with understanding' how other people play – and similar things. Only then will he, while learning the game, be able to ask relevantly, 'What is this called?' – that is, this chess piece. We may say: it only makes sense for someone to ask what something is called if he already knows how to make use of the name.[262]

To ask what the name of something is, presupposes the knowledge – and the existence – of something called 'name' and its use. As a consequence, the very same act of following a rule (for instance, following the rule of language, or of math, etc.) presupposes the 'existence' of that rule as a stabilised custom and institution. To follow a rule, to make a report, to give an order, to play a game of chess, are custom (usages, institutions).[263] Only if we know and we are trained to deal with such customs, we can be able to follow the related rules. Consequently, since the answer to the question on why rules are followed should be found on 'the outside', in the institutions and stabilised practices through which a rule takes its sense, an action according to a rule cannot be explained mechanically by referring to causes, but can only be justified by referring to regularities: to custom and institutions.

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[262] Wittgenstein (2009), p. 19e.
[263] *ibid.* p. 87e.

To recapitulate, the rule constitutes the ruled – the monk; the pawn or the king – but can do this only by posing itself on a different level from the existence of the ruled (the monk; the pawn or the king). Norms, thus, presuppose the existence of customs and regularities; it is not possible to follow a norm, without something that makes following such a norm intelligible. We cannot follow a norm without the real concrete existence of that norm – as a given institution or in other words as a "regularity" giving the norm a meaning. Therefore, *the rule presupposes the existence of the ruled; and the ruled, in the moment of acting according to the rule is determined by it.*

However, the rule and the ruled – the constitutive and the constituted – cannot be thought as immanent to each other; since to follow a rule necessarily implies the existence of something like a rule that is not coinciding with the action of following a rule but represents its codification, its institutionalisation. The existence of the monk presupposes the existence of a monastic rule – that in this regard represents the "custom" or "institution" that gives sense to and create the idea of being-a-monk. And the monastic rule, as an institutionalised form of life, to be considered as such, presupposed the existence of the broader family of the institutions.

Following the same, backward causal logic line, the piece of the chess game called the king is the king by virtue of being part of the game that is used to be called "chess". The game of chess is such, because of its belonging to the broader family of "table games". This way of posing questions, reach a point in which it is not possible to give a further answer than "this is it". As Wittgenstein claims, when human actions are interrogated from the point of view of the related institutions and customs, we reach the point in which it is not possible to answer further questions without having different answers than this is what we do: 'once I have exhausted the justifications, I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do'.[264]

The legitimate question then would be, what is this point of arrest? What lies beyond institutions and customs? This question could also be expressed as follows: what remains of the piece of chess that we call the king if suddenly I do not have any more words to explicate what a chess

[264] *ibid.* p. 91e.

game is? Alternatively, what remains of the monk once he has deposed his *habitus*? The answer to these interrogatives, Agamben suggests in the *Use of Bodies*, could be found in Wittgenstein's speculation of the concept of *lebensform* [form of life].

Lebensform

Despite the fact that Wittgenstein had used it no more than a dozen times in his works, the concept of *lebensform* has generated widespread interest and – to a certain extent – a surprising 'significant controversy'[265], especially so, if it is considered that this term was never used in a technical way.[266] The very idea of a form of life emerged in the evolution of Wittgenstein's thought from the 'analytic' observation of language as in the *Tractatus Logicus-Philosophicus*, to the understanding of language, as it is used and practised. Since the early 1930's, Wittgenstein began to look at the rules structuring language from the side of their use, regarding them more like the norms of a game than the mechanic instruction of calculation. Language, in this renewed perspective, consists of an articulated family of linguistic games: it is a practice, an activity that humans learn from the early stages of their life.

The rules that govern the use and the comprehension of linguistic enunciation are operative in human behaviour and human understanding only implicitly.[267] In everyday life, in communicating, the rules structuring language do not function as a principle of correctness in successful communicative acts. Indeed, frequently the agent using language does not have the faculty of expressing precisely the rules used in the language talked while being able of recognising and correcting mistakes. In such a case, it becomes clear how language is learnt by humans primarily as a practice. In looking at language from this perspective, Wittgenstein claims that it is possible to follow a rule only when that rule is stabilised in a custom or institution. It is the stabilisation of a "practice" the source of

[265] Padilla Galvez and Gaffal (2011), p. 8.
[266] Saidel, (2014) p. 165.
[267] Schroeder (2006), pp. 190-191.

norms and meanings. Language is a convention, a technique that humans have been trained to master: 'to understand a sentence means to understand a language. To understand a language means to have mastered a technique'.[268]

It is in the context of the approach to language as institution, custom and uses that Wittgenstein introduced the concept of a 'form of life'. This concept appeared – five times – firstly in the *Philosophical Investigations*:

to imagine a language means to imagine a form of life (par. 19).[269]

The word 'language-*game*' is used here to emphasise the fact that *speaking* of language is part of an activity, or of a form of life (par. 23).[270]

What is true or false is what human being *say*; and it is in their *language* that human beings agree. This is agreement not in opinions, but rather in form of life (par. 241).[271]

Can only those hope who can talk? Only those who have mastered the use of a language. That is to say, the manifestations of hope are modification of this complicated form of life (1 – i – *Philosophical Investigation part II – Philosophy of Psychology – A Fragment*).[272]

What has to be accepted, the given, is – one might say – *forms of life* (Fragment XI, par 345).[273]

In the context of the *Philosophical Investigations*, the idea of form of life is quite blurred and not easy to grasp fully. If we take into account the first propositions, a form of life is equated to language and to an activity; consequently, in this case, it could be seen as 'form of culture'[274], as belonging to the world of custom and institutions. If language is composed by language-games, which are determined by social regularities, and 'to imagine a language means to imagine a form of life', then a form of life is something culturally and socially determined. Moreover, in the third of the

[268] Wittgenstein (2009), p. 87e.
[269] *ibid*. p. 11e.
[270] *ibid*. p. 15e.
[271] *ibid*. p. 94e.
[272] *ibid*. p. i.
[273] *ibid*. p. 238e.
[274] Kishik (2008), p. 122.

propositions reported above, the image of a "form of life" is equated to language as the ground through which human beings agree on the validity of what they *say*. So, in this case, also, the equivalence between language and form of life, makes of the latter something like the specific socially and historically determined the existence of a linguistic community – as the sum of institutions and customs giving validity to language-game.

This representation, however, goes in contradiction with the idea of *lebensform* as a *given* – as in the last two propositions. Form of life as a *given* resembles the image of "ground" for the possibility of the emergence of the regularities of the language games structuring the linguistic community. A form of life, from this point of view, is something that stands outside language-games, customs and meanings; something that goes beyond the contingent cultural differences. A form of life, as a given, represents the 'transcendental' condition that allows humans to have a language.[275]

The work *Remarks on the Philosophy of Psychology* includes a compelling passage for the understanding of Wittgenstein's idea form of life and of how to conceive the claim that a form of life is a *given*:

> Instead of the unanalysable, specific, indefinable: the fact that we act in such-and-such ways, e.g. *punish* certain actions, *establish* the state of affair thus and so, *give* orders, render accounts, describe colours, take an interest in others' feelings. What has to be accepted, the given--it might be said--are facts of living.[276]

In this passage, Wittgenstein suggests that all these practices are 'brute facts about us, for which no explanation or justification is possible', which has to be considered as 'mere facts of living'.[277] The *given*, what constitutes the limits to every explanation, represents the ground on which humans use their language and their institutions: their "mere living".

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[275] The debate around the question of Wittgenstein's "form of life" could be divided into two opposed groups: those who consider "form of life" as a biological, organic and natural life, common to all humans; and those who view forms of life as the "form" the life of different individuals and social group assumes. See: Kishik (2008). On Wittgenstein's form of life see: Cavell (1989); Garver (1994); Winch (1990); Lurie (1992); Emmett (1990).

[276] Wittgenstein (1980), pra. 630, p. 116.

[277] Emmett (1990), p. 222.

Whether considered as culturally determined, or as a transcendental condition through which it is possible to observe the anchorage of language and human life, with the term form of life, Wittgenstein attempts to think of the ground of human language and institutions. As Stanley Cavell puts it:

> That on the whole we do is a matter of our sharing routes of interest and feeling, modes of response, senses of humor and of significance and of fulfillment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation-all the whirl of organism Wittgenstein calls 'forms of life.' Human speech and activity, sanity and community, rest upon nothing more, but nothing less, than this.[278]

With the term form of life, thus, Wittgenstein seems to be willing to define something like the ground for the possibility of the establishment of a linguistic community. A form of life, thus, is what is shared by human beings; what constitutes the common of the community.[279]

What is this given in common? What constitutes the limit upon which every justification rests and on which human conventions find their ultimate ground? What is a fact of living? Agamben, in the volume *The Use of Bodies* seeks an answer to these questions in Wittgenstein's *On Certainty* (UoB, 240-244). Here, the Austrian philosopher claimed that the search for a justification of the linguistic experiences reaches inevitably an end; however, this 'end is not certain propositions' striking us immediately as true, i.e. as a self-standing truth. Thr "bottom" of language and institutions is defined by Wittgenstein not as 'something akin to hastiness or superficiality, but as a form of life', intended ultimately as 'something animal'.[280] It is life with its animality that rests at the very ground of the institution; and what we describe as habits and customs, find in the animality of natural human life their ultimate ground: 'giving orders, asking questions, telling stories, having a chat, are as much a part of our natural history as walking, eating, drinking, playing'.[281] It is life, the subject

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[278] Cavell (1969), p. 74.
[279] See: Hardt and Negri (2009), pp. 121-122.
[280] Wittgenstein (1969), pp. 204/ 358-359.
[281] Wittgenstein (2009), p. 16e.

in the sense of "what lies at the ground", of what it is predicated on rules and institution.

To recapitulate, with the concept of *lebensform*, Wittgenstein discovers the common ground of human living existence, upon which it is possible to consider the use of language and of the different customs and institutions as "human" practices. In keeping with what could be considered as a 'deconstructive' approach to language, Wittgenstein reached the conclusion that when the justifications and explanation of human actions cannot be referred to causes or reasons (language games or specific customs), it appears the ground of the human life: 'this is what we do', this is an inexplicable given that corresponds to human life. The animality, thus, represents a given – the common ground upon which it becomes possible the emergence of a "form of life" specifically human.

Anthropogenesis

Not dissimilarly from Wittgenstein, Agamben argues that humans are those beings that to be such 'have to appropriate their own language'[282]. This implies that men and women have to acquire their own essence, which is – from this point of view – something external and (in a way) independent from them. In the volume *Infancy and History*, which represents one of the earliest efforts of Agamben's philosophical thought, this aspect of language is clearly stressed:

> Animals do not enter language, they are already inside it. Man, instead, by having an infancy, by preceding speech, splits this single language and, in order to speak, has to constitute himself as the subject of language -he has to say *I*. Thus, if language is truly man's nature […], then man's nature is split at its source (IH, 52).

At the very moment of, what Agamben calls *anthropogenesis* (the emergence of human beings as a species, *homo sapiens*) lies the fracture between a non-speaking being (a non-yet-human) and the human; whereby language is what discriminates between the two. "Infancy" in this sense, is the not-yet-

[282] Seidel (2014), p. 172.

human, that stage in which a human has not yet acquired language, whose presupposition is necessary for the conception of the very emergence of the *human*. 'Infancy', for Agamben, is not 'merely a chronological stage', but represents a 'transcendental condition of our entrance (or not) into language'[283] that marks human experience. And only if a human being is considered as acquiring language, only if something like infancy is thought, it is possible to think of an *anthropogenesis*:

> Imagine a man born already equipped with language, a man who already possessed speech. For such a man without infancy, language would not be a pre-existing thing to be appropriated, and for him there would be neither any break between language and speech nor any historicity of language. But such a man would thereby at once be united with his nature; his nature would always pre-exist, and nowhere in it would he find any discontinuity, any difference through which any kind of history could be produced. Like the animal, whom Marx describes as 'immediately at one with its life activity', he would merge with it and would never be able to see it as an object distinct from himself. It is infancy the transcendental experience of the difference between language and speech, which first opens the space of history (IH, 52).

Infancy is not 'something to be sought, anterior to and independent of language, in a psychic reality of which language would be the expression' (*ibid*., 47), nor is it something that could be identified topologically and chronologically. It is the same entrance of human beings into language, the caesura between the linguistic and non-linguistic being, what marks the emergence of infancy as a transcendental limit marking human existence.

The *caesura* that marks the limit (a threshold) of human experience, signing the entrance of the *homo sapiens* in history and the emergence of infancy, the transcendental dimension of the non-speaking being, is articulated, by Agamben, as the fundamental distinction between man and animal. As he writes: 'Anthropogenesis is what results from the caesura and articulation between human and animal'; this original distinction is not a departure from a dimension to another, rather it 'passes […] within man' (TO, 79). There is not an abandonment of the animal condition and the approach to a proper human experience: 'man suspends his animality and,

[283] *ibid*. p. 171.

in this way, opens a 'free and empty' zone in which life is captured and a-bandoned {*ab-bandonata*} in a zone of exception' (*ibid*.). The animality of the human being – the simple fact of living – stands in a relation of exception with human-qualified life; it is removed and pushed (conserved) to the bottom of human existence. Agamben writes:

> What distinguishes man from animal is language, but this is not a natural given already inherent in the psychophysical structure of man; it is, rather, a historical production, which, as such, can be properly assigned neither to man nor to animal. If this element is taken away, the difference between man and animal vanishes, unless we imagine a nonspeaking man (TO, 36).

Language, culture, and human sociality is what distinguishes the human and the animal; a fracture that stands at the foundation of the human. This fracture implies, thus, a division between animal life and human life (*zoē* and *bios*); a division that traverses human experience, and works as a border, or a threshold, which separates and at the same times connects the two poles. In becoming human – through the event of the anthropogenesis – the animal side (infancy) of a human being (the simple fact of living) does not disappear, but is kept and conserved in a relation of exception as its hidden foundation; that is, as the bottom of the articulation of the different forms of human life.

For this reason, the concept of a constitutive rule, while rightly addressing the question of the performativity of rules and norms – their faculty of creating objects and (binding) relationships in the world – fails to recognise that there cannot be a perfect coincidence between rules (law, institutions, social roles, etc.) and their concrete, mundane reference. If we disrobe the monk of his *habitus*, it will remain as the concrete reference of the *rule*, a body (with its biological functions and needs) of a non-monk: the animal life (or the Aristotelian vegetative life, as we have seen in chapter 2) that is common to all living being and that represents the presupposition for the emergence of a qualified life. In this light, Agamben's suggestion that the monastic rule (the habit of the monk) springs from the *koinos bios*, from the biological support common to all the members of the monastery, takes on a renewed sense. The *habitus* becomes the actualisation – the

putting in a form – of a possibility entailed in the simple common living of a given group of individuals. However, it is the very form of life of the monk that allows the realisation (and the subsequent comprehension) of the communal life. In this sense, the dialectic between life (animal life) as something the lies "at the bottom", and the different "qualified" forms of life constituting the human experience is hinged upon the relation of exception that forms the inner mechanism of the dispositive of *potentiality*.

Matter and Forms

It should now be clear that the relationship that Agamben stipulates between animal life – the mere fact of living – and a politically and socially qualified life – as embodied in the different forms of life – is a relation of *implication*. In this section, I will proceed to suggest that the relationship between animal (bare) life and its form(s) could be better understood if compared to Aristotle's theory of the relationship between matter and form. In Agamben, in fact, animal life stands as akin to the Aristotelian *hypokeimenon* (subject), i.e. as something that stands at the 'bottom' and works as a sort of foundational element of human existence. The reference to Aristotle's physics here aims at suggesting a further reformulation of Agamben's critique of the metaphysics layering the Western conception of the subject, showing how the signature of Aristotelean beings works as a model for the conception the relationship between human life and its actual forms.

The mere fact of living, the organic life of men, according to Agamben's archaeological research, works like matter does in Aristotle. 'The substratum [*hypokeimenon*] is substance', Aristotle writes, 'and this is in one sense the matter (and by matter I mean that which, not being a 'this' actually is potentially a 'this'), and in another sense the formula or form […] and thirdly the complex of matter and form […] But clearly matter also is substance'. Matter represents the substance, the *hypokeimenon*, which

underlies every actual form; but the matter is also potentiality to have a form.[284]

Aristotle articulates the relationship between matter and form in the *Physics*, in facing the questions of "becoming", "generation" and of "movement". What is of particular interest for the purposes of this section is the idea of generation (*genesis*). In every process of generation, there is "something" (the matter) that becomes something other with a determinate form (*morphē*). For Aristotle, there is a generation (*genesis*) when something comes out of something other (like a statue from bronze), or when a thing comes out from the same thing (a musician from a man). In any case, the process of generation, Aristotle writes, entails the passage from something without a form (matter) to something formed. The matter is, thus, primarily what stands at the bottom of things 'out of which as a constituent and not by virtue of concurrence something comes to be'.[285] According to Aristotle, objects, in their concrete existence, consist of a composition of matter [the underlying – subject – *hypokeimenon*] and form [*morphē*]. With form, Aristotle intends the determinate properties of something (what makes the statue a statue – it essence), the matter, instead, represents the support (material support) from which an object is constituted. The matter is the substrate, what lies on the ground of the existent object, and to which the properties of the object are posed upon.

As such, matter does not exist by itself (i.e. without a form), but is potentially a form: it is, by itself, potentiality (i.e. 'not yet' a form). Moreover, – like animal life, which is defined negatively from the side of human life – matter can be understood only analogically:

> As for the underline nature [*hypokeimenon*], it must be grasped by analogy. As bronze stands to a statue, or wood to a bed, or [matter] the formless before it acquires a form to anything else which has a definite form, so this stands to a reality, to a this thing here, to what is.[286]

[284] *Metaphysics*, 1042a 24 – 1042 a32. See: Aristotle (1991).
[285] *Physics*, 192a 31-32. See: Aristotle (2008).
[286] *Physics*, 191 a8-12. See: Aristotle (2008).

This means that if we eliminate from an object its form, what remains is matter; if the statue of bronze is deprived of its statue-ness, what remains is its 'matter', bronze. What is peculiar in this relationship is that without the actual object of bronze (the statue) it is not possible to know what its matter is.

This becomes clear in the third book of the *Physics,* matter and form are understood as akin to potentiality and actuality. Here, the bronze is described as potentially a statue. The form of the statue is, consequently the actualisation of something that is potentially *in* the matter (bronze). The form realises what is potential in the matter. Moreover, the form constitutes the essence (being) of an object and allows the understanding of the identity of that object. Consequently, the matter is the support of forms, which, in objects, is what makes them what they are; form constitutes and determines the 'being' of the object. Aquinas expresses this function of the form in this way: '*forma dat esse materiea. Et ideo impossibile est esse materiam sine aliqua forma*'.[287] It is the form that gives 'being' (and identity) to matter.

The application of the logic of the presupposition (potentiality/actuality – matter/form) to the example of the monk could be, at this point, enlightening towards the understanding of the relationship between life and its forms. As Agamben writes, to follow the rule of monkhood implies necessarily the existence of a 'community and a set of habits' (THP, 58), that is, as a form of stabilised customs and rules. The habit of the monk is the concretisation (in its monkhood) and the actualisation of something potentially present in the *koinos bios* (communal life - or the life "in" common). The *habitus*, as codified in the monastic rule, represents the monk's form of life; that is, the actualisation of something potentially present in the very *life* of the not-yet-monk. Communal life, the life shared in common by the community that aims to be monastic, represents the matter (the potential) of the form of life of a monk. Therefore, the *habitus* of the monk represents the form of monkhood, something that makes the monk 'as such'; something that gives being (*dat esse*) to the very life of the monk. As in the Aristotelean *morphē*, the habit of the monk makes the monk

[287] Aquinas, *De ente et essentia*, c.3. "Form gives being to matter. And it is impossible for matter to be without any form". See: Aquinas (1965).

existent, as a determination (actualisation) of something potentially present in the very fact of living. In this sense, Agamben rightly claims that *forma dat esse rei* and in the case of the monastic rule, the *habitus* of the monk, *norma dat esse rei*. The monastic rule 'makes' the monk be.

The different forms of life, which identify human beings and distinguish one another, are a determination and codification of possibilities grounded and implicit in the mere fact of living of humans, which consequently represents the "subject", what stands as removed presupposed foundation of every singular individuality, as the common presupposition of all living beings. In this manner, the concept of a constitutive rule assumes a renewed understanding. The monastic rule (and in general every set of rules) gives shape, actualises, in a specific form (as in the habit of the monk), something that is potentially present in the very fact of living.

However, the rule does not exhaust the very existence of the monk; it does not coincide with the whole of his existence. In the very existence of human beings, is present something not reducible to a form of life. It is the mere fact of living, the animal-organic life, the exclusion of which is the ultimate foundation of human-social-qualified life. Forms of life are something that rests ultimately on simple animal living. Yet, the different forms of life – the different customs and institutions – characterising human living (made possible by the event of anthropogenesis) are what constitutes the essence of human beings. In other words, the different human habits are the most "proper" elements, distinguishing human living from the mere fact of living, separating different political communities and ultimately characterising the singular individuality of the member of the species *Homo sapiens*. Since the simple fact of living (the animal life – *zoē)* is common to all living beings, what makes the human-being a specific subject is its specific *bios*, what has been historically construed on the ground of the mere fact of living.

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The human living consists in customary, repeated and obligatory forms, which actualises something potentially present in the very existence of

human beings; in the factual experience of the "mere living". As Agamben writes, 'The form of human living is never prescribed by a specific biological vocation nor assigned by any necessity whatsoever, but even though it is customary, repeated, and socially obligatory, it always preserves its character as a real possibility' (UoB, 207-208). A form of life, thus, represents all those social and legal codification of living, through which human beings experience their being human. However, this becomes possible only through presupposition of the non-human, of the simple fact of the natural-animal-life. If the human is principally what is not animal, thus, what constitutes the humanity of human beings is what has to be non-animal. The constitution of humanity – the event of *anthropogenesis* – Agamben suggests is not a negation of the mere-animal-living (death), it is rather the "entrance" in a linguistic world and subsequent "suspension" of animality. The natural side of human life, thus, is suspended and posed at the bottom of human experience as the proper subject; as the *hypokeimenon*, the material substrate of the individual forms of life. While, instead, the form of life – the form that the material substrate assumes – represents the properly human element of a human being: it is, in fact, the form of life that we live in that gives "being" to the "human", and distinguishes it from the simple fact of natural-animal living.

Let us try to expound then once more, what has been suggested in this chapter in schematic points:

1) A "form of life", in Agamben, is the sum of all the constitutive rules that determine the existence of a given subjectivity. In the case of the monk, the form of life is constituted by the *habitus* of the monkhood that is the "rule" that dominates his specific existence. The rules and the institutions of the monkhood, thus, have a perspicuous "creational" force, in the sense that they determine and stabilised the whole "life" of the monk.

2) However, the form of life does not constitute the "whole" of the existence of the subject "monk". There is present, in the very life human beings a reminder, a hidden foundation: the animal

(organic/vegetative) life, which represents the hidden core of the human existence. As I have tried to demonstrate through a reading of Agamben and Wittgenstein, the whole the set of essential institutions, custom and rule, which goes to determined human life rest upon "something animal" – the mere fact of living.

3) Humans are those beings whose existence is not something like a given but is a process of becoming. This is, in short, the idea of anthropogenesis as elaborated by Agamben. Humans become humans, through the entrance into a linguistic world and the ejection and separation of their animality. The form of life of human beings, thus, becomes possible only through this process of separation. It is, thus, the negation and the inclusion as a subject (*hypokeimenon*) of the natural-animal-life that makes possible the emergence of human forms of life.

4) All the different forms of life, socially and legally produced, are the actualisation of something potential: "human life". As Agamben suggests, the life of human beings has not a predetermined vocation. Therefore all the forms it takes are "possibilities". Life, in this sense, is the potential that could acquire and overcome all forms and determination. As I have tried to show, the natural-animal living represents the substance, the material substrate of the different forms of life determining the life of the subject. This is the peculiar ontological status of the subjects of the species *homo sacer*.

The *habitus* of the monk – in this perspective – represents a specific form of life that a subject could acquire, a possibility of living, named monkhood. At this point, a crucial question needs to be raised. It is, in fact, not the case of a rule (*qua* rule) to be, essentially, a "possibility". The monk, to be such, "must" be a monk. Monkhood – as a rule – acquires existence only when it is actualised; only when it is in-formed in the concrete existence of the life of the monk. This implies that it is not possible to be a monk "potentially": the rule is never potential but acquires existence only when it is followed, that is when it is made real in a specific form of life. However, this implies

a distortion of the ontological dispositive of potential and actual being. Norms are, in this light, particular "things", which differently than other objects cannot be thought in their potential being. The rule – and in general in every norm and law – exists only if actualised, only if it has the real power in shaping human life. In the next chapter, I will show the way in which Agamben tackles and explain this problem.

Chapter Six

IMPERATIVE: LIFE AND THE FORM OF THE LAW

In the volume *Opus Dei. An Archaeology of Duty*, Agamben carries out a dense critique of the *imperative* form of the law, through the reconstruction of what he has defined as the *ontology of command*. In line with his archaeological approach, Agamben analyses the system of commands and obligations of the law, by exploring the ontological structure underlying it. As I suggested at the end of the previous chapter, norms and rules (and more generally the law) cannot be properly thought using the Aristotelian ontological dispositive, since they cannot be thought as "potential" that is to say as not-in-act. Agamben calls the particular ontology of norms and law "ontology of command": a way of thinking the being or rules that is oriented primarily to actuality and to the operational conception of being. The ontology of command, typical of law and religion thinks the being as in act – in the very operation of passing to actuality, underplaying in this way the function of the potential being.

As often happens in Agambenian works, the inquiry into the ontology of the command it undertaken through the investigation of the theological sphere and more precisely through an exegesis of the concept of *officium* (office) and the liturgical praxis of the Church ministers (priests). It is, in fact, into the theological elaboration of the sacramental-liturgical action of the priests that something like an ontology of the command has been elaborated and transmitted to ethics and law.

In this chapter, thus, I will retrace Agamben's archaeology of duty (with a special focus on the idea of the office) to understand the ontological substrate of the imperative form of law. Moreover, the concept of office facilitates the comprehension of the relationship between life and law. The *ufficium* is, in fact, a paradigmatic figure of the form of life. What is at stake

in the idea of office (and of duty), in fact, is a modality of thinking the link between forms of life, their operational *vis obligandi* and the real and concrete effect that law has in the real world: that is to say, the performativity of law. The paradigm of performativity in law suggests that law, being a linguistic practice in its very expression and formation, creates its own objects – fictions – that have the power to constrain the world into a specific form. The law, thus, operates by generating and fixing forms, which are fictional constructions that allow the social and political community to function, and the members of it to recognise themselves.

The form of the law

In approaching the conclusion of the text *Opus Dei. An Archaeology of Duty*, Agamben, resolutely claims that 'the imperative' is the constitutive 'verbal mode' of 'law and religion':

> Not only are the laws of the Twelve Tables (*sacer esto, paricidas esto, aeterna auctoritas esto*) and the formulas of juridical transactions (*emptor esto, heres esto*) in the imperative, but the oath, perhaps the oldest of the juridical-religious institutions, also implies a verb in the imperative […]. And it is superfluous to recall that in the monotheistic religions God is a being who speaks in the imperative and to whom one speaks in the same verbal mode in worship and prayer (OD, 119).

Rules are formulated in the verbal mode of the imperative. In English, this is expressed through the auxiliary verb *shall* [*Thou shalt not kill*], which represents a verbal deontic modality. In linguistic, deontic modalities refer to those conditions of 'obligation or permission, emanating from an external source', from an 'authority such as rules or the law'; more frequently the 'authority is the actual speaker, who gives permission to, or lays an obligation on'.[288] This form of utterances is what John Searle has called

[288] The auxiliary verb "shall" that is the common mode of expression of laws, is categorised in linguistic as "Commissive modality" – a sub-categories of "deontic modality" –, which represents the condition that "connotes the speaker's expressed commitment, as a promise or threat, to bring about the proposition expressed by the utterance". See Palmer (2001), p. 10.

'directives' that is when 'we try to get them to do things'.[289] Commands, imperatives and rules are structured upon a binary framework, in which an actual behaviour is the result of an external cause (rules, command, directives, etc.).

The explanation of the verbal mode typical of norms and law, offered by linguistic is nothing other than the reformulation, through a technicised language, one of the most familiar experiences of the everyday life of humans as social beings. Since birth, men and women are immersed in a sea of rules and normative apparatuses of disparate genres. The very moment of being in the world, – the moment of birth – is legally regulated; and parenthood is legally determined (and enforced) too. The experience of adhering to imperatives and directives is so familiar that, to some degree and with good reasons, the obligation expressed by the meaning-imperative of norms represents something like a given[290], a constituting part of human nature.

As Karl Olivercrona has stated, the imperative is an essential constitutive part of the law. Two are in fact the main components in legal norms (and in rules in general): the *ideational* (or *ideatum*) and the *imperative*. The former consists of the 'pattern of conduct represented in imagination and put forward in a text'[291], in other words, the content of a norm. The latter, instead, represents 'the impression that this action must or *shall* be performed', and 'the means used to convey this purpose'.[292] The verbal mode of the imperative represents, in this perspective, the form this purpose has to take to become a norm.

What underlays the imperative, (the linguistic form of the law), as Agamben has demonstrated in his archaeology of duty, is a particular ontology that had a decisive influence in the way law has been thought and

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[289] Searle (1983), p. 166.

[290] Samuel Pufendorf explained this when he famously claimed that the law becomes so 'ingrained in our minds" that it "can never thereafter be wiped from them […] on this ground, too, it is said in the Holy Scriptures to be "written in the hearts of men". Since we are imbued with a sense of them from childhood on by the discipline of civil life, and since we cannot remember the time when we first took them in, we think that we had a knowledge of them already in us when we were born. It is the same thing as we all experience with regard to our native language'. Pufendorf (1991), p. 37.

[291] Olivercrona (1964), p. 794.

[292] *ibid*.

represented. There are in fact, 'two distinct and connected ontologies' in Western thought he claims: 'the first, the ontology of the command, proper of the juridical-religious sphere, which is expressed in the imperative and has a performative character; the second, proper of the philosophical-scientific tradition, which is expressed in the form of the indicative' (*ibid.*, 120). Therefore, if the law has assumed the grammatical form of the imperative – and the semantics of a command or an order – it is because of a particular ontological conditions that appeared in the transition from an ontology of being to an *operative ontology* or *ontology of effectiveness* according to which being and praxis (to be, and to do) overlap. According to the perspective inaugurated by the prevalence of operativity (actions, effects, actuality), being is constituted principally by what-it-can-do, by its actual operations. An entity, in this perspective, to be such has to be actualised – it must be put in practice.

The imperative form of norms, the duty and the obligation they express, though, could be explained – from this point of view – recurring to the comprehension of particular ontological conditions that have led to the emergence of the paradigm of operativity as the matrix of human normative experience. On the ontological level (as shown in the previous chapters), 'being and substance are independent from the effects that they can produce'; on the contrary in effectiveness, being is 'indiscernible from its effects; it consists in them […], and it is "functional" to them' (*ibid.*, 63). An entity to be (to come into being) *must be* 'effectuated and actualised' (*ibid*.).

These ontological assumptions in a way upset Aristotle's ontological dispositive; '*energheia* no longer designates being-at-work as a full dwelling of presence but an "operativity" in which the very distinctions between potential and act, operation and work are indeterminate and lose their sense'. In the ontology of effectiveness, being in act and being in potential are not separable, and being is constituted by its actuality (actions). According to this ontological conception, a given entity, to be, *has to* be actualised. In this sense, the operational ontology sees a transformation of 'being into having-to-be' (*ibid.*, 84). This transformation marked, for Agamben, the entrance of duty and obligation into the sphere of ethics and law. The normative apparatus in which human life finds itself determined

in forms that constitute matrixes of conduct has in the ontology of command and operativity its condition of existence.

Agamben – with, once more, a move typical of his philosophical manner – undertakes an archaeological inquiry into the ontology of command looking into the theological sphere of the *officium* and on the liturgical praxis of the Church ministers (priests). It is, in fact, into the theological elaboration of the sacramental-liturgical action of the priest that something like an ontology of command has been elaborated and transmitted to ethic and law. In this chapter, I will retrace Agamben's archaeology of duty (with a particular focus on the idea of the office), to understand the ontological substrate of the imperative form of law. I will then move in looking at the performative character of law, through a critical reading of Kelsen's distinction between "ought and is". With the differentiation of "ought and is", Kelsen expresses the autonomy and groundlessness of law in respect to the reality it must regulate. Following Agamben critical reading of such assumption, I will expose how the law, contrary to Kelsen's idea of a "pure theory of law", has a fundamental functional link with the concreteness of human life. Law's imperative (the "ought") needs, in this regard to be realised; it needs to be performed to acquire a legal sense. Following this argumentative line, I will turn then in exposing, further, the performative essence of the law, looking at a specific example taken from the work of Yan Thomas – an author who, through an original reading of the Roman law, has shed light over the performativity of law. In the final section (following a suggestion Agamben has advanced in concluding *Opus Dei*) I will provide a reading of Arnold Gehlen's theory of the institution. As I will explain, Gehlen philosophical anthropology offers a particular insight of the idea of the imperative. The command of rules and norms (and ultimately of the law), performs a proper action of putting in form human life, through its fixation and reification in institutions. Human life, for Gehlen, is marked by a fundamental lack of preformed instincts; the whole set of legal imperatives and institutions, thus, operates mainly as instruments for giving human life the form it lacks.

Officium

The term that designates the effective praxis of the liturgical life of the Church is *officium*. This word has been charged with a crucial significance in the attempt of defining the institutional tasks of the ministers of the Church. Thanks to the terminological exchange between theology and jurisprudence typical of the process of secularisation that has invested Western political power, the term office has been transmitted to the sphere of state's administration, bringing inside the realm of law the idea of public *duty*. Office (*officium*), is, in fact, a common expression used in the sphere of public law and is translated at least since the XVII century as 'duty'. However, Agamben claims, the 'strong sense of (moral or juridical) obligation that duty would acquire in modern culture is lacking in the original Latin term' (OD, 72). The Latin *officium*, in fact refers to

> the behavior that is expected among persons who are bound by a relation that is socially codified, but the compulsory nature of which is sufficiently vague and indeterminate […] *officium* is what causes an individual to comport himself in a consistent way – as a prostitute if one is a prostitute, as a rascal if one is a rascal, but also as a consul if one is a consul and, later, as a bishop if one is a bishop (*ibid.*, 72).

As Cicero wrote in the first book of his *De Officiis*, the two most important aspects that every treaty on "office" should face are 'the doctrine of the supreme good' and 'the practical rules by which daily life in all its bearings may be regulated'.[293] The discourse around the "office" for Cicero, tackles the ethical dimension of the "supreme good" and the crucial question of the regulation of social life, which he defines as "institution of communal life" [*institutionem vitae communis*].[294]

In reflecting on the meaning of the phrase "institution of the life in common", Agamben noted that Cicero is not using the term solely in a strictly moral or juridical term, but also in an anthropological fashion. 'Cicero opposes the way of life proper to beasts to the properly human way of life […] while the animal, moved only by sensation, adapts itself

[293] Cicero (1928), p. 9.
[294] *ibid.* p. 8.

immediately to what is nearby', the human being is 'endowed with reason, by which he comprehends the connections among things […] draws analogies, and connects and associates the present and the future, easily surveys the course of his whole life' and is, therefore, able to make the 'necessary preparation of its conduct' (*ibid*., 74).

The human, by nature, takes care of things and other humans since provided with reason. This faculty of having an interest in the care of the other, Cicero states, 'stimulates their souls and makes them more capable of governing things' (*ibid*.). The 'institution of communal life' – and the organisation of the many different offices –, therefore, is functional to the government and the conduction of social life:

> Conducting life *[vitam degere],'* 'governing things *[rem gerere]':* this is the meaning of […] 'instituting the common life *[vitam instituere]'* that were in question in *officium.* If human beings do not simply live their lives like the animals, but 'conduct' and 'govern' life, *officium* is what renders life governable, that by means of which the life of humans is 'instituted' and 'formed.' What is decisive, however, is that in this way, the politician and the jurist's attention is shifted from the carrying out of individual acts to the 'use of life' as a whole; that is, it is identified with the 'institution of life' as such, with the conditions and the *status* that define the very existence of human beings in society (OD, 75).

As Agamben points out, the term office in the Roman world is the name of the *status* that the individual has in society. It is implicit in the idea of *status* that its existence and significance depends on the production of certain effects of obligation that is used by human beings to 'conduce' and to govern their lives and the lives of others. The *officium* presupposes the anthropological assumption of a socio-biological nature of the different offices (social status) as properly human; as something that originates from the biological essence of men. An office is, in this regard, a life that has been instituted in a stable form, a form of life that has emerged in the womb of society, creating a model for the recognition and the fostering of social stability and control.

Three centuries after Cicero, the concept and practice of *officium* have been adopted by Ambrose, in the composition of a treaty on the ethic of

priests, which has the same title and structure of Cicero's book.[295] The strategy of the doctor of the Church, Agamben suggests, consist of 'transferring the concept of *officium* from the secular sphere of philosophy to that of the Christian Church' (*ibid.*, 77). This strategy has been implemented by Ambrose through a translation of *leitourgia* (the public function of the ministers) as *officium*. In Ambrose's *De Officium* the term "office" is one of the elements of the liturgical action of the priest, which is constituted by the articulation of 'the *ministerium* of the *priest – officium* in the strict sense, which acts only as instrumental cause – and the divine intervention – the *effectus – that* completes it and renders it effective' (*ibid.*, 80). The *effectus* designates the modality of the 'presence and operativity of Christ in the sacraments', which is the necessary elements for making the instrumental action of the priest properly a sacrament (*ibid.*, 38).

In the rite of the Holy Communion (the ritual representation of the sharing and delivery of Christ's body and blood), Christ's presence is made real, is made effective. Here, Agamben claims, *effectus* 'does not designate simply the *Wirkung*, the effects of grace produced by the sacramental rite, but even and above all the *Wirklichkeit*, the reality in its effective fullness' (*ibid.*, 40). The effect of the liturgical practice, the presence of Christ and his mundane action, is something that to become real has to be actualised in the sacramental *praxis*. The mystery of the presence of Christ in liturgy does not 'coincides neither with the presence of the historical Christ in flesh and bone *(sicut corpus in loco)* nor with his simple symbolic representation, as in a theatre'; rather, liturgy 'realises its effects, so that one can say that the presence of Christ in the liturgy coincides totally with its effectiveness' (*ibid.*). The presence of Christ, thus, its effectuality, is realised in the liturgy, making the reality of his presence depending and coinciding with the taking the place of the liturgical *praxis*.

It is in the theoretical landscape of the Christian theological conception of liturgy and of the sacrament that emerged more explicitly the traits of an ontology radically different from the classic Aristotelian dispositive. Central to these renewed senses of being is 'no longer *energeia* and *entelecheia* but effectiveness and effect' (*ibid.*, 45). The Aristotelian

[295] Ambrose (2001).

ontological categories enter, in this way, into a process of transformation that leads to a different comprehension of being, which is ultimately dislocated 'into the sphere of praxis'. Being becomes intelligible only through what it does, through its operativity (*ibid.*, 44).

A symptom of this transformation is, for Agamben, the appearance in early Christian literature of the translation of the Aristotelean *energheia*, with *efficacia* and *effectus*.[296] 'The thing and the work considered inseparably in their effectiveness and in their function: this is the new ontological dimension that is substituted for the Aristotelian *energeia*' (*ibid.*, 46). In this new ontological conception of being and acting, which represents the substrate of the modern understanding the essence of human subjectivity, the substance of a thing lies in its effectuality, that is to say, both in its actual realisation and in the operation of its actualisation. In this sense at the level of ontology, potentiality and actuality (as well as substance and form) enter a "zone of indistinction"; and the being of a thing is ultimately understood as its concrete realisation (effect), on the model of Christ presence as "effect-uality".

The sacramental and ritualised action of the priest is his office: his being in charge of the faculty of representing *the* instrument of the sacramental action. In the articulation of these two elements, the "bishop", the minister in his concrete "biographical" dimension, is excluded and used as a simple instrument. However, the relationship between *effectus* and *ufficium* – between the agent-priest and the effective presence of Christ in the liturgy – is hinged upon a circular dialectic, in which the sacramental action defines and excludes the minister in his existential dimension:

> Let us reflect on the paradoxical circular structure that appears in these examples and the implications that it may have for the conception of human action and ethics. Action is divided into two elements, the first of which, *ministerium* (or *officium* in the strict sense), defines only the instrumental being and action of the priest and, […] The second, which actualizes and perfècts the first, is divine in nature; moreover, it is, so to speak, inscribed

[296] And it is interesting to note that before finding its canonical translation as *potentia-actualitas*, the couple *dynamis-energeia* had been rendered by the Latin Fathers as *possibilitas-efficacia (effectus)* (OD, 46).

and contained in the first, in such a way that the correct fulfilment of the priesrly function necessarily and automatically implies the actualization of the *effectus* (one will recognize here the duality of *opus operantis* and *opus operatum* by which the scholastics will define the liturgical mystery). The divine *effectus* is determined by the human minister and the human minister by the divine *effectus.* Their effective unity is *officium-effectum. This means, however, that* officium *institutes a circular relation between being and praxis, by which the priest's being defines his praxis and his praxis, in turn, defines his being.* In *officium* ontology and praxis become undecidable: the priest has to be what he is and is what he has to be (*ibid*., 81).

The Romans, to express this kind of relationship between something that has to be acted in order to be realised and the agent, used the term *gerere*: to carry. The agent, in this perspective, carries the office. For this reason in the juridical and political sphere, the activity of governing and administering is also defined as 'carry out an office' (*ibid*., 83). The action of 'the *imperator*, the magistrate invested with an *imperium*', as well as the monk or the priest 'is not defined' by an external result (the work) – life if they are "doing" or "making" something –, nor does it have its end in itself: *it is defined by its very exercise* […] *by assuming and fulfilling a function or an office*' (*ibid*.). Only when put in practice – only in the moment of his concrete and actual exercise – an office is such, and the officer could be called such. An office, thus, is something that has to be carried and effectuated by an agent. In delivering a sacrament, the priest is as 'instrument' through which Christ operates. For the priest, it is just enough to be an animated being for becoming the means of Christ action in the world.

In the idea of the sacrament as Christ action, and the priest as instrument what is at stake, for Agamben is the separation between actions and its realisation 'from the subject who carries it out' (*ibid*., 24). The priest's action (as much as the essence of the figure of the priest) is in this sense divided into two spheres: 'on the one hand, the *opus operatum,* that is, the effects that derive from it and the function that it carries out in the divine economy; on the other, the *opus operans* (or *operantis),* that is, the subjective dispositions and modalities through which the agent calls the action into being' (*ibid.*). The efficacy of the sacrament, thus, consists in the articulation of two moments: the performance of an agent (the priest) and Christ action (presence), where the first represents the instrument of the latter.

The liturgical action, the actual rite of the sacrament, is a fragment of behaviour the crystallisation of which in a codified *praxis*, is an institution that goes to determine the life and function of the priest. And as 'happens in every institution', Agamben claims 'it is a matter of distinguishing the individual from the function he exercises, so as to secure the validity of the acts that he carries out in the name of the institution' (*ibid.*, 21). The action – and the function – of the priest, as a social figure in Christian community, thus, becomes independent from the individual subjects 'priests'; however, without the priest as a "subject-instrument" the sacrament of Christ cannot take place, and both the priest instrument and Christ action are not actualised.

A crucial point of Agamben archaeology of the duty is that the act of carrying an office has the same essential traits typical of the 'sphere of command' (*ibid.*, 83). As in the case of the office, a command has a sense only when 'it takes as its object […] the action of another (who is assumed to have to obey, that is, to execute the command)' (*ibid.*, 84). The imperative form of the command (the "you shall") that defines the 'decree of the norm', to be such (that is to say to express a normative intention) has to be referred to 'the behaviour or action of an individual external to it' (*ibid.*). The imperative expresses the will that a certain behaviour must follow. Without the reference to the actualisation of specific behaviours and the pretence that such behaviours *must* follow to the imperative statement, the command (and the norm in general) is just letters, and cannot be distinguished – as such – by other particles and forms of language. In this sense, Agamben suggests, that there is

> no substantial difference 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 (*ibid.*).

In this point, the imperative and the office coincides: in both cases, it is necessary the action of an agent for making them real. Only if actualised, both the command and the office can claim existence. 'Both the one who

executes an order and the one who carries out a liturgical act' Agamben claims 'neither simply *are* nor simply *act*, but are determined in their being by their acting and vice versa. The official – like the officiant – is what he has to do and has to do what he is: he is a being of commando' (*ibid.*). To speak of norms and offices (and institution) in relation to the sphere of the potential is a non-sense. In the ontology of office and command – in the ontology of effectiveness – there is no room for a being-in-potential. To be is reduced to be-in-act.

In this regard, Agamben writes, 'the most decisive influence that *officium* as the paradigm of priestly praxis has exercised on Western ontology is the transformation of being into having-to-be and the consequent introduction of duty into ethics as a fundamental concept' (*ibid.*, 87). Office, in fact, refers to that sphere of human sociality that has been constituted by a stable set of practices that goes to define specific habits, functions and utilities for a given community. The very idea of office entails – since its origin in Roman time – the idea the fulfilment of duty that is some level of obligation and conformity to a stated behaviour. Agamben detects this aspect in the liturgical practice of Christian ministers. As he claims the 'priest must carry out his office insofar as he is a priest and he is a priest insofar as he carries out his office. Being prescribes action, but action ultimately defines being: 'having-to-be' means this and nothing else. The priest is that being whose being is immediately a carrying out and a service-a liturgy' (*ibid.*). Office, in this light, resemble what has been defined as an institution; as a stabilised practice, whose existence depends on the actual manifestation as a source of normativity.

The imperative form of the law – like the office – renders the law in need of 'taking place'; and as I have suggested in concluding the previous chapter, the *habitus* of the monk, the office of monkhood, with all its meticulous ruling of every aspect of life, claims for its concrete realisation. Here, following Agamben, we reach something like the ontological structure of law's "obligation". The rules of the law are those statements that to be so – i.e. to be properly norms – ought to be made mundanely concrete.

'Ought' and 'is'

While the classic Aristotelian categories of ontology (the ontology of the 'is') constitute the foundational logic of science and philosophy, for Agamben, the ontology of command, according to which an entity – to be such entity – *ought* to be actualised and put in practice, stands as the matrix of legal and religious phenomena. In the ontology of command, expressed in the imperative verbal form, a being must be actualised to exist. In the indicative ontology, instead, an entity is thought according to the Aristotelean dispositive as both in the sphere of the potential or on the plane of actuality (or form and substance). In the ontology of command, the two sides of the Aristotelean dispositive seem to overlap, and the entity (a rule, the office, or an institution) *ought* (shall) find actualisation, in order to be.

An exemplification of the difference between the imperative and the indicative ontology, Agamben suggests, is offered by Hans Kelsen's pure theory of law, which is also paradigmatic of the imperative essence of legal regulation. Kelsen 'moves from and absolutisation without reserve of *sein* and *sollen*, being and having to be' (OD, 123), and considers a pure science of law possible, only if legal norms are maintained into the place of the *sollen*, of the "*ought* to be". A 'Norm', Kelsen writes, 'is the meaning of an act by which a certain behaviour is commanded, permitted, or authorised', and is independent by the 'act of will whose meaning the norm is: the norm is an *ought*, but the act of will is an *is*'.[297] The sphere of the normativity of rules and norms is independent from the act of enunciating the rule, and the act of following the rule. The plane of the *ought* is other from the plane of the *is*; they cannot be either in a relationship of derivation nor in a relation of implication:

> The difference between *is* and *ought* cannot be explained further. We are immediately aware of the difference. Nobody can deny the statement: 'something is' – that is, the statement by which an existent fact is described – is fundamentally different from the statement: 'something ought to be' – which is the statement by which a norm is described.

[297] Kelsen (1967), p. 5.

Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa.[298]

In this sense, between the sphere of normativity and the sphere of the real existence of human behaviour are displaced on different levels. The norm – and its imperative form – once it has expressed its will (like through a legislative process) enters the sphere of the *ought*, which is auto-referential: the *ought* depends on the *ought*, and does not claim to be a *is*. This distinction, as Ota Weinberger argues, is the same that stands between the 'cognitive and the normative'[299], and has the functions of making possible the thought of the normativity as a self-standing sphere.

Norms, thus, even if corresponding to regularities in human behaviour cannot be derived from the actual social reality in which such regularities are usually grounded. Norms are posed by human will, and what is considered as normal entails neither the necessity nor the obligation of being normal. Kelsen in this regard writes:

Insofar as the word 'norm' figures in the adjective 'normal', it is not in fact an 'ought' that is meant there, but an 'is'. A thing is 'normal' if it is what actually happens as a rule. So far as any 'ought' is also meant there, we are presupposing the validity of the norm that what tends to happen as a rule is also what ought to happen, and in particular that a man ought so to behave as men do behave as a rule. It is significant in this connection that the words *Pflicht* (duty) and *pflegen* (to be accustomed) are related. To believe that, because a thing regularly happens in fact, it also ought to happen, is a fallacy. An 'ought' cannot logically be derived from an 'is'.[300]

Therefore, in Kelsen's *Pure Theory of Law* – which is 'pure' as long as it remains tied to the sphere of the ought – the relationship between rules and norms and the behaviour they are supposed to govern is not a relation of *is* but of *ought*. As Agamben claims 'the norm does not decree that one behave in a certain way, only that one *has to [soll]* behave in a certain way' (*ibid.*, 124). For Kelsen, the form of law is indifferent from whether or not its dictates are followed; for the law – and this is its essential trait – it is enough

[298] *ibid*. pp. 5-6.
[299] Weinberger, (1973), p. XV.
[300] Kelsen (1973), pp. 216-217.

that in the case of missed obedience a sanction must follow. A certain behaviour is stated legally, 'when and only when' a 'legal norm posits the opposite course of conduct as the condition of an ordained sanction'.[301] Therefore, in Kelsen theory of law, norms are directed, not to the subject that has to follow them, but to the ruler that has to apply the sanctions.

The attempt at constructing a pure and purified system of law, Agamben claims, is ultimately destined to failure, since the 'two ontologies (being and having-to-be), while clearly distinct, cannot be entirely separated, and they refer to and presuppose one another' (*ibid.*, 125). This becomes clear in looking at sanctions and penalties: 'to say that the norm that establishes the sanction affirms that the executioner *must* apply the penalty and not that he, in fact, apply it, takes away any value from the very idea of a sanction' (*ibid*.). In this light, a legal norm to be such must presuppose the actual application of a sanction. Only the presence of a concrete application of a penalty marks the difference between a norm of law and a simple statement.

Moreover, the relationship between the sphere of normativity and the behaviour of subjects is more complex than what Kelsen suggests. The reference to a specific behaviour, in fact, is always presupposed to the norm-sanction scheme. Ota Weinberger summarises this aspect in this way:

> From the form of the sanction-norm 'If *A,* then *B* (the sanction) is to be', i.e., a hypothetical 'ought-sentence, the forbidden ness of *A* can be logically inferred when and only when it is known that *B* is posited as a *sanction.* This is the case when and only when the behaviour posited as condition of the obligatoriness of the sanction is assumed to be forbidden. In other words, the concept of a sanction contains an implicit reference to a behavioural norm, whose violation is the condition of the sanction. The behavioural norm must therefore be presupposed in any case, and it will not do to regard law, in Kelsen's fashion, as a mere system of sanction-norms[302]

Legal norms are tied to reality via a presupposition of a specific normality of behaviour, whose violation is the reason for the application of the sanction. In this way, something like a behavioural norm should be present

[301] Weinberger (1973) p. xix.
[302] *ibid.* p. XXIII.

given the fact that the sanction follows its violation. The legal norm is, therefore, tied to the reality it wants to regulate; when a norm is formulated, it must regulate (to creates the condition for regulation) a specific segment of reality. Furthermore, the sanction represents a constitutive element of law in the form of external support for the regulation – normalisation – of a specific behaviour.

As stated in the opening paragraph, in every imperative statement, in every command – and therefore, in every norm – there are two elements, the articulation of which produce the phenomena that it is known as normativity: norms and agents. Only when the norm corresponds to the majority of cases – as normal behaviour of the agents – it can be named as the norm. A rule, thus, is the stabilisation in the form of an imperative and of a command of a specific pattern of behaviour; and in the case of the law, a sanction in many cases is used to reinforce the norm and to limit the deviation.

What is at stake in the ideas of norm and law is the codification, formulation of a specific pattern of behaviour that becomes autonomous from the agents the actions of which it has to regulate. In the process of producing norms, it is involved, thus, a mechanism of reification and abstraction according to which, the regularity of human phenomena are apprehended as not belonging to the sphere of the human existence. As Berger and Luckmann suggested, institutions and norms more generally are considered

> as if they were things, that is, in non-human or possibly suprahuman terms. Another way of saying this is that reification is the apprehension of the products of human activity as if they were something other than human products - such as facts of nature, results of cosmic laws, or manifestations of divine will.[303]

The crux of Agamben's archaeology of the office, and his understanding of duty is the possibility of thinking the distinction between the subject and his/her social and juridical roles. However, even if separated, the plane of the norms (*ought*) and the plane of the reality (is) are strictly tied. The law

[303] Berger and Luckmann (1966), p. 106.

pretends and has to have a specific effect in the world; a law to be such has to be followed by its execution. For this reasons Agamben could claim that the imperative, the form in which the law is expressed has a performative character: it has to be tangible outside of its pronunciation, it has to produce concrete effects.

The Performativity of Law

The idea of the performative character of law, while being advanced and discussed directly and indirectly by different authors, lacks a specific and delimited definition. However, it should be clear enough – at this point – what law's performativity is. The law is a linguistic practice that has the "power" to create its reference in the world. Legal norms – and rules in general – acquires their status as norms thanks to their faculty of effectivity, that is to say, the capacity of being a ruler for human behaviour. Following what has been stated in the previous sections, a norm that does not claim to be followed, a rule that does not correspond to a particular section of reality would be rather nonsensical. And this is typical of the normative sphere, as it operates according to the logic of the ontology of the command. This is the core of the conception of performativity, 'the leap from language to reality that challenges every ban on the passage from ought to is'.[304]

The performativity of law, while addressing the unavoidable bond between the sphere of legal normativity and reality, presupposes the neat distinction between the plane of norms and command and the mundane experience of human behaviour; between the sources of duty and the actual conformity to the norm in reality. Legal norms, in this light, can have a real effect on the world, as long as they are not facts. This aspect raises, inevitably, the question of the nature of legal objects and their relation to reality; the question of the law as human 'artefact' – to use Kelsen's terminology –, relates to the mundane human experience, outside legal institutions.

[304] Croce (2015), p. 67.

Some legal scholar has turned their gaze to the question *legal fictions* to elucidate the nature of legal objects. In its ordinary definition, a legal fiction is a statement 'a judge, a scholar or a lawyer tells, while simultaneously being aware that the statement is not a fact'.[305] A legal fiction is something that belongs to the 'pragmatic of law' and 'consists in disguising the facts, to declare them other than they are, and in taking from the same adulteration and false supposition, legal consequences'; legal fiction takes 'the false, as it is true'.[306] A famous example of legal fiction is the *lex Cornelia* about the validation of testament of citizens died in *captivité*. Captivity, in Roman law, deprives an individual of the status of free citizen, particularly impedes the right to Testament. In this case, a legal fiction allows considering a person died in captivity as it has died as a free citizen.[307]

In its functional operation, legal fictions are technical legal instruments creating fictional facts to establish the 'factual' ground for the implementation of the law. In this way, a legal fiction is an instrument for the adaptation of law to new and mutated circumstances[308]. Jurists and historians described legal fictions as an 'economic mean' for the transformation of law, which does not contradict and does not change the law itself, and which conciliates the needs for innovation and preservation.[309] Even Lon Fuller, who nevertheless defined legal fictions as 'the pathology of law', claimed that fictions are 'generally the product of the law's struggles with new problems'; since, as he wrote, 'we cannot foresee what changes are destined to take place in our social and economic structure',[310] the legal fiction will remain a useful tool to adapt the law to renewed conditions.

Legal fictions bring to light the creative potential of law, becoming in this way a paradigmatic example of the relationship between legal institutions and reality. As Jerome Frank has stated:

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[305] Riles (2010).
[306] *ibid*.
[307] *ibid*.
[308] *ibid*. p.137.
[309] *ibid*. p. 135
[310] Fuller (1967), p. 50.

in a sense, all legal rules, principles, precepts, concepts, standards – all generalized statements of law – are fictions. In their application to any precise state of facts they must be taken with a lively sense of their unexpressed qualifications, of their purely 'operational' character. Used without awareness of their artificial character they become harmful dogmas.[311]

The fictionality of legal objects is, in a way, inscribed in the very nature of modern positive (and positivist) law. In the process of secularisation, with the passage from God-willed natural law to the paradigm of positive law, the ambit of the juridical became a human enterprise. From a secularised perspective, the rules regulating human sociality are considered as artefacts produced through the art of law (*ars iuris*). Therefore, the very social framework of human communal life, in this way, is conceived as dependent by a structure of fictional-artificial elements.

An author who has thought with intensity on the fictionality of legal objects and the performativity of law is the French legal historian and thinker Yan Thomas. In Looking at the techniques of legal fictions in Roman law, Thomas claimed that 'we are in the presence of the mystery, the most unfamiliar for common sense, of the technique of law, its way of doing things, the *ars iuris*'.[312] Legal fiction shows the creative potential of law, which in transgressing the natural order of things demonstrates to have the power to create the same natural order it has transgressed. For Thomas, the operation of *instituere* defines the performance of law, that is to say, it is the capacity to produce reality, which stands apart from the factual world, but at the same time has the power to transform it. *Fictio* [fiction] is in this sense the name of the *modus operandi* of law.[313] And through the study of Roman Law (an inexhaustible source of "legal fictions"), Thomas has proposed a fictional theory of law, based on the idea of performativity: the law is a discursive practice in which dwells the same potentiality of language. From this point of view, a fact, an event or a thing (*res*), becomes part of the world

[311] Frank (1949), p. 167.
[312] Thomas (2011), p.135.
[313] Spanò (2015), p. 91.

only when is translated into the language of law: '*quod non est in actis non est in mundo*'.[314]

An example of the creational faculty of law, in the work of Thomas, is certainly the analysis of the legal elaboration and definition of 'thing' (*res*) in Roman law. In the essay *La valeur des choses*, Thomas directs his gaze on the 'juridical constitution of things, more precisely, on the status conferred to things by those procedures through which things are evaluated as goods [*biens*]'.[315] What is at stake in the legal definition of things is the possibility of property and commerce, which as Thomas shows, are depending ultimately not on material factual condition of possession and exchange, but on the legal qualification of the 'thing'. The patrimonial [*patrimoniel*] character of things, the possibility of possessing things, is defined, in Roman law, negatively:

> In order to make openly appear their juridical nature as evaluable, appropriable and available things, it is necessary that certain things are excluded from the area of appropriation and exchange, and then assigned to the Gods or the city, according to a model of investment and [*thésaurisation*] common into the ancient world but that had its most typical juridical expression, and perhaps its own conceptualisation, in Rome. It is then that Jurisprudence of the imperial period qualify these things, through a paradoxical formula, which has not always been understood, as 'things belonging to a property that does not belong to anybody' (*res nullius in bonis*); and it qualifies them also as 'things whose alienation is prohibited' or more often as things 'out of commerce'.[316]

The act of taking out from private appropriation a certain amount of things renders what remains legally appropriable and exchangeable, opening up the possibility of the appearance of something as "private property". 'It is the institution of sanctuarized reserves of things', Thomas claims, which 'renders via contrast the rest of the world – which is nothing but the sphere of private law – immune to sacrality and religion'.[317]

The possibility of private property and commerce is thus, depending upon a radical legal division between sacred-public and private

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[314] *ibid*. p. 90
[315] Thomas (2002), p. 1431.
[316] *ibid*. p. 1432
[317] *ibid*.

appropriable. Roman law, in fact, tends to make the sacred and the public legally close. Alongside the *res nullis in bonis*, the things that have been taken out from private fruition, the Roman law defined another type of thing not belonging to anybody: the *res nullis*. This kind of things are objects that are not yet the property of somebody, which have – however – a patrimonial vocation since the first person who will encounter them will have the right to their possession.[318]

It is, thus, through the exclusion of the sacred and the public, from possession and exchange, and from the temporary unavailability of the *res nullis*, that the possibility of being the possessor of things and the possibility of making commerce with them have been legally determined in Roman law. What we can factually possess and what can be legally exchanged is defined by legal procedures, which qualifies (and in a way produces) things. What, in this perspective, characterises the definition of things, making the creative-performative character of law explicit, is that since the beginning the very concept of 'thing' (*res*) is a juridical concept, that has been used in Roman law to designate many elements of law (*res* is also referred to legal procedures and trials). The categorisation of physical things, as *things*, and therefore the opening of the possibility of their possession and exchange is the result of a legal procedure (process) of qualification, which – as it should be now clear – perform the creation of specific *things* that can be possessed. The possibility of private property, thus, is the result of a process of subtraction of the public and the sacred. And, it is the same legal procedure, of classification that established the character of different *res*. Therefore, what has been transmitted by Latin world as *res* [things] is nevertheless the result of the legal process of the institution of the difference between private and public.

This example is, in a way, paradigmatic of what Agamben has defined as the performative character of the imperative ontology that informs the sphere of law and religion. The *sacratio*, the very act of making things sacred (and public), opening the space for appropriation and exchange, presupposed, in the same way, the impossibility of the violation of the sacred, and a consequent penalty. As Agamben writes:

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[318] *ibid*. p. 1447.

> The Roman jurists knew perfectly well what it meant to 'profane.' Sacred or religious were the things that in some way belonged to the gods. As such, they were removed from the free use and commerce of men; they could be neither sold nor held in lien, neither given for usufruct nor burdened by servitude. Any act that violated or transgressed this special unavailability, which reserved these things exclusively for the celestial gods (in which case they were properly called 'sacred') or for the gods of the underworld (in which case they were simply called 'religious'), was sacrilegious. And if 'to consecrate' (*sacrare*) was the term that indicated the removal of things from the sphere of human law, 'to profane' meant, conversely, to return them to the free use of men.[319]

The *sacrilegium*, the act of profanation, was intended as a violation of the sacred things and was punished with death. In this case, thus, the process of qualifying things, of the opening of the space of private property and commerce, coincided with the limitation of access to specific *res* and the obligation to not alienate them.

Leaving aside the technical aspect of singular legal phenomena, which are nevertheless useful paradigmatic figures, what is at stake in the idea of the imperative is the very relationship between words and reality, between ought and is. The imperative calls for its actualisation. In differentiating itself from the level of human actions (in other words, being a fiction), the imperative asks, nevertheless, to be the guide and the author(ity) over human life, generating, therefore, a certain degree of obligation; obligation, here, has to be intended, (according to the Latin *obligare*, [*ob*] – *ligare*, to tie), as to bond human action to a specific behaviour. If the ontology of command presupposes the performativity of law, therefore, the crucial question to be answered regards the relationship to between norms of law and human *bios*. In what way do the rules of the law act performatively on human life?

[319] Agamben (2007), p. 73.

Giving form to life: on institutions

In approaching the conclusion of *Opus Dei*, Agamben mentions in a brief passage the work of Arnold Gehlen, describing it as an 'anthropology of command' (*ibid.*, 120). Agamben's analysis does not go further than a quotation and a comment on Gehlen's juvenile commitment to the Nazi cause. However, this, short paragraph points toward a specific direction for the understanding of the strict bond that ties the imperative to human biological existence. In this section, thus, I will advance a reading of Gehlen idea of 'institution' to provide a useful theoretical insight of the grounding of norms in life, and the specific performance of imperatives have in relation to the living.

Gehlen has been a representative of the so-called *philosophical anthropology*.[320] This branch of philosophical studies originated in early 1920's Germany and proposed a philosophically oriented interpretation of the relationship between human nature and the human environment. Gehlen's anthropological conception of human life is summarised in the work *Man. His Nature and his Place in the World*.[321] The fundamental theoretical linchpin that has oriented the development of his work is the concept of 'deficient being' [*Mängelwesen*][322]; men are in a relation of disharmony with Nature and with the environment, unlike animals that are in an enclosed and harmonious connection with their environment. Men lack a pre-ordained (pre-codified) instincts, which in animals represent a kind of perfect-program of actions to be undertaken in the presence of certain stimuli.

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[320] The label "philosophical anthropology" refers to a philosophical approach that, under the influence of phenomenology, tries to challenge the main questions raised by anthropological studies. It has emerged in Germany primarily thanks to the influence of the work of Max Scheler. Along with Scheler, the main representative of philosophical anthropology are Arnold Gehlen and Heluth Plessner. See: Scheler (2009); Gehlen (1988); Plessner (1970). On "philosophical anthropology" see: Cusinato (2008); Rasini (2008); de Mul and Jos (2014).

[321] Gehlen (1988).

[322] As Davide Tarizzo claimed, the idea of a peculiar inborn natural incompleteness of humans, can be traced back to the thought of Fichte, whose theories had a decisive impact on the development of the "philosophical anthropology". See: Tarizzo (2020), pp. 56-57.

As in the theory of the *Umwelt* [environment], by Jakob Von Uexküll[323], the animal built up its environment, on the base of the organic structure of its senses and instinct. Men, differently from animals, is not tied to a given environment since lacking particular preordained and stable set of instincts. As Gehlen claims:

> Because man is an unspecialised being dependent on his own initiative and because he possesses no environment to which he is naturally adapted, he is denied the direct gratification of his life needs that an animal enjoys. He cannot pursue the 'short cut' taken by the animal, whose instincts operate through its senses to find its goals, which Nature, in her great wisdom, has made readily available. Man must confront the world and its constant surprises and render it available, knowable, intimately familiar, and usable, so that he can engage in planned an appropriate work to create what he needs, what is not readily available to him. For precisely this reason, the range of human action is not limited to the given situation, to the boundaries of the here and now. By anticipating the future, the human being creates the conditions that enable him to survive in it. These facts provide the basis for the structure of human impulses and explain their orientation.[324]

The crucial term, from Gehlen's perspective, is *lack*. Man is an animal lacking a given position in relation to a determinate environment. While for the animal 'instincts are the instincts of its organs, through which it has adapted to its environments', following the predictable 'rhythm of Nature'[325], in the case of man, the instincts seem to be 'tailored to the unpredictable'.[326] This characteristic takes the form of an *excess of impulses*. In animals, impulses find a satisfaction automatically; man, instead, is chronically exposed to a number of impulses that cannot find a specific relief. Therefore, humans need to locate the way to relief from the overwhelming stimulation in which they are immersed.

Humans, in Gehlen's anthropology, are destined to find a target, a direction for their excess of drives [impulses], to guarantee their survival, avoiding the disruptive energy a clash between excessive drives produce. In terms of philosophical anthropology, this means, to create an

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[323] See: von Uexküll (2010).
[324] Gehlen (1988), p. 328.
[325] *ibid*. p. 49.
[326] *ibid*.

environment, to erect the world that could give a shape to human formless instinctual nature. "Culture" is the term that defines the 'closure' of the human environment. Culture 'reduces the uncertainty and contingency stemming from human biological deficiency'.[327] Gehlen intends culture as all those social products that men established to guarantee their survival and subsistence; technology, religion, law, art, moral, are human product constituting the human environment. Culture, thus, has the role of inhibiting and shaping human behaviour, and therefore, has essentially a restrictive essence. Social structuring, familial ties, the law, the division of labour: these elements entered the very nature of human beings, and – as in Wittgenstein – have to be considered as facts of natural history, that have oriented men's drives and needs for so long to have become structures of human consciousness.

It is in the context of the peculiar lack defining human nature that Gehlen introduces the idea of "institution". Thanks to the capacity of adaptation and elaboration of impulses, embodied in cultural structures, human beings build upon the 'relative disorder'[328] of his environment, rites and 'schemes of conduct', which constitute themselves as stabilised forms of behaviour, transmitted by social groups throughout generations. Forms of action 'are stabilised and reinforced by a process of institutionalisation' that the members of a given community inherit as a 'stock of knowledge'.[329] The institutions of a given society – its organisation, law, customs, etc. – work as 'external supports' that makes harmonious and balanced the many diverse needs of the individuals. Institutions allow the self-standing of a community; they work as pre-ordained instincts, permitting the emergence of a proper human environment. If the institutions of a given people are destroyed, the tendency to disaggregation and chaos typical of human nature is freed and the community is destined to the dissolution.[330] Institutions, thus, 'crystallises and stabilises' in forms the 'human

[327] Croce and Salvatore (2013), p. 42.
[328] Fabini (1991), p. 56.
[329] Croce and Salvatore, p. 42.
[330] See: A. Gehlen (1961), chapter 1.

interaction, which emerges in a given geo-historical context, and creates an objective order'.[331]

In light of Gehlen's philosophical anthropology, the idea of a human *office* is further clarified. The office, as social status (but also as the action of the minister of the church), consists in the institutionalisation – reification – of particular conducts, which to be a rule has to be separated and fixed to express itself as imperative, becoming a guide for human behaviour. The law, its institutions, forms and regulations are involved in the process of institutionalisation of life. The law, as the creation of norms and rules, with its imperative form, establishes what the Romans – and centuries later and author like Pierre Legendre – defined as "to institute life" [*vitam instituere*].[332]

With his theory of the institution, Gehlen offers, also, an anthropological interpretation of the 'imperative' form of the law. In his work *Urmensch und Spätkultur. Philosophische Ergebnisse und Aussagen*, he sustains, in fact, that:

> the imperative is thus the form in which the entity is thought as valid and obligatory and in which it is rendered autonomous by transcending the simple representation that one has of it. It... exonerates the will from choice: behavior is already decided in a preliminary way, and it is so independently of the affective situation, from the state of the soul in which it is found from time to time and from circumstances .... This is the only form-beyond that of blunt habit-owing to which a behavior can be rendered durable: the imperative is virtually the being-already-completed of the action.[333]

The imperative, the grammatical form of law and institutions in general, assumes the faculty characteristic of stabilising a rule on the level of consciousness. The imperative hides and put aside from consciousness all the elements – drives and stimuli – that determine human behaviour. The imperative offers a ready-made model of interacting, limiting in this way the possible critical resistance to an already codified and accepted behaviour. The imperative is the becoming automatic of human conduct

[331] Croce and Salvatore (2013), p. 43.
[332] See: Legendre (1999).
[333] Gehlen (2016), pp. 188-189.

that is, by its nature, non-automatic and dependent by the contingency of the openness of human being to the world.

What is crucial to Gehlen analysis is that the imperative – and the institutional world humans have created through generation – fills the gap of the lack of predetermined instincts, and works, therefore, as a "human instinct". Gehlen in this regard writes:

> The obligatory modality, the being-already decided of behaviour, the inhibition of analytic reason, the component of social reciprocity: these are all the moments of the imperative but also of the dynamics of the residual human instincts when we imagine them transposed into the consciousness of a being that acts according to its own will. An elementary rite, for example: 'This is taboo! It is forbidden to touch it!' would be, so to speak, the analogy of an authentic inhibition, instinctive and rigidly directed at a specific subject, if, naturally, a similar inhibition existed in the human being.[334]

The imperative and the obligatory essence of law and institutions, thus, work properly as a substitute for the human's lack of determined behaviour. Institutions transform human unsettled life in structured forms of conduct, which goes to create a transmittable culture. In this process of creation of forms of institutional life, it is expressed a sort of shrewdness of life that directs the excess of drives toward the creation of optimal condition for the subsistence of human beings.[335]

It is useful, at this point, to reflect upon the idea of imperative and of the institution, in light of Gehlen's thought and of the concept of the performativity of law. Institutions constitute a kind of second nature for humans in the form of stabilised matrixes of conduct that 'pretend' to be actualised, to be followed. If an institution is not effective, if it is not corresponding to the majority of cases, decays, and leave the space to new or renewed institutions. Much like the legal organisation of society, institutions, Gehlen suggests, are not only essential for a community but constitute the identity of its members. A community in this sense is the sum of all the institutions governing the behaviour of its members. The imperative form of norms and their obligatory character work, in this light,

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[334] *ibid*. p. 190.
[335] Fabini (1991), p. 55.

as external support for the action of humans. They are external forces that limit the possibility of action that every human has. In this sense, law and norms are forms that in applying to human existence, give form to the formless and eccentric human life, creating the conditions for the emergence of an environment properly human.

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Gehlen's anthropological interpretation of the human nature as lacking a proper predetermined instinctual structure validates Agamben's conception of human life as eminently located in the sphere of potentiality. If human beings are lacking a fixed instinct in relation to an ordained environment, this implies logically that for humans everything becomes potentially possible. Essentially nothing is "given" for humans, and what constitutes the form of life of the subject is historically determined in the contingent relationship between the animal-human and the environment it has created for itself. In this regard, as Gehlen sustains, the institutionalisation of life consists in the actualisation and limitation of the indefinite potential of human existence. Law, institutions, social and legal obligation and culture more generally, operate a proper limitation and actualisation of the potentiality of human life; and at the same time, they constitute the most proper essence of the human. The form of human life is the concretisation of the indefinite potential forms the lack of a predetermined instinct and environment entails.

Gehlen's theory of the institutions allows, also, for a better comprehension of what Agamben, has been named a form of life. The process of institutionalisation, abstraction and fixation into specific forms, consists in the creation of a matrix of conduct that goes to in-form human life, which differently from the animal has no proper and predetermined form. The biological assumption of a lack of the organisation of instinct, thus, is the necessary presupposition for the law, and other institutions, to emerge. In this sense, law concurs in instituting life, through the creation of forms of life. The simple fact of living, the biological data, also, in this case, finds itself in a relation of presupposition to formed and qualified life. As it has been stated in the previous chapter, the different forms of life are the

concretisation of a substance (or lack of substance) that is in common to all human beings, which is removed and posed as the foundation of human existence.

Let us summarise some of the main points raised, then, in this chapter:

1) The imperative, the grammatical form of the law (and religion) has historically assumed, reflects an alteration of the classic ontological categories. Norms, rules, offices and institutions, entail a modality of being in which their existence is determined by their actualisation and by the operation of their putting in practice. The imperative form of the law implies the fact that a rule (and more generally every norm) to be such has to have a concrete realisation in the world. This means that a norm regulating the behaviour to be considered as a norm has to have a real effect on the behaviour it regulates; it has to correspond to the majority of cases.

2) The law has a performative character. The necessity for laws and norms to be actualised and realised in the mundane reality implies their substantial power in determining and shaping the target and the object of the regulation. The idea of a performative character of the law expresses the constitutive function of laws utterances, which – to be such – need to have a concrete effect.

3) Even though their performative essence norms, rules and the sphere of the law has not to be confused with the plane of human existence. Rules tend to constitute themselves as an external authority. To rule – as Wittgenstein had grasped – and to follow a rule, implies the presence of something external to the experience of the subject, which can constitute itself as authority claiming – sometimes forcefully – the respect for the rule. The plane of norms is always independent and separated from the plane of the actual – factual – behaviour, and at the same time

claims to be put in practice. And at the same time, performatively, shapes the very existence of its subjects.

4) In relation to the sphere of human life, the whole set of different imperatives and obligations intervene in shaping and in actualising human life, which thanks to its lack of preordained instincts is substantially a modality of the potential. Social and legal norms, thus, organised the living in "institutions" that constitute the forms of life through which the individual is constituted as a human and as a member of a given community. Human life, thus, is always shaped and formed by culture, rules and institutions; all elements that are stabilised in patterns of behaviour that work expressing some level of obligation and force.

It is implicit in this last point the fact that human life – as different from animal life – is determined principally by something that is external from the plane of the very biological existence. Using Gehlen's words, it is thanks to culture and thanks to institutions that the human being experiences his/her being human and not animal. This, however, implies the paradox that "my life" as a subject is ultimately determined by something that is not mine, something that involuntary I acquire gaining existence in a given place at a given time. The law – and all the other social formations establishing the identity of a given social group – is in this sense an "anthropogenetic" factor, since it sustains the emergence of the human as "properly" human.

Chapter Seven

THE PERSON AND THE ANTHROPOLOGICAL MACHINE OF LAW

In this chapter, I will continue the interrogation of the performativity of law through the examination of the concept of the *person*, as a paradigmatic example of the effect that legal categorisations have on living beings. The term person, from the Latin *persona*, originally meant "mask" and in Roman law was one of three fundamental categories of law alongside the "acts" [*actiones*] and "things" [*res*]. Emerged within the sphere of law, the term person initially referred to the juridical encasement of the citizen, for then becoming used to characterise the social and legal status of the individual, more generally. Migrated from the sphere of law to moral philosophy, theology and social sciences, the idea of the person, ended up in being the reference of the human being qua *human*, as different from animals and things. In the development of Western law, the concept of the person has been deployed as the touchstone for the determination of what could be defined properly as legal and political subject, offering from time to time the criteria for the establishment of different statuses and forms of life. Ultimately, the person represents a dispositive that is put in motion for the determination of the "never-fixed" limits between the personal and the impersonal (the human and inhuman). As I will argue, the original performance of the dispositive of the person, thus, is the fixation of the division of life, between fictitious, social, juridical side and an "insufficient", animal, excluded part; between a "qualified form of life" and the "organic substrate of the mere living".

The Legal Person

In her analysis of the vexed question of the legal person, in the book *Law's Meaning of Life*, Ngaire Naffine systematises the spectrum of the many different interpretations of what counts as person before the law into two broad categories: the legalists and the metaphysical realist.[336] For the legalists, the person in law is a 'formal and neutral legal device', which permits the acquisition of the 'ability to bear rights and duty'.[337] In this perspective, everything could ultimately be a person for legal purposes. Legal personality could be recognized for a river or a piece of land, with the scope of their protection and in a similar fashion but admittedly with distinct ethical and practical consequences, a foetus can be regarded as a person for specific legal purposes. The person in the legalist perspective is an abstract technical artefact devised and implemented to fulfil determinate juridical operations. From a different angle, the metaphysical realists see the person as mirroring (in the sphere of law) certain essential characters of human nature. Legal personality is an expression of certain constitutive attributes of human beings; it corresponds to the affirmation and transposition in the law of pre-supposed assumptions over the essence of the nature of men. Hence, only subjects adhering to a given image of the human (usually adults with fully developed and functioning intellective capacity, capable of expressing moral agency) are recognised legally as persons. For the realists, it is necessary to go beyond the abstract and empty categorisation of law, to look at human nature – also from different viewpoints (such as philosophy, religion and science) – in order to capture its primary constitutive ground and build upon it the structure of the person.[338]

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[336] Naffine (2009).

[337] *ibid*. p. 22.

[338] *ibid*. p. 22-24. Naffine divides the position of the 'metaphysical realists' into three different approaches: the *rationalists*, the *religionists* and the *naturalists*. The first conceives rationality as the most prominent aspect defining human nature; the law in this perspective should preserve the humans primarily as rational beings. The second, instead, in line with the Christian values, sustains that human life is worth of being protected by law thanks to its intrinsic sanctity. From this perspective, it is necessary to be human for being considered as a person. The naturalists, instead, see the human being primarily as a natural corporeal

The bi-partition between legalists and realists, while remaining unambiguous at a theoretical level, when confronted with the actual operations of law becomes quite problematic. The practice of law demonstrates how the legalist premises of the person as a "pure" abstract legal category, is rather untenable. The notion of person as a fictional construction applicable potentially to anything and anybody, clashes with the fact that the process of personification is ultimately discriminatory; as Naffine points out in looking at its concrete use 'we discover that the empty slot of the person has been given certain dimension, fitting some and not others'.[339] The mask of the legal person is adhering perfectly to the 'rational adult' but not the animal. The exclusion of the animal is for Naffine paradigmatic of the fact that the mask of the legal personality has been made 'exclusively for human beings, especially of a rational nature, because they are thought to possess a certain moral status'.[340] In whatever way is intended, though, the legal person seems never immune to pre-supposed metaphysical assumptions of what a human person is and should be.

The image of the human being posed at the exergue of the Universal Declaration of Human Rights of 1948 is exemplary of the metaphysical assumptions layering legal personality: 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience'.[341] This definition is the outcome of a long historical process that 'stretched from the development of Roman law to modern declaration of rights'[342] and, through the interplay between law, theology and moral philosophy (and later biological sciences) ended up in establishing a conception of the human person hinged upon the idea of rationality, self-consciousness and moral autonomy.

A decisive impact on our current understanding of human (and legal) personality indeed came from Kant. In his doctrine of ethics, men are persons since by their nature they are 'end into themselves' that is to say

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sentient being capable of feeling pleasure and pain, and the law should protect human living needs as a 'sophisticate animal'.

[339] *ibid*. p. 57.

[340] *ibid*.

[341] *Universal Declaration of Human Rights*, art.1.

[342] Supiot (2007), p. 11.

they are beings that should not be used simply as a means.[343] What confers to humans with an intrinsic value and dignity (the being "end into themselves") is their rational nature, since human inborn rational faculty 'exist as an end unto itself and not simply as a means to be utilised'.[344] Men, thus, are persons with an eminent value thanks to their rationality, expressed in the faculty of being autonomous moral agents: 'capable of making their own decisions, setting their own goals, and guiding their conduct by reason'.[345]

What is perhaps more compelling in such a conception of the human and of the reflected idea of legal personality, is the selective nature of the category of person. The election of the rational, cognitive and moral factors as discriminant essential elements of the human *qua persona*, in fact, makes everything that is not attributable to such factors, non-personal. Not only animals cannot be persons since lacking rationality and moral agency, but also the corporeal existence of the human seems to be excluded from the person. As noted by Roberto Esposito, in line with the evolution of Western thought, the person corresponds to what 'in a human being is other than and beyond the body'[346]: it consists of everything in a human escape the thingness and the concrete existence of the bodily (animal) human living. This particular aspect is better expressed by the thought experiment offered by Brian Garrett:

> I can make perfectly good sense of the possibility that I might gradually become an entirely bionic being. My various bodily and brain parts may gradually be replaced by functionally identical bionic parts. Provided that the changes preserve my continuing mental life, abilities and appearance, we would have little hesitation in saying that I survived a process of total replacement…[therefore] we have good reason to think that the relation between a person and the human being they share their matter with is not that of numerical identity.[347]

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[343] Kant (1981). On the Kantian conception of the person see also: Wolff (1973); Rachels (1986); Herbert (1999).
[344] Trendelemburg (1910), p. 337.
[345] Rachels (1986), pp. 114-117.
[346] Esposito (2012), p. 76.
[347] Garreth (1998), p. 6438

The non-pertinence with the thingness of the body frees the person from the materiality of human life. In this regard, the person represents *the* 'category of the self'[348] corresponding and delimiting the whole sphere of human existence that is not (purely or merely) biological. Personality is thus an attribute that humans possess that does not coincide 'with the living being in its entirety, inside of which it is nonetheless inscribed'.[349]

In light of what has just been suggested, the process of legal personification assumes a particular *anthropological* function.[350] Cases in which legal personality has been assigned to land and rivers are well-known, as it is still raising questions the status of the legal person of corporations. In such circumstances, it is a matter of allocating liability and rights to a non-human entity, deciding on the personalisation of a thing. However, when for the law comes the moment of deciding on the "natural person" on the conditions of its organic and social living, the recognition, adjudication and assignment of personality could have unpredictable and contentious consequences. The fact that it is the person (as a rational sentient moral agent) the bearer of the fundamental rights, obligation and liabilities, the decision of what counts as person is essentially a decision over the *status* of a life; a decision about what can autonomously live (and what has the right to live) – the person – and what is at disposal of the decisional power of others. Legal personification, thus, is never neutral, since it corresponds to the recognition in a subject of the attributes and values defining the humanity of the human being, as opposed to the mere biological-animal life.

Focusing on the concept of person, in the argumentative development of this thesis, is functional to the further understanding of how legal categories have a concrete effect on the reality they are called to regulate. Like in the case of the *res* (things), the category of person has been established legally, becoming in this way an artefact that has been used to organise the social field and that later went to signify the individual as a whole. Persons, thus, are not natural facts. Rather, they are an abstraction

[348] Mauss (1985).
[349] Esposito (2012), p. 76.
[350] On the anthropological function of law see: Supiot (2007); Sacco (2007).

(fictions) whose very function is to make possible the articulation of the two natures of human existence (as animal equipped with language and rationality), stabilising through a sort of reification a distinction that is by definition labile. What is at stake in the legal definition of person, as Yan Thomas claimed, is the concealment of 'the concrete individuality behind an abstract identity': these two modalities of being cannot be confused since 'the first is biographic the second is statutory'.[351] The biographic dimension of human existence, is thus, excluded from the legal consideration and at the same time represents the necessary support of the person. The person is the cover-side of the individual that is exposed to social and legal imputation. The concept of person, in migrating from the sphere of law, through the theological speculation, became the main signifier for the modern understanding of subjectivity, keeping intact the reference (the exclusive/inclusion) to the singular bodily-impersonal existence of the human being. The person divides and articulates on the plane of human life, nature and culture, mere life and form of (qualified) life, animality and rationality, the being a thing of the body and the juridical and social masks of human institutions

While belonging to the order of fictions, as a technical product of the *ars juris*[352], the legal person is at the same time other and in need of the natural person. In this regard, the legal person could be seen as the 'embodiment' of the law producing a functional classification of subjects. Rather than deconstructing and retracing its origin and evolution this chapter will unfold a narrative of the concept of person that privileging a philosophical approach will look at law in its creative function as a proper *anthropological machine* (in the sense Agamben gave to such a concept in the volume *The Open. Man and Animal*) establishing time to time the limits of the human. To accomplish this task, the chapter will move on in looking at the emergence of the category of person in Roman law, showing how it has worked since antiquity as a dispositive for the legal characterisation of human beings. Persons, in Roman time, were fictional legal categories, separated from the natural existence of the real subject, whose main

[351] Thomas (2002), pp. 135-136.
[352] Thomas (2011).

function was the organisation of Roman society, through the division and determination of different statuses. I will then turn in looking at the relationship between the legal and the natural person. While for the Romans, the person was independent from any natural (and biographical) characterisation referring to the subject of the mask-person, with the development of the Western culture, the concept of person acquired a more naturalistic tone, becoming the reference of the 'integral' subject as the composition of a body and a rational soul. Obviously, in the development of such conception of the person, a decisive role has been played by Christian theology. In this section, thus I will scrutinise the theological model of Christ person as 'personification' of God, suggesting that such idea has also been proposed in the hyper-positivistic understanding of the law of Hans Kelsen. The chapter will proceed in analysing further the category of the legal person in comparison with Agamben's idea of the anthropological machine. In this part, I will point out how the person offered the criteria for the establishment of different "anthropological thresholds" – through the allocation of different degree of personality –, which constitute proper forms of life. Therefore, as I will argue, the category of legal person is ultimately selective. In the last two section, I will look at the idea of person in relation to sovereign power. As I will try to demonstrate, the act of establishing of a personality is proper of sovereign power: legal personality – as the faculty of bearing rights and duties – could be granted only if recognised by a third party (usually the sovereign power of the state). Therefore, the acquisition of personality is a process that is ultimately dependent on sovereign power. And, being dependent on the decision of an agent external to the plane of the existence of the subject of rights, the process of personification can also fail; or in extreme case, the person could be revoked and annulled, with all the tragic consequences the de-personalisation implies.

Mask

In the essay *Identity without the Person*, Agamben claims that '*persona*' represents a mask through which 'the individual acquires a role and a social identity'; significantly the acquisition of the person by the individual is dependent by the social (and political) assemblage in which s/he is living, since it is 'only through recognition by others that man can constitute himself as a person' (N, 46). In this essay, Agamben goes on to explain how in society the singular identity – social identity –, constituted by the encounter with the other members and neighbours, worked properly as a mask that the subject should wear in order to be recognised. The mask-identity, thus, despite being dependent on the relation of power implicit in society – since the individual is not fully in possession of the power of choosing his mask – could be susceptible to variation and concealment in relation to the context and the time frame in which the individual is operating. The personal identity, therefore, as a proper mask, represents the public side, the "face" of the individual, without exhausting the complete dimension of the subject fully.

However, with the latest development of the 'biometric technologies' capable of determining the identity of the individual through specific biological features (from fingerprint to DNA), the recognition and statements of identity have undertaken a radical distortion. As Agamben suggests:

> For the first time in the history of humanity, identity was no longer a function of the social 'persona'' and its recognition by others but rather a function of biological data, which could bear no relation to it. Human beings removed the mask that for centuries had been the basis of their recognisability in order to consign their identity to something that belongs to them in an intimate and exclusive way but with which they can in no way identify. No longer do the 'others,' my fellow men, my friends or enemies, guarantee my recognition. Not even my ethical capacity to not coincide with the social mask that I have nevertheless taken on can guarantee such recognition. What now defines my identity and recognisability are the senseless arabesques that my inked-up thumb leaves on a card in some police station. This is something with which I have absolutely nothing to do, something with which and by which I cannot in any way identify myself or take distance from: naked life, a purely biological datum. (N, 50)

New technologies applied for the determination of identity-based on immutable biological data, lead to the potential transformation of how humans identify themselves, marking a radical anthropological turn moving the criteria for recognition from the person to the *biological* life.

Leaving aside this important question, what is crucial from the point of view of the argumentative line of this chapter, is the irreconcilable opposition, Agamben states, between a person and "purely biological data". In the subtle distance, that separates the "naked life", with which the individual cannot identify, and the social-legal mask representing the most proper identity, lies the essence of the western conception of human subjectivity. Being a person is, in fact, what ultimately distinguishes human beings from animals and things. The person represents *the* 'category of the self'[353], which corresponds to the whole sphere of human existence that is not biological.

The roots of term person are grounded in the Latin *persona*, which originally meant mask (tragic mask, ritual mask, and ancestral mask),[354] but also 'part, duty and dignity'.[355] In Latin literature, the term *persona* has been employed to describe the characters of dialogue of an oration, the social role and the function of an individual as well as the temperament and the personality of a subject. The semantic sphere of such term gradually expanded: from the original meaning of mask person began to signify the 'social role', the specific public function of an individual and subject conceived from the point of view of his moral character.[356]

The etymology of the term *persona*, however, is quite contested. A popular hypothesis is that such word may be the outcome of a 'Greek borrowing made by the Etruscans' of *prosopon* [προσωπον][357], which stands for 'face' and 'theatrical mask'. Others, instead, have insisted on a different origin. For the philologist Giovanni Semeraro, for example, *persona* recalls the value of the meaning of *pars* [part], function, office, of a subject, while the reference to mask is derived. The juxtaposition with *prosopon*, he claims,

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[353] Mauss (1985)
[354] *ibid.* p. 13
[355] Semeraro (1994), p. 514.
[356] See: Comerci (1997); Agnati (2009).
[357] Mauss (1985), p. 15.

misled the etymological interpretation[358], concealing to a certain extent the juridical ground of emergence of *persona*.

What is, instead, undoubtable is that the person for the Romans was a 'basic fact of law'.[359] Along with things (*res*) and actions (*actiones*), the person was one of the foundational categories of Roman law. As Gaius in his *Institutiones* synthesises, 'the whole of the law by which we are governed relates either to persons, or to things, or to actions'.[360] For the Romans the person is 'unitary notion' designating the 'human being in the context of law'; *persona* is the human subject as projected in the juridical context, as a legal actor. The person is the side of human existence to which legal relationship, obligations and imputations are pertinent[361]; and it is starting from its original legal definition that the term person widened its semantic spectrum and acquired further meanings, which in this sense must be considered as derivative of the sphere of law.[362]

As Yan Thomas pointed out, in Roman law *persona* is a 'technical artefact' that constitutes a mask (a cover), which gives to the real subject – independently from its concrete attributes and specificity – a 'unique and stable' identity, to be deployed in the sphere of law.[363] The rights of the individuals, and the juridical acts were not attributes of the integral subject, but only to the person; 'the person was first of all the creditor, the debtor, the proprietor, the actor and the defendant, etc.'.[364] A single individual, therefore, could have embodied different 'persons', in relation to different legal contexts, in which he was involved. The person was properly a legal mask that the individuals should impersonate in order to the benefit of certain rights and to take parts to disputes. Along with reference to specific figures and roles, pertinent to given legal relationship, the term person also

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[358] Semeraro (1994), p. 514.
[359] Mauss (1985), p. 14.
[360] *Omnes ius quo utimur, vel ad personas pertinent vel ad res vel ad actiones*. [*Gaius* I.8]. See: Gaius (1904).
[361] Agnati (2009).
[362] Comerci (1997).
[363] Thomas (2002), p. 126.
[364] *ibid*.

applied, to 'stable, functional categories and statutes'[365], structuring Roman society. Gaius testimony, in this regards, is quite explicit:

> The first division of men by the law of persons is into freeman and slaves. Freemen are divided into freeborn and freedmen. The freeborn are free by birth; the freedmen by manumission from legal slavery. Freedman, again, are divided into three classes, citizens of Rome, Latins, and person on the footing of enemies surrender at discretion.[366]

The law of persons, thus, was not concerning the individuals taken in their singularity, but rather the 'functional classes, the norms of which dictated the effect of the different juridical roles (*personae*)'[367] the individuals could bear according to their social and legal position. The juridical actor comes into existence through the acquisition of a person – an authentic mask, a double of the natural existence of the subject.

The discrepancy with the corporeal existence, which we have highlighted above, represents a constant of the very concept of person, which could be observed already in the original ground of emergence of such a concept. What is at stake in such a category of Roman law, as Thomas noted, is the concealment of 'the concrete individuality behind an abstract identity'; this two modalities of being cannot be confused since 'the first is biographic the second is statutory'.[368] The biographic-singular and concrete dimension of human existence is excluded from the legal consideration and at the same time is posed as necessary support of the mask-person. The person forms a kind fictional of cover, a mask (according to the etymology of the word) of the concrete individual: it represents the side of the human subject bearer of legal imputations, social habits and abstract identities. The concrete-biographical singular existence of the subject (as opposed to the person) is excluded from the realm of personality and at the same time is included as the hidden support of the person.

While it is accepted that the most accurate translation of the term *persona* is "mask", the juridical meaning of the same, instead, is quite

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[365] *ibid*. p. 127.
[366] Gaius, [I, 9-12]. See: Gaius (1904).
[367] Thomas (2002), p. 127.
[368] Thomas (2002), p. 135-136.

difficult to establish; this simply because person has not a specific legal meaning, it does not refer to a specific object of law. Person is rather a functional device allowing the characterisation of human beings outside their particular singularities, through the subsequent encapsulation and the division into categories. This becomes explicit in the interplay of the terms *persona* and *homo*, as in Gaius. According to the law of person [*ius personarum*], all men [*omnes homines*] are included into the macro-category of *persona* and then divided into sub-categories. As it has been noted, person could be understood as a *genus* [genre], as a superior class, capable of encompassing all men for then dividing them into numerous *species* corresponding to the whole amount of role-figures that could be embodied in the juridical (and social) life of the individual.[369] Persons are, thus, divided primarily in *personae serviles et liberae* [free person and slaves]. In this classification the person stands (as in Linneus taxonomy) as the "genre", the adjective is, instead, a predication of the subject, what specifies the character and the position of that individual.[370] The *servus* [slave], the *pater familias* [the father], the *filius familias* [the son], *uxor* [wife], etc. are all specification, 'persons', of a single genre *persona* – which corresponds in this sense a transposition of the life of 'all men' into the realm of law.

Persona is configured – in Roman law – as a technical artefact that includes and in the same time excludes from the realm of law the single living existence of the subject since – as we have seen above – the person excludes every reference to bodily substrate of the subject, and represents properly a mask covering (and organizing) the life of the member of the community. When the law of person classifies all men [*omnes homines*] as persons, it includes in the legal consideration all subjects as *homines* [man] that is as natural living entities. As dictionaries reports, in fact, the term *homo* refers to an unspecified life that is common to all human beings.[371] The fiction of the person, thus, works properly as a legal device that includes and at the same time excludes human life in law, for then classifies it into different functional categories. The law recognises the equality of the life of

[369] Agnati (2009), p. 13.
[370] *ibid*. p. 14.
[371] The Oxford Latin Dictionary define *homo* as 'A human being (of either sex) […] (in contrasts or distinctions from the non-human)'. See: voice *homo*, p. 800.

subjects as *homines*, and states their difference as *personae*. In this sense, humans are equal by nature and different by law.[372]

Essentially, the category of person and in general the *ius personarum* served as an instrument for the organisation and division of the social body into different actors. This specific performance, however, entailed a peculiar contradiction. The law of person, in fact, acknowledges all men as person, even the subjects that do not have – by definition – a person. The *summa divisio* between "freeman" and "slave" that Gaius expounds just after having distinguished between persons, things and actions establish the inclusion into the category of person of the slave [*personae serviles*]; which, in Roman law, notoriously, is defined as a being-without-a-person. The Justinian *Institutiones* exposes the complexity of this operation with clarity when declares that 'the slave is a man; he is also a person when considered in a natural state; but in the civil state he has no personality [*aprosopos*] since the law does not give him one'.[373] In this sense, the law operates processes of personification and de-personification, with all the consequence on the plane of the concreteness of the life of the slave. Along with other categories such as the wife and the progeny, the slave was *alieni iuris*[374]: a subject under the power and the command [*potestas*] of a freeman. The freeman can act according to his rights and duties, the slave (the wife but also the son) instead – not having a person – is in the direct possession of the freeman. The slave 'is a thing among the others composing a fund'[375], the patrimony and in this sense is in the direct disposition of his proprietor.

The legal classification of the individual in Roman law establishes the inscription in the law of person of something that is by its legal status opposed to the person that is the "thing" [*res*]. The fundamental distinction between persons and things is, at this point, subjected to a distortion. What is at the very beginning excluded from the realm of the law of person – the *res*: the things –, re-enter it in the form of the slave, which not having a person, is (or could become) a thing. What is crucial is that the reification of the slave, as opposed to the personification of the freeman, is a specific

[372] Agnati (2009), p. 22.
[373] Jus. *Inst.* Lib. I, 3 § 77. See: Justinian (1987).
[374] Gaius, I, 48. See: Gaius (1904).
[375] Jus. *Inst.* Lib. I, 3 § 77. Justinian (1987).

performance of the law. The freeman has the 'natural faculty that everybody has of doing what he likes, as long as it is not forbidden by law'; the status of the slave, instead, on the contrary 'is established by the law of nations [*jus gentium*]'.[376] And, as the law possess the faculty to reify men, it has at the same time the power of making a thing a person (it is the case of the institution of the *manumissio*).

It becomes clear, at this point, how the law claims for itself the faculty of changing the very nature of the subjects through its categorization. The division in different social roles, in Roman law, corresponded to a proper process of de-humanisation (and of rewriting of the limits of the human) through a reduction to the status of thing of specific living beings. Therefore, as Esposito has pointed out, the distinction between thing and person is rather a mobile limit, putting in relation two different entities through different degrees of separation. Along with slaves that is human beings reduced to the status of thing, he suggests, 'there were many others, *alieni iuris*, whose subjective dimension continually crept toward the objective […] *Uxores in matrimonio, filii in potestate, mulieres in manu, liberi in mancipio, addicti, nexi, auctorati, ducti*', these were figures the status of which 'slid into one that was very close to that of slavery' and of things.[377] The division between persons and things does not separate 'different classes' neatly, rather it 'arranges them into a unity consisting of two asymmetrical parts, one of which is subjugated to the other,' therefore, 'the slave does not belong entirely to the sphere of the person or to that of the thing, but to the indefinite area that brings them together and juxtaposes them at the same time'.[378]

Personification

In the juristic language of the Roman time (and it its social and moral semantic register) the person was conceived properly as a mask, excluding

[376] Jus. *Inst.* Lib. I, 3 § 79. Justinian (1987).
[377] Esposito (2015), p. 92.
[378] *ibid*. p. 91.

any reference to the natural person, to the real living existence of humans. As such, it was purely an abstraction, belonging to the large family of the fictional artefacts populating Roman law. When early Christian authors borrowed the term, though, they operated a radical alteration towards the naturalisation of the person. Significant in this perspective is the canonical passage from Boethius who, in linking the human person to rationality, tracked the way for the subsequent modern conception of the human person. In *Contra Eutychen*, Boethius wrote that the person is *naturae rationabilis individual substantia* (the individual substance of a rational nature).[379] What is peculiar to this conception, as Agamben noted, is that '*persona* always refers to a *natura* that is its *subiecta* and without which it cannot subsist'.[380] Nature, therefore, is separate from person, and included as a *subjectum*, as a hidden substance of personal rationality. Person, on the contrary, is the rational side of a natural support. Early Christianity, thus, elaborated a notion of the person that, on the one hand, replicated the structure of the juridical and moral mask separated from the natural existence of the individual, and on the other established a tighter relationship between the person and the natural side of the human.

The inherence of the natural element of the corporeal human dimension to the person – postulated of contemporary law – finds its roots in the Christian conception of human being and the juridical thought of the middle age. In the theological speculation over the nature of men emerged the figure of the human person as the singular unity of two radically different substances: the corporeal dimension generated naturally by human beings, and a soul produced by God in the very moment of the conception. A person becomes the indivisible union of a natural and a divine (rational) element, that entity formed by the union of a corporeal (animal) substance, and a rational divine essence.[381] And it is the divine incarnation of that makes possible the genesis of the person. The Christian conception of the person is drawn according to the doctrine of the *hypostatic union* as the modality of the incarnation of Christ, in which in *una persona*

[379] Boethius (1968), pp. 84-85.
[380] Agamben (1999a), p. 19.
[381] See: Thomas (2002; 2011).

[one person] lies *duae substantiae* [two substances] one corporeal (human) and one divine. The Christological speculation had a decisive influence in "Christian anthropology", via a parallel between the son of God and the duality of human nature as body and soul, the flesh and the sphere of rationality/morality. The theological speculation produced a conception of the human person as *imago Dei*: the divine acquires a face and becomes a person through the incarnation of God in the son.[382]

However, the two substances of the human as image of God are not composing a harmonic balance of values, but rather they form an 'asymmetric bipolarity between two areas endowed with different values', one of which is demoted to a lower level and consider as in possession of the other. The superiority of the rational/moral part of the human being 'draws its roots from the insuperable difference that in the person of Christ subordinates the human element to the divine'.[383] As the Christian doctrine teaches, a man is a person and not just something; therefore the human as person is 'superior to the material world'since endowed with a 'spiritual, immortal soul'. The animal corporeal dimension of our body is, thus, something infinitely less valuable than human spirituality; something accidental that should be controlled and mastered. Although the theological interpretation of the person gives space to the thingness of the bodily existence of men, it re-proposes to a certain extent the 'exclusionary inclusion' of the non-personal (the flash, the body) into the person. The mere animality of the human person represents the concrete support for the embodiment of a soul; it constitutes the subjects in both the senses of the word, as posed at the bottom of the person and subject as "under the power", "in possession".

The onto-theological ground of modern Western jurisprudence has transmitted to contemporary legal thought the conceptual apparatus of the person and its specific articulation between juridical capacity and the real substrate of human bodily existence. Even though it could appear quite surprisingly, given his history and approach to law, it is possible to find the

[382] On the concept of person in Christian theology see: Milano (1984); von Balthasar (1986); Beck and Demarest (2005).
[383] Esposito (2015), p. 36.

echo of a theological terminology also in Kelsen's conception of the so-called physical person in his *Pure Theory of Law*. 'Traditionally', he suggests, in law, the person is the term used to define the subject holder of rights and obligations. Jurisprudence, then, divides the person in two: "physical person" (natural person) when the holder of rights is a human being, "juridical person" when the subject is an entity (a corporation, a municipality, the state, etc.). While the first is considered as a real person, the second as the characteristic of artificiality and is regarded as fictitious. 'Efforts have been made', Kelsen claims, 'to prove that even juristic persons are real', however 'these efforts are futile because analysis shows that even the so-called physical person is an artificial construction of jurisprudence'; the natural person is only a 'juristic' person.[384] The physical person is not, in this light, corresponding to the human being that is holding specific rights and obligation but is, on the contrary, the 'unity' of the whole 'rights and obligations' that are regulating the behaviour of a specific subject of right. A person is not different than the norms giving it rights and obligation:

> The legal order imposes obligations upon, or confers rights to, human beings, that is, that legal order makes human behaviour the content of obligation and rights. 'To be a person' or 'to have a legal personality' is identical with having legal obligations and subjective rights. The person as holder of obligations and rights is not something that is different from the obligations and rights, as whose holder the person is presented – just as a tree which is said to have a trunk, branches, and blossoms, is not a substance different from trunk, branches, and blossoms, but merely the totality of these elements. The physical or juristic person, who 'has' obligations and rights as their holder, *is* these obligations and rights – a complex of legal obligations and rights whose totality is expressed figuratively in the concept of 'person'. 'Person' is merely the personification of this totality.[385]

Kelsen's theory of the legal person, in the attempt of re-affirming the fictitious essence of such legal category, resonates explicitly Christological. The person, in light of his hyper-positivist inclination, is the 'personification' of the unity of the whole obligations and rights a subject has. The existence of a subject – of the natural person – is, thus, the presupposition of the unity of a person, and at the same time is what the

[384] Kelsen (1967), p. 172.
[385] *ibid*. 173.

person is not – since the person is just the unity of "obligations and rights". The physical person is a product of law, which expounds its subjective-individual referent through the inclusion (and exclusion) of a natural datum.

The anthropological machine of law

The legal device of the person, since its origin in Roman law, operates by dividing and opposing the juridical existence of personality and the natural dimension of human organic (and biographical) life. As Jacques Maritain expresses it, in law these two spheres are in a way played dialectically one against each other. The human being, Maritain writes in the book *The Rights of Man and Natural Law* is in possession of 'rights because of the very fact that it is a person', and is a person because is 'master of itself and of its acts'.[386] In line with his Christian conception of the person, Maritain thinks the faculty of being-master-of-itself, as the ability of fully control the 'animal part', constituting, along with rationality, the dual nature of the human being. 'A human being is a person precisely because (and only if) it maintains full control over its animal nature'. The animal nature of humans, therefore, serves as a confrontational site, to 'measure against it' the sovereign status of a person.[387]

In this point, the impossibility of acquiring a legal personality for animals finds an explanation on the ground of the (negative) ontological difference between 'being human' and 'being animal'. The human is a person – and legally recognised as such – because s/he is not an animal; the animal cannot be a person since it is not a human, a "rational entity" capable of acting as a moral agent. The animal and the person represent two poles whose essence is defined by their dialectical opposition and whose composition and articulation determines "traditionally" the nature of the human as a "rational animal" [the Aristotelian *zoon logon*].

[386] Maritain (1971), p. 65.
[387] Esposito (2012), p. 89.

Paradoxically, the process of personification for the law, as suggested in the previous section, necessitates what it logically excludes: the animality of organic human life, the corporeal existence of the body or using a term dear to Simone Weil, the impersonal.[388] It is, in fact, the biological dimension of the human the ultimate ground addressing the establishment of the legal person and the determination of the criteria of the subjects of rights. Legal subjects are identified on the basis of their biological (and biographical) specificities: gender, age, physical and mental conditions. In so doing, the law confers the capacity of bearing rights and acting autonomously in the juridical sphere, following (and marking) proper "biological threshold". It is common for children and mentally incapacitated, while being bearing rights, to be considered as 'legally incompetent',[389] and therefore being under the "responsibility" of others. Infants, senile people, subject in a vegetative state, are considered as not capable of being rights-holder, and therefore they are legally recognized as a not *fully* legal person.[390] This implies, though that the space that separates the person from the non-person (the human being from the organic life of men; the personal from the impersonal; man from animal, etc.) is populated by subjects whose legal status is an uncertain hybrid of personality and impersonality: the non-person (the *foetus*), the quasi-person (the infant), the semi-person (the elderly, no longer mentally or physically able), the no-longer-person (the patient in a vegetative state), and, finally, the anti-person (the fool).[391]

The law does not limit itself to the determination of what is (or should be) a person and what is not, but produced a classification in which the limits of the personal and the non-personal are indeterminate. The person (what characterizes the standardized 'subject of rights') is, thus, a pole, which, opposing the non-person (the organic life of the body, the

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[388] See: Weil (2005).

[389] Kramer (2002), p. 69.

[390] Harel (2005), p. 194. This position is also called 'will theory'. Influenced by a strong rationalism the will theory affirms that the capability of bearing rights and legal responsibility a subject should be able of expressing and exercising the will. What characterises the legal personality is the possession of the mental capacity for making choices and expressing preferences and will autonomously. See: Naffine (2009), pp. 67-68.

[391] Esposito (2012), p. 97.

animal…) creates a space in which it is legally possible to establish and to recognize forms of life with different composition of personality. In so doing, though, the law works properly like what Agamben as defined as *anthropological machine*.[392] In Western culture, Agamben claims, is at work a dispositive that in different fields of knowledge determines the essence of the human. This machinery consists of a 'symbolic and material mechanism'[393], fuelled by the opposition between the human and the animal (or inhuman), which produces a basin of meanings from which it becomes possible to deduce the essential traits of human nature.

To explain the working of the anthropological machine Agamben lingers on the very definition of *Homo Sapiens* noting how Linnaeus, in the moment of classifying men, found himself in front an enigmatic problem: it was not possible for him to identify specific features separating human beings from other species – especially apes. So to solve such a riddle, Linneus 'does not record – as he does with other species – any specific identifying characteristic next to the generic name *Homo*': in the binary denomination, *Homo* is followed by the 'old philosophical adage: *nosce te ipsum* [know yourself]' (TO, 25). The very definition of *Homo sapiens* depicts the human as an entity that to be such has to recognise him-self: 'man has no specific identity other than the *ability* to recognise himself' (TO, 26). Lacking a specific pre-determined essence, the *Homo sapiens*, Agamben claims,

> is neither a clearly defined species nor a substance; it is, rather, a machine or device for producing the recognition of the human. […] *Homo* is a constitutively 'anthropomorphous' animal […] who must recognize himself in a non-man in order to be human (TO, 29).

The absence of a given nature makes the human in needs of finding its place in the world, through the research of a point of confrontation: that is to say looking at what it is not. The negation of the human (in the form of the animal), therefore, becomes an essential part, a presupposition of the being human. The auto-comprehension of the human is marked by the necessary

[392] Agamben's definition of 'anthropoligical machine' is taken by Furio Jesi. See: Jesi (2013)
[393] Calarco (2008), p. 92.

absorption of its negation – which, as such, cannot be part of the being human. The inclusion/exclusion of the animal into the human, thus, happens immanently to the very existence of men, and it is not a transcendental (or simply epistemic) condition. However, this implies necessarily the recognition of the presence in the concrete living existence of humans an element that negates essentially the characteristics of the *humanity* of the human: in Agamben's terminology "bare life".

Standing precisely in a relation of exception, the inhuman and the human, are in a relation of presupposition, which consequently opens up the possibility of making the two poles of the machine indeterminate. As Agamben writes, the machine

> necessarily functions by means of an exclusion (which is also always already a capturing) and an inclusion (which is also always already an exclusion). Indeed, precisely because the human is already presupposed every time, the machine actually produces a kind of state of exception, a zone of indeterminacy in which the outside is nothing but the exclusion of an inside and the inside is in turn only the inclusion of an outside (*ibid.*, 37).

The dialectical determination of the human/animal distinction gives space to the appearance of moments and figures in which the two poles becomes indistinguishable: the *Musselman*, the *néomort* and the *overcomatose*, but also the slave, the barbarian and foreigner are the outcome of the animalisation of the human or invariably of the 'humanisation of the animal' (*ibid.*). The proximity with the logic underlying the device of the person is here evident. We could say that the anthropological machine is in motion in law, trough the legal dispositive of the person. The set of figures that Agamben reports as produced by the anthropological machine are in fact also established through of a juridical process of de-personalisation, of a gradual abandon from and by the law of those subjects falling under such categories. The slave, the foreigner and the barbarian or the subjects living in a vegetative state, or more explicitly the *Musselman*, are all actual manifestation in the very plane of human life of the fading away of the 'person' (as a subject of law capable of holding rights, but also as a moral and social agent and ultimately as human) and the emergence of a condition in which is no

longer possible to determine the limits of the personal and the non-personal; of the human and the inhuman.

The law historically has always contributed to the generation and affirmation of specific anthropologies; every production of rules and norms draws its own model of the "person", which is never the simple registration of the human nature in law, but is the elaboration, and selection of what could be accommodated in the limits of law as a proper sovereign subject. The person classifies and creates standards; it is an abstraction, working properly as a model of reference for the establishment of the legal subjectivity. As such, the person represents the core mechanism of the anthropological machine of law, addressing the procedure through which it becomes possible to determine what could be included and excluded from the law; what could be recognised legally by law with its 'natural' characteristics and what needs a metamorphosis, made possible by the fictional categorisation of law, to become a subject according to a given law.[394] But, in doing so – as the history of the West taught and continue to teach us – the law assumes the risk of the possibility that through the conceptual apparatus of the person, certain categories of human beings are deprived of rights, of their qualified form of life, falling into the realm of the inhuman.

The Person and the Sovereign

Person and personality are 'dogmatic constructions' that enable the articulation of law with the substrate of organic human life, the non-human (animal) with the human, or from the point of view of Christain theology, 'matter and spirit in their unity'.[395] The human being as *imago dei* (which had nevertheless a primary influence in the later development of the idea of person) is a composition of two elements one material and the other immaterial. The theological speculation left us the idea that 'every human being without exception is a composite of a body and soul, a *homo naturalis*

[394] See: Rodotà (2013).
[395] Supiot (2007), p. 27.

destined through baptism to become a person in the Church.[396] The acquisition of a personality, thus, is dependent on something that turns out to be heteronomous in respect to the singularity of human subjectivity. This is characteristic also of the Aristotelean definition of political animal [*politikon zōon*]. As Bernard Stiegler suggests being a political animal means that 'I am not human except insofar as I belong to a social group'[397]; to get access to humanity thus, depends ultimately on being part of a political community.

The process of personification, as Supiot claimes, needs ultimately a 'third party guarantor', which enable the setting of its limits and its protection. In secular society what has taken the place of God – as in the Christian conception of person – and of the political community – as in the Aristotelean definition of man as a political animal – is the state. 'The state', Supiot writes 'is the cornerstone of the organisation of the socio-political whole and is the immortal representative of the attributes of the human being', the state is 'the ultimate guarantor of the legal personality of the real or fictive beings that are referred to it':[398]

> In the West […] there is no 'I' possible without an authority that guarantees this 'I', or, to put it in legal terms, without an authority that guarantees personal status. No one can make the sovereign gesture of altering their lineage, sex or age. Such issues have long been referred to the religious authorities, and still are in certain countries. In the West, it is the State which is nowadays the ultimate guarantor of personal status; this status is inalienable, that is, it lies beyond the domain of individual sovereignty. The rules determining civil status or the conflicting dogmas concerning the legal personality of the embryo may have replaced religious casuistry regarding the administration of the sacrament of baptism, but the identity of the mortal human being still continues to be governed by an immortal and super-human subject. Even before arriving at the autonomy of the speaking subject through the heteronomy of language, the human being becomes a legal subject through the heteronomy of the law.[399]

The gaining of a personality is, therefore, dependent on the statement of an external authority (God, State's sovereignty, the law, the polis), which

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[396] *ibid*. p. 23.
[397] Stiegler (2009), p. 3.
[398] Supiot (2007), p. 28.
[399] *ibid*. p. 21.

guarantees the unity of the subject – that is to say the articulation of the natural substrate with the public-social-legal personality, which represents the form of a (subjected) life.

The necessity of a "third party" guarantying the process of acquisition of a person – and in this sense of the becoming properly human of the not-yet-human – was already inscribed in the Roman law of person. The acquisition of personality, in fact, always entails a process of "becoming" a person. As Esposito has noted, in the Latin world every individual with a person was, previously, devoid of it; every individual, before acquiring a personality was *alieni iuris*, and therefore, close to the condition of the slave or thing: 'anyone who was put in a state of legal dependency— which in actuality included everyone except the *patres familias*— shared the status of *subiectus*, meaning, an object under the domination of others'.[400] A subject *sui iuris* was always the product of a process of acquisition of personality. Every newborn comes to life as *alieni iuris*: in the form of a *filius/a* – and thus in possession of the father – or in the form of the slave – if born from a slave. In the first case, the son could acquire personality through the *emancipatio*, becoming a subject *sui iuris*. In the case of the slave, it was the *manumissio* the juridical rite regulating the passage from the status of a slave, to the one of a free man (*liberto*). The process of acquisition of a person, in ancient Rome, thus, was always a passage from a status to another, a transition that did not exclude the possibility of being reversed. The process of gaining personality was accompanied by the possibility of falling back to the status of non-person. What is most proper of this process is that the alteration of the status of an individual was regulated by law, depending on the act of an agent and performed according to a well-established ritual.

Being a person is, therefore, something that depends ultimately on an entity that is heteronomous with respect to the person itself. The status of the person, thus, is the outcome of a decision on whether a subject has to be recognised as fully capable of bearing rights and duty or on the contrary excluded from the realm of the person, falling in this way into the sphere of the non-person (and eventually of the inhuman). This is nothing but a

[400] Esposito (2015), p. 92.

reformulation of Agamben's idea of sovereign power, as the decision over the status of life, in the form of the power of exclusion/inclusion of life into the realm of law.

The link between sovereignty and the person is central also the Esposito's critique of Western legal and political power. It is useful, at this point to look it, in order to gain a better comprehension of the functions and operations of sovereign power. 'The juridical category of person', he claims, 'intersects at several points with the political category of sovereignty'.[401] Through a reading of Hobbes *Leviathan*, Esposito reinforces the image of the person, as a fictional product of a sovereign act of personalisation. His argument rotates around Hobbes's opposition between a natural and artificial person, as in the famous exergue of chapter sixteen, when it is claimed:

> A person, is he, whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing, to whom they are attributed, whether truly or by fiction. When they are considered as his own, then he is called a *natural person*: and when they are considered as representing the words and actions of another, then is he a feigned or *artificial person*.[402]

The sovereign, in this perspective, is the person *par excellence*, since it represents all the members of the covenant. Moreover, Esposito claims,

> Given that the sovereign does not have to represent himself, not only is he an artificial person, he is also the person who represents all the other persons. To put it more precisely, he is the only agent of personalization, since, strictly speaking, before the sovereign is constituted nobody can define him- or herself as person, whether artificial or natural, because in a state of nature everyone coincides with his or her living (and, before long, dying) being. In other words, there is no such thing as the transcendence of self, which is the necessary condition of personality.[403]

Hobbes synthesises this when, in referring to those humans (children, fools, etc.), which can be personated only through a different figure, a guardian or a curator – since in possession of a defective reason –, he wrote: 'yet

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[401] Esposito (2012), p. 83.
[402] Hobbes (1998), p. 106.
[403] *ibid*. p. 85.

during the folly, he that hath right of governing them, may give authority to the guardian. But this again has no place, but in a state civil, because before such estate, there is no dominion of persons'.[404] The performance of personation, thus, depends on the possibility of being represented by and into a civil state. And sovereign is that power that could grant the possibility of being personified.

Within the covenant, the members of the political community are represented by the artificial person of the sovereign. Only in this way, thus, they can acquire a juridical personality. However, Esposito notes, under the shield of sovereign power individuals 'are established as persons' and at the same time, 'they are deprived of personhood because, as soon as they obtain it, their person is entirely absorbed by the sovereign'.[405] The sovereign, as long as it establishes the form a political community, recognises the members of the state as persons, but as a counterpart of this recognition, it gains an absolute power over them. As Hobbes wrote, the one who is carrying the person of the sovereign is 'said to have sovereign power; and everyone besides, his subject'.[406]

In Hobbes theory of the state, the entrance into the covenant makes the single members of the community properly authors of the establishment of a state in the form of a sovereign-actor, acting on behalf of the people, which "authorise" the sovereign to legislate. The sovereign is, in this regard, properly and actor, since is 'acting' according to what stated by the author, the people. However, Esposito claims, the sovereign-actor becomes in this way the 'sole author of the law'[407], gaining the power to be author itself – creating other actors (state's officials), which could become authors in relation to the subjects under his authority. This is tantamount, for Esposito, to deprive the subject of all its power and ultimately of the personality. Sovereignty, thus, operates a double process of personalisation and de-personalisation:

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[404] *ibid*. p. 108.
[405] Espoisito (2015), p. 110.
[406] Hobbes (1998), p. 114.
[407] Esposito (2012), p. 86.

persons who take on this status upon their entrance into the civil order only enter into relationship with the person who legitimately represents them. Because of this, they forfeit their capacity to represent anyone else and, more importantly, even to represent themselves. They thus lose their personal status at the precise moment they acquire it.[408]

The sovereign-actor, once it has been appointed such, becomes an agent having the monopoly of the representation of the members of the community.

State's formation, in Hobbes, consists of the merging of subjects into the body of the Leviathan: *de pluribus unum*. In this way, the subjects united in the covenant gives away the legitimated possibility of being an author, the possibility of actively decide. Therefore, the acquisition of a personality (as author of the covenant), Esposito suggests, implies at the same time the consignation of the very person to the sovereign, 'which becomes the sole author of the law', the absolute authors and ruler with 'the ability to make things, or inanimate entities, into new legal persons', and conversely 'to thrust people into the realm of things'.[409] The becoming of persons is never a definitive process; the guarantor of personality (the *pater familias*, the sovereign, the state, etc.) has in its own prerogatives the power to reverse the process and to let the inhuman emerge inside the human.

De-personification

Throughout the *homo sacer* series, Agamben has pointed out that the caesura between forms of life (qualified life-*bios*) and mere-fact-of-living (animal life), does not entail an actual separation through which it becomes possible to speak about two natures or two substances of human life. The distinction traverses the existence of human beings immanently. Much as in the Aristotelian conception of the relationship between substance and form (potentiality and actuality), the mere fact of living and the actual forms of life of the single individuals are two modalities in which the being human of human beings is expressed. As in the idea of anthropogenesis, in which

[408] *ibid*. p. 87
[409] *ibid*. p. 86.

the acquisition of language could not happen (or fail) making of a living being a not-yet-human, the relationship – in human existence – between forms of life and animal life, does not give away the potentiality of not being human anymore. It is the case of bare life, the production of a life radically exposed to the possibility of death by a political (and legal) act. It is the figure of the *homo sacer*, as a third element of the political articulation between animal and social life.

Agamben exemplifies the re-emergence of the non-human inside the plane of human existence through the figure of the *Musselman* as described and depicted by the testimonies of the survivors of the Nazi Lagers. The *Musselman* represents the last stage of the degradation of human life inside the borders of the 'camp'; the *Musselman* is deprived of every form of life, except its own simple biological living, his not-being-human. As Agamben claims: 'Auschwitz is the site of an experiment that remains unthought today, an experiment beyond life and death in which the Jew is transformed into a *Muselmann* and the human being into a non-human' (RA, 52). To describes this fundamental knot that keeps in a relation of exception non-human life and human living, Agamben looks again to the event of anthropogenesis: 'The human being is the speaking being, the living being who has language, because the human being is capable of not having language, because it is capable of its own infancy' (*ibid.*, 146). It is infancy – the not-yet-human being the ultimate possibility of being human, and in the same way, what constitute the ultimate ground of a form of life (qualified life) is the possibility of having those forms revoked that is the re-emergence of the inhuman in the form of bare life. Therefore, 'infancy is the non-human side of the human. But whereas the infant implies a transcendental possibility of a mute experience, the *Musselman* represents the dramatic figure of the inhuman' in history, 'the bare life produced by sovereign bio-power'.[410]

In the last section of the first volume of *Homo Sacer*, Agamben describes the *Musselman* in these terms:

[410] Saidel (2014), p. 173.

> Now imagine the most extreme figure of the camp inhabitant. Primo Levi has described the person who in camp jargon was called 'the Muslim,' *der Muselmann*-a being from whom humiliation, horror, and fear had so taken away all consciousness and all personality as to make him absolutely apathetic (hence the ironical name given to him). He was not only, like his companions, excluded from the political and social context to which he once belonged; he was not only, as Jewish life that does not deserve to live, destined to a future more or less close to death. He no longer belongs to the world of men in any way; he does not even belong to the threatened and precarious world of the camp inhabitants who have forgotten him from the very beginning (HS, 184-185).

The *Musselman* is an individual degraded, denuded and deprived of his/her rights, personality and ultimately of an identity, whose existence coincides with no remainders, with the precariousness of his/her bodily functions. This figure, which is destined to remain as a removal of Western historical consciousness, reminds us the extraneousness of humanity from the mere fact of living. And at the same time exposes, explicitly, the hidden foundation of the social and political self: that mere-animal-life whose exclusion makes possible the emergence of something like human life – socially and politically qualified.

In looking at the *Musselmann*, thus, Agamben asks: what is the life of the *Musselman*? If it is not human life, what is this not-human of the human?

> Can one say that it is pure zoe? Nothing 'natural' or 'common,' however, is left in him; nothing animal or instinctual remains in his life. All his instincts are cancelled along with his reason […] the camp inhabitant was no longer capable of distinguishing between pangs of cold and the ferocity of the SS. If we apply this statement to the Muselmann quite literally ('the cold, SS'), then we can say that he moves in an absolute indistinction of fact and law, of life and juridical rule, and of nature and politics. Because of this, the guard suddenly seems powerless before him, as if struck by the thought that the Musselmann's behavior-which does not register any difference between an order and the cold-might perhaps be a silent form of resistance. Here a law that seeks to transform itself entirely into life finds itself confronted with a life that is absolutely indistinguishable from law, and it is precisely this indiscernibility that threatens the lex animata of the camp (HS, 184-185).

When in the state of exception human life is denuded of all its forms, bare life emerges as the third element in the articulation between *zoē* and *bios*; as a pure form of organic life, deprived legally of any personality. What is the life of the *Musselmann* (of the overcomatose, of the VP, of the migrant

trapped in a sinking ship) if not the existence of a subject that has his/her personality completely suspended? The life of the *Musselmann* is nothing other than the condition of a life that has lost every form, remaining exposed to the radical contingency of irrevocable political (and legal) decisions. The measure of the deprivation of the nationality that the Nazi regime implemented as a racial policy toward the Jews assumes here the decisive significance of a proper act of de-personalisation, in the form of deprivation of the possibility of bearing rights and duty, which constituted the first step toward the "camp".

Here sovereignty, thus, exposes itself as that absolute power, which holding life in its ban has the power to separate – in the plane of the very existence of human beings – the mere life of the subject from its person; the simple fact of living from its socially and historically produced forms. And yet in not exercising this faculty, sovereignty maintains the force to keep (in human life) the mere fact of living in a relationship with the different forms of life; to determine the articulation between the personal and the impersonal. Sovereign power is, thus, the guarantor of the bond that keeps in a relation of exception life (*zoē*) and its forms (*bios*) and marks the ultimate entrance of life into the juridical and political sphere.

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The acts of personalisation and de-personalisation – examples of the process of *subjectivation* and *de-subjectivation* – are always, to a certain extent, depending on external sources with respect to the existence of the singular subjectivity. As I tried to bring to light in this chapter, the development of the dynamic of legal personification (and subjection) is always a mechanism of entrance into, while, on the contrary, the process of de-personification is an operation of exit from. The status of a person – as a proper mask – covers the existence of the subject as a body, as mere animal life. In the same time, it is the 'personality' that makes the human such, and that gives to the subject the 'value' of the person. For these reasons, I have suggested that the law, determining what is personal and what is not personal, replicates – in a way – the process of anthropogenesis, establishing what counts as human and inhuman, and therefore, could be seen as a proper

anthropological machine. The person, thus, operates as a biopolitical dispositive that allowed the law to decide on the status of the living, separating (and rearticulating) the properly human form the inhuman (or the not-yet, quasi-human).

In summary, in this chapter, we have found that:

1. The concept of person, which in the development of Western culture, ended up defining the human being qua human, has a legal origin. More precisely, it represented, in Roman law, a proper dispositive that allowed for the distinction between things (*res*) and persons (*personae*). In the Latin world, the person designated the social role, the mask that a specific subject had in the sphere of law and society. However, not all humans were persons. According to Roman law, while all human beings were *homines*, only certain subjects were properly persons (usually *patres*), the others were always in the condition of being in 'possession' of a person. Therefore, the legal dispositive of the person replicated in the sphere of human life, the distinction between person and thing-person.

2. In the evolution of western culture, in the interplay between religion, law, politics and morality, the idea of person became the signifier for the modern conception of the human subject. However, in this process, the person kept intact a logic of inclusion/exclusion of the natural human substrate, of the bodily-impersonal existence of human being. As in Roman law the person divided and articulates the human with things; in the later development of the concept of person became a dispositive that divides and articulates on the plane of human existence, nature and culture, mere life and form of (qualified) life, animality and rationality, the being a thing of the body and the juridical and social masks of human institutions. It can do so, firstly in performing the original separation (the *summa distinctio*) between itself (the person) and things (*res*).

3. The process of personalisation is always an acquisition, which necessitates the presence of a 'third party' guarantying the process. The acquisition of personality, in fact, always entails a process of 'becoming' a person, which is determined by an external power. This confirms, in a way, Agamben's thesis of the *anthropogenesis*: the human being is that entity that has to acquire its essence, its humanity. And the person is a dispositive that throughout the centuries worked marking and moving the *anthropogenetic* threshold.

4. While the person determines and delimits human subjectivity, it not correspond to the 'whole' of human existence. There is always a rest in the person, something that is excluded and included as a necessary foundation: the animality of the human bodily experience. This becomes explicit in Kelsen interpretation of the physical person, which. What we call the physical person, in law, is not the actual 'physical person' but is the sum of the imputations and right related to a specific subject. The physical person is the incarnation of such sum of obligation. Again, the bodily experience of the human is a necessary presupposition for the subsistence of something like a 'person'.

From the broader perspective of the second part of this thesis, the concept of person – and the whole apparatus of values that are attached to it – works properly as anthropological machine determining the threshold that separates and connect the human and the non-human. Thus, the person is a dispositive that makes possible the consideration of a form of life as properly human. The person, as a mask, like the *habitus*, or like the office, is a category that determines the human existence as split into two natures – one of which is excluded and posed at the bottom as hidden support. The category of person, in this regard, should be seen as a proper device that permits (or deny) the access to the whole set of forms of life that constitutes the existence of the singular subjectivity. What is the human person, if not the number of habits, roles, tastes, idiosyncracies, passions, statuses, that composes the everyday existence of the subject?

The dispositive of the person and in general the paradigm of the performativity of law brings to the fore the crucial question of the broader relationship between law and facts that is the capacity of law to fix – and to create – the social life it is called to regulate. How is it possible for an abstract legal category to have a tangible effect on the outside world? How is it possible for fictional legal products to sustain themselves by creating forms of life? This question is a reformulation of the crucial issue of the *force* of law, and the relationship between the words of the law and violence. This will be the theme of the next chapter.

Chapter Eight

LAW, VIOLENCE AND THE SUBJECT

In this final chapter, I will re-examine one of the fundamental concepts of Agamben's political thought: 'bare life'. There is no need, here, to retrace in much detail the source and the substance of such a notion. Rather, I would like to advance a reading of bare life that underlines its nature as a product of the relationship between law and life. That said, in what follows, I aim to bring to light how bare life is, in a sense, the product of the "force of law"; that is, of the supposed necessary encounter of law and violence. Bare life, in fact, represents *the locus*, the place of the action of the law: it is the point of the anchorage of law to life.

As I have suggested in the previous chapter through the reading of Kelsen's idea of "person", rights and legal obligations need to be grounded in the concrete existence of the subject. The fiction of the person (as the sum of all rights and legal obligations) has to be "personified" to be declared as existing. The bare life of the individual, in Agamben's perspective, is the real – proper – subject: it is the place in which all the legal and social determinations, all the different forms of life and obligations, lie. However, bare life is not something original, rather – as we have already seen – it is the product of the relation between law, sovereign power and life. Bare life is the place of the exercise of sovereign-legal violence; it consists in the outcome of the encounter of a "life" and the force of the law, of a body and the violent means the word of the law necessitate to be effective. Bare life, thus, represents the proper subject – the actual substance of human life under the sovereign ban and its production accounts for a process of subjectivation. This chapter, thus, will be a further step in the critical comprehension of Agamben's theory of the subject.

Law's Subjection

As the second part of this work tried to establish up to this point, the law has a specific *anthropogenetic* function, in the sense that it contributes to the determination of the threshold that separates and articulates the human from/with the non-human (or the personal and the impersonal); establishing through its institutions and categorisations many of the most peculiar aspects of human life. This was the main argument that the speculation over the concept of person, the habit of the monk, the imperative, tried to advance. It seems to be inscribed in the functioning of the law, the power of shaping human life, separating – on the plane of human existence – a substance (as subject – the material substrate) and an essence, a person – namely the various forms of qualified life and institutions, according to which human beings find themselves living in. In this sense, the order in which humans live, determines the very subjectivities of the individuals – as a composition of an impersonal organic life (the body, the mere fact of animal living) and of a personal, legally (but also socially and politically) form of qualified life.

This process of the production of subjectivities, though, entails a peculiar paradox. What turns out to be the most proper and personal aspect of human subjects depends on the recognition and legitimation of a specific form of power that is external from the singular-personal existence of the subject. If the person is determined socially and legally, this means that what makes us human qua persons and not animals (or non-persons) is established by something that is ultimately other than the person itself – and that pre-exists the life of men and women. The process of subjection and production of subjectivity, though, replicates the logic of the anthropogenesis: we could say that it represents its epiphenomenon.

The operation of subjection is summarised precisely by Judith Butler in the introduction to her book *The Psychic Life of Power* when she writes:

> To be dominated by a power external to oneself is a familiar and agonizing form power takes. To find, however, that what 'one' is, one's very formation as a subject, is in some sense dependent upon that very power is quite another. We are used to thinking of power as what presses on the subject from the outside, as what subordinates, sets underneath,

and relegates to a lower order […] But if […] we understand power as *forming* the subject as well, as providing the very condition of its existence and the trajectory of its desire, then power is not simply what we oppose but also, in a strong sense, what we depend on for our existence and what we harbor and preserve in the beings that we are. […] Subjection consists precisely in this fundamental dependency on a discourse we never chose but that, paradoxically, initiates and sustains our agency. 'Subjection' signifies the process of becoming subordinated by power as well as the process of becoming a subject.[411]

In the last three chapters, I have tried to show, through a reading of Agamben's insights into the relationship between life and law, how law produces a proper process of subjection. The different forms of life, through which humans experience their own being, are in fact, institutionalised fragments of life, whose ritual repetitions are shaping the agency of the subjects. In Foucault's terminology the, institutionalisation of life in forms, is a 'form of power that makes individuals […] subject to someone else […] and tied to his own identity'. The law in this light 'subjugates and makes subject'.[412] Humans, though, *acquire* the form of their subjective living: they become subjects through the adherence to pre-determined institutionalised forms.

The account of law's subjection offered in this thesis does not aim to be, nor could it ever be, a complete and exhaustive reconstruction on the question of subjectivation. The problem of the "subject", since the outset of modern times, and perhaps much earlier, is a recurrent "obsession' of philosophy" (and science more generally). Rather, the second part of this thesis aimed at shading some light, from a theoretical-philosophical point of view, on the relationship between law-sovereignty and life, reading sovereign-legal power in its productive *action*. The "juridico-political subject" is one of the many forms subjectivity assumes in the scene of human living. In different ways, the law (as both a state's legislation and social norms) shapes the limits of human social interactions (both at a practical-concrete and symbolic levels), and 'ostensibly embodies our most respectable values, understand us as recipients of, and actors within, fixed codes and powers: we are subject of and to the monarch, the State and the

[411] Butler (1997), p. 2.
[412] Foucault (2001), p. 331.

law'.[413] As I have tried to show normative regulation is something that – to use Wittgenstein's words – is a 'fact of natural history'.[414] The institutionalisation of life, on the one hand, determines the most proper nature of human living; while on the other hand, it separates humans from what is considered as a natural-animal-form of life. In any case, though, it determines and shapes human life into distinct recurrent forms.

With his work in the field of biopolitics, Agamben has traced the contours of an ontology of legal and political subjectivation. The paradigmatic examples of the monastic rule and the concept of the *office* offer a peculiar understanding of the relationship between law and life, which, differently to what had been theorised by Foucault and Bourdieu – among others – favoured ontological speculation over a more sociological (in the sense of directed to the actual manifestation of the forms of subjectivity) understanding of the subject.[415]

Human subjectivities are, for Agamben, always split into two spheres (bare life and form of (qualified) life), the separation and articulation of which goes to determine the singular existential dimension of the individual. The political performance of the separation between *zoē* and *bios* – and the creation/presupposition of a bare life – involves the very existence of the human being *qua* human; and the law (as I suggested in Chapter seven) replicates such a split – dividing and articulating the personal and the impersonal, the proper human and the inhuman, the animal and the non-animal. What is most proper in this essential separation is that it occurs immanently to the plane of human existence. Subjects comprehend their existence as human only through the rejection of the non-human in the form of the animal. However, the non-human, the animality of organic life, is shielded at the core of human existence. Mere life, the simple natural bodily presence, represents the proper substance (the most authentic subject) of the many different forms that human life acquires.

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[413] Mansfield (2000), p. 4.

[414] Wittgenstein (1969), p. 358.

[415] For a general overview of theory of the subject in Foucault, see: Mansfield (2000); Butler (1997). Bourdieu has elaborated a theory of the subject and of the process of subjectivation through the elaboration of the concept of "habitus". See: Bourdieu (1977). On Bourdieu's habitus see also: Wacquant (2004; 2009).

In light of what I have suggested in the previous chapters through a close engagement with Agamben's thought, the law is intended as primarily performative: legal utterances have specific and concrete effects in the world they are supposedly called to regulate; they create that 'world' as such in the first place. In Chapter six I tried to demonstrate, that legal regulation gives rise to particular (controlled or uncontrolled) effects that provide a form to the human environment. The law is composed of words whose effect gives a shape to human life, simply from the moment of their particular manner of enunciation. The law conveys a power that is made concrete through language, and language is made concrete through the command of the law. It is worth interrogating at this point the very efficacy of the law, that is to say, the relationship between the language of rules and the world. In which way does the law affect the world? How does language create binding effects? If the law – as I have suggested in the previous chapter – is constituted by artificial fictions (forms of life), how is it possible for a fictional categorisation to determine real effects in the world?

I argue, here, that these questions are nothing other than reformulations of the crucial and long-standing problem of the "force of the law". This is also, to put it in other terms, the perennial question of the application of the law: an issue that rests at the base of the comprehension of the normativity of law and rules more generally. The peculiarity of the norms of law, as Agamben claims, is that their application 'is in no way contained within the norm and cannot be derived from it; otherwise, there would have been no need to create the grand edifice of trial law' (SE, 40). Much like the gap that divides language (linguistic experience) and the world (non-linguistic experience), 'between the norm and its application, there is no internal nexus that allows one to be derived immediately from the other' (*ibid.*, 40). An external element is required to make legal statements efficient and to make legal utterances performatively real. As Agamben suggests – following the theses of Walter Benjamin – we could call this element "violence". As I will establish in the following pages, it is thanks to the possibility of the exercise violence that the law acquires its

force. Or, using Benjamin's words, it is through violence that the law 'conserves' itself.[416]

Furthermore, the question of legal violence, in Agamben, is strictly related to the figure of bare life and, to the question of the subject and more generally, to sovereign power. 'The bearer of the link between violence and law', Agamben claims, is 'bare life […] the rule of law over the living exist and cease to exist alongside bare life' (HS, 65). Bare life, as claimed previously is the 'proper subject', the hidden foundation of human subjectivities under the sovereign ban. Bare life, to put it bluntly, constitutes the price subjects pay for the protection and recognition of power that has to be assumed as sovereign. Agamben summarises this peculiar performance of sovereign power and the law as follows:

> The *puissance absolute et perpetuelle*, which defines state power, is not founded — in the last instance — on a political will but rather on naked life, which is kept safe and protected only to the degree to which it submits itself to the sovereign's (or the law's) right of life and death […] The state of exception, which is what the sovereign each and every time decides, takes place precisely when naked life—which normally appears rejoined to the multifarious forms of social life—is explicitly put into question and revoked as the ultimate foundation of political power. The ultimate subject […] is always naked life (MWE, 4-5).

In normal time, when social and political life flows without clashing with the limits of normality, bare life remains excluded from the *polis*, relegated as the hidden foundation of the community. In the state of exception, instead, bare life appears as the main subject, as the authentic substance of law and political power.

At this point, it is crucial to interrogate the relation that ties law (sovereign power) and violence, since violence ultimately guarantees the efficacy of law and its capacity to exercise its power of subjection. According to Agamben's critique of sovereignty and law, the possibility of using legal violence – that is to say, the possibility of implementing violence without bearing any legal responsibility for it – is the element that determines the existence of bare life. Therefore, bare life is, as I will argue below, the place of the application of legal violence; and it represents, though, the necessary

[416] Benjamin (1978).

ground for the efficacy of the law. The effectiveness of the law, its performativity, though, is strictly related to the production of bare life, as the sphere of application of legal violence.

In this chapter, I will proceed as by introducing, in the next section, the crucial theme of the force of the law as the problem of the relationship between the text of the law and the violent means that are implemented to guarantee its efficacy. The following section will move on in examining further the question of the force of law, through the thought of Agamben. In this part, I will argue that in his critique of Western legality is present the attempt to analyse legal violence genealogically. In the text the *Sacrament of Language. An Archaeology of the Oath*, Agamben suggests that legal violence (in the form of penalties and punishments) is an instrument that historically has been implemented to guarantee the actual performativity of law. In the last section, instead, I will scrutinise the idea of bare life, as the product of legal violence. Bare life – as the ultimate subject of law – is the result of law's attempt to gain efficacy implementing violent means.

The force of law

Despite that in the second half of the 20th century, under the decisive influence of the work of H. L. A. Hart, legal scholarship pushed it aside, the question of the functional bond between law, violence and force remains a central trope of jurisprudence.[417] Paradigmatic, in this regard, is the classic interpretation offered by Max Weber and Hans Kelsen, who endorsed a view of the state and the legal order as ultimately coercive orders claiming 'the *monopoly of legitimate force* for itself'.[418] It is also worth mentioning the

[417] Hart (2012). In his *The Concept of Law*, which is by now a classic of 20th century Jurisprudence, Hart inaugurated the tendency to marginalise the role of coercion and threats in the practice of the law.

[418] Weber (2008), p. 156. H. Kelsen (1967). Generally in jurisprudence the idea that coercion, penalties and ultimately what we use to call "force", are the essential elements making the law functioning, is traced back to the thought of Jeremy Bentham and John Austin. See: Bentham (2010); Austin (2009). The two authors are the most prominent exponents of the "command theory of law", according to which the law is made of commands supported by threat. On the "command theory of law" see: Schauer (2015), especially chapters 1-3.

jurist Rudolph von Jhering who resolutely insisted that 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'.[419] More recently, Robert M. Cover, in a series of article, sustained that violence is such a determinant element of the law that the efficacy of legal interpretations and legal judgement depend on it.[420] These are just a few examples amidst a vast literature that has brought to the fore the questions of violence and force as determinant elements for the actualisation of law.

The paradox of the relationship between law and violence could be enunciated as follows: the law absolves its function as a deterrent to violence through the application of violence. Perhaps there is no better exemplification of such a paradox than the one offered by René Girard in his seminal work *Violence and the Sacred*. In the juridical system, Girard writes, the penalty represents a form of revenge that 'succeeds in limiting and isolating its effects in accordance with social demands'[421], with its own subsequent nullification. There is not a substantial distinction between private revenge and public revenge in the form of punishment: in both cases, violent deeds are reactions to given events. However, the violence exercised by the juridical system has the particular capacity of interrupting the potentially infinite cycle of revenge. The law makes humans free 'from the terrible obligations of vengeance'[422], holding the means for 'stifling'[423] the spreading of violence in society. Therefore, the acquisition of a decisive faculty of limiting violence (and of pursuing justice) is, for the law, determined by the possibility of implementation of specific forms of violence.

A significant categorisation of legal violence could be found in Benjamin's influential essay *Critique of Violence* of 1916. Here, violence is portrayed as the determinant element for the subsistence of law. 'When the consciousness of the latent presence of violence in legal institutions

[419] von Jhering (1913), p 190
[420] Cover (1986), p. 1613.
[421] Girard (2013), p. 24.
[422] *ibid.* p. 23.
[423] *ibid*. p. 24.

disappears', he wrote, 'the institution falls into decay'.[424] As it is well known, for Benjamin legal violence is expressed in two main forms: a genetic-law-making violence [*rechtsetzend Gewalt*] that could be referred to a revolutionary party (or to a holder, generally, of constituent power), functioning as the original positing of law; and a law-preserving [*rechtserhaltende Gewalt*]one, manifested in the whole set of institutions apt to the conservation of the order.

In the perspective of Benjamin's *Critique of Violence*, the law is in need of monopolising violence, not much for the protection of a supposed interest of the single members of the community, not even for a given idea of justice. The law necessitates violence for the sake of its own self-preservation. The law does not tolerate any form of violence other than its own violence. Giving space to non-legal violence would mean, from the point of view of the law, to open up the possibility of the re-emergence of the creational potential entailed in any violence, threatening in this way the endurance of the order. Therefore, the crucial point of Benjamin's argument, as Derrida noted, is that the two forms of violence are not mutually exclusive: the violence that 'threatens law already belongs to it, to the right to law (*droit*), to the law of the law (*droit*), to the origin of law (*droit*)'.[425] Violence, in this sense, is always tied to the possibility of establishing a new order; law's preserving violence, thus, could be considered as a type violence that has suspended its creative potential. It follows, though, the paradoxical status of the law, which could be such only if it remains in connection with its violent origin. The passage from the foundation to preservation is never definitive, but rather inaugurates a dialectic movement between law-making and law-preserving violence – where the latter should prevent the former. And, accordingly, every law-making act (in the form of revolution) is destined to be followed by the institution of law-preserving violence, in the form of an organised power.[426]

In light of the Benjamin's *Critique of Violence*, law exposes its essential tie to violence in two fundamental ways: as a 'violent foundation' – which

[424] Benjamin (1978), p. 288.

[425] Derrida (1992), p. 35.

[426] To this eternal return of law, Benjamin opposed a form of "divine" violence that nor make neither preserve, but destroy (or overcome) the law.

the western legal and political tradition usually locateed in a context of conflicts and revolution; as the whole series of apparatuses and institutions, administering the application and the preservation of law. Law's violence, in the latter sense, becomes visible in the violent deeds of legally legitimate actors: police guns, the execution of tribunal sentences, the jail system, and all those instruments apt at granting law's efficacy that fall under the category of "law enforcement". This "idiomatic expression", which is a technical term for the definition of the implementation of the exercise of the police force, exposes the essential bond that conjugate the real operation of the law – as regulation and administration of the life of humans – to violence. As Derrida noted, to 'enforce the law,' or 'enforceability of the law or contract' are statements reminding us that the

> law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable. Applicability, 'enforceability,' is not an exterior or secondary possibility that may or-may not be added as a supplement to law. It is the force essentially implied in the very concept of justice as law (*droit*), of justice as it becomes droit, of the law as '*droit*' […] The word 'enforceability' reminds us that 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. There are, to be sure, laws that are not enforced, 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, and so forth.[427]

Under the normative cover of law, violence dissimulates its violent essence, assuming the form of the legitimate use of force. From the point of view of the law, violence is what falls outside its own realm: violence is the illegitimate or unauthorised use of force against others. In this regard, murder is a violent act, while capital punishment by a legitimate state is not.[428] Legitimacy is 'the minimal answer to a sceptical question about the ways law's violence differs from the turmoil and disorder law is allegedly brought into being to conquer'[429]: to state it in simpler terms, the use of force

[427] Derrida (1992), pp. 5-6.
[428] Wolff (1971); Sarat (1995).
[429] Sarat (1995), pp. 4-5.

without law becomes violence, while violence with the law is a legitimate force.

The image of a structural impotence of law's letter and a profound anthropological pessimism are the two main ingredients of the notion of law enforcement. Let us take, for instance, two passages from an introductory manual to law enforcement and criminal law:

> Law is a body of rules for human conduct enforced by imposing penalties for their violation. Technically, laws are made and passed by the legislative branches of our federal, state, county and city governments. They are based on customs, traditions, mores and current need. Law implies both prescription (rule) and enforcement by authority.[430]

The possibility of being enforced is not only a determinant element of law but is what determine the very destiny of law:

> Without means of enforcement, the great body of federal, state, municipal and common law would be empty and meaningless. Recall that law implies not only the rule but also enforcement of that rule. All forms of society rely on authority and power. Authority is the right to direct and command. Power is the force by which others can be made to obey.[431]

The form of power expressed by the law in order to make "others" obey, takes the forms of violence, threats of violence or reprisal – that is to say *coercion*. And, as Frederick Schauer sustains, in the book *The Force of Law*, 'coercion in law is so ubiquitous' that it 'may be the feature that, probabilistically even if not logically, distinguishes law from other norms systems and from numerous other mechanisms of social organisation'.[432] The possibility of the implementation of violent means to guarantee the respect and the efficacy of the law is not something accessory, but rather constitutes a distinctive trait of the life of the law.

It seems to be implicit in the theorisation of the necessity of violence for the law a kind of weakness of legal words, which without the external element of the violence (of their enforcement) could not shape human behaviour effectively. Violence, force and the whole apparatus for the

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[430] Wrobleski and Hess (2006), p. 4.
[431] *ibid.* p. 61.
[432] Schauer (2015), p. 98.

implementation of the law is, thus, organised and structured to make the meanings of legal utterances having a proper effect in the world. If we are taking with the necessary honesty Schauer statement, we should conclude that what distinguishes the text of the law, from other systems of norms is ultimately coercion and the possibility of using violent deeds. *The law, in this perspective, results from the conjunction of a significant language and violence.*

A Genealogy of Legal Violence

The motif of the essential link between law and violence stands out as one of the recurrent themes in Agamben's work. As he explains in the second chapter of *Homo sacer - Sovereign Power and Bare Life*, the idea of a functional association of law with violence is rooted in one of the foundational concepts of the legal and political tradition of the West that is the principle of law's sovereignty. In the 'most ancient recorded formulation of this principle, Pindar's fragment 169', Agamben claims, the sovereign character of *nomos* [law] is determined 'by means of a justification of violence' (HS, 30-31). The fragment is recited as follows: 'The *nomos*, sovereign of all | Of mortals and immortals | Leads with the strongest hand | Justifying the most violent | I judge this from the works of Hercules' (*ibid.*, 30). Pindar's fragment, for Agamben, left to Western political and legal traditions the very idea of sovereignty as a junction of law and violence; *nomos basileus* 'contains the hidden paradigm guiding every successive definition of sovereignty: the sovereign is the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence' (*ibid.*, 32). At the heart of this fragment lies the unification of two antithetical terms '*Bia* and *Dikē*, violence and justice', *nomos* 'is the power that achieves the unification of the two opposites' (*ibid.*, 31). Therefore, violence turns out to be a necessary part of the possibility of being sovereign of law.

Indeed, also in Hobbes – Agamben noted – sovereignty constitutes itself in relation to violence. The 'absolute power of the sovereign' in fact, is justified by the equation of 'state of nature and violence (*homo homini lupus*)'

(*ibid.*, 35). The crux of the Hobbesian idea of sovereignty remains the right to do anything to anyone, (proper of every individual in the state of nature), in the form of the power to inflict punishment. The original violence is permeating human existence in the state of nature, thus, is preserved – at the heart of the community – in the form of the absolute power of the sovereign. Therefore, Agamben claims, sovereignty 'presents itself as an incorporation of the state of nature in society' (*ibid*.).

It is on the terrain of the exception that Agamben interrogates the operational correlation between violence and law's application. Following the Schmittian lesson, he exhibits how the state of exception reveals the chasm separating law from its actual deployment; especially given that, the exception's task is to suspend the norm in order to create the conditions for its application. Therefore, in the exception is revealed, explicitly, the distance between the statement of the law and the practical actualisation of its contents. 'In the case of the juridical norm', Agamben claims, the decision of the 'concrete case entails a trial that always involves a plurality of subjects and ultimately culminates in the pronunciation of a sentence, that is, an enunciation whose operative reference to reality is guaranteed by the institutional powers' (SE, 39-40). The actual application of the norm in law, though, is never included in itself but depends ultimately on something external: on the set of institutions and apparatuses appointed to fulfil such a task. The force of law, thus, to be produced, necessitates a force that the law – as a significant set of utterances – does not possess. This peculiar character of law is – as suggested in the previous section – summarised in the telling expression "law enforcement". And it is the institutional edifice of the practice of the application of legal norms along with the administration and implementation of violent means that guarantees the force of law.

Following Schmitt, Agamben observes how the exception operates a separation between the force of the law and law itself: the state of exception determines the appearance of a situation in which a given existing legal order finds its force suspended, and extra-legal acts acquire legal meaning and force (of law). The exception, thus, liberates the force of law from the

text of the law, exhibiting in this way the non-formality of law's force. As Agamben points out:

> In this sense, the state of exception is the opening of a space in which application and norm reveal their separation and a pure force-of-law realizes (that is, applies by ceasing to apply [*dis-applicando*]) a norm whose application has been suspended. In this way, the impossible task of welding norm and reality together, and thereby constituting the normal sphere, is carried out in the form of the exception, that is to say, by presupposing their nexus. This means that in order to apply a norm it is ultimately necessary to suspend its application, to produce an exception. In every case, the state of exception marks a threshold at which logic and praxis blur with each other and a pure violence without logos claims to realize an enunciation without any real reference (*ibid.*, 40).

At this point, the speculation on the exception intersects with the paradoxical relationship between law and the violent means of its realisation and enforcement. In the state of exception the violent force of the law, which in regular legal practice is tied and conveyed through formal procedures, is detached by the law liberating its creational power as a tool for the re-statement of a suspended law or the creation of a new one. The state of exception, thus, liberates and makes visible the violence supporting and sustaining the law.

Something like an archaeology of legal violence is offered by Agamben in the volume *The Sacrament of Language: An Archaeology of the Oath*. In this text, relying upon a series of classic documents on oath (from ancient Greek legal practices and philosophy, to Cicero as well as more modern examples), Agamben undertakes an archaeological deconstruction of the practice of the oath, aimed at exposing what he has defined as the original 'experience of language' (SL, 53). What represents the crucial point of his research – the element buried under centuries of development of western culture and tradition that a philosophical archaeology pursues to bring to light – is that it allows for the reconsideration of the very performative essence of language. What the sphere of religious, legal and political rituality – to which the practice of the oath is related – covered up is the specifically peculiar human phenomenon of the "actualisation" of human language: the making up of a world out of language, or in other words, the creational potential implicit in the speech act.

To express this particular essence of the oath, Agamben turns to Émile Benveniste, who claimed that:

> [The oath] is a particular modality of assertion, which supports, guarantees, and demonstrates, but does not find anything. Individual or collective, the oath exists only by virtue of that which it reinforces and renders solemn: a pact, an agreement, a declaration. It prepares for or concludes a speech act which alone possesses meaningful content, but it expresses nothing by itself. It is in truth an oral rite, often completed by a manual rite whose form is variable. Its function consists not in the affirmation that it produces, but in the relation that it institutes between the word pronounced and the potency invoked (*ibid.*, 4).

The rituality that developed in relation to the oath guarantees and 'reinforces' the statement of a pact, an agreement or a declaration. For this reason, Agamben claims that 'the oath does not concern the statement as such but the guarantee of its efficacy: what is in question is not the semiotic or cognitive function of language as such but the assurance of its truthfulness and its actualisation' (*ibid.*, 4).

Throughout a tight engagement with the philological and philosophical interpretation of the ancient sources on the matter (that, unfortunately, cannot concern us in this work), Agamben highlights three structural elements of the oath: 'an affirmation, the invocation of the gods as witnesses, and a curse directed at perjury' (*ibid.*, 31). At stake in the articulation of these three elements is the actual correspondence between language and the world; the actual concretisation of what has been each time 'promised'. The invocation of the gods as witnesses of the oath, and the curse (as a consequence of perjury and the transgression of a promise) are the two elements that have been elaborated in antiquity to guarantee the efficacy of the words pronounced in the oath.

In our perspective, it is interesting to look at the particular element of the curse since as it has been noted, it acquires a decisive function of 'a practical auxiliary for the efficacy of law'[433] (*ibid.*, 35). In antiquity, the curse played a pivotal role in the origin and function of the law as a form of a sanction of its infringement. The curse represents 'an exclusion from the religious community constituted by society: it manifests itself through an

[433] Ziebart (1895), quoted in SL, p. 35.

interdiction in the proper sense and, in its concrete application, it *is* a putting outside the law'[434] (SL, 35). The curse, thus, consists of a specific form of punishment implemented in an eventual infringement of the oath.

As Agamben has established in his work, historians agree on the fact that the curse had a function in the development and emergence of the law; the curse guarantees the validity and efficacy of law, and in a sense, it delimits the ambit of its application. To explain this point he refers to Ziebarth and his research to the form of the political curse in ancient Greece:

> Ziebarth has demonstrated, with ample documentation, the consubstantiality of the curse to Greek legislation. Its function was so essential that the sources speak of a veritable 'political curse,' which always confirms the efficacy of the law. In the preamble of the laws of Caronda one thus reads: 'It is necessary to observe *[emmenein]* what has been proclaimed, but the one who transgresses is subjected to the political curse [*ara politike]* Ziebarth has traced the presence of the 'political' curse in the legal apparatuses of all the Greek cities, […] 'This means,' comments Ziebarth, 'that the entire constituted legal order, according to which the *demos* is sovereign, is sanctioned by means of a curse'. Not only the oath, but also the curse—in this sense it is rightly called 'political'—functions as a genuine 'sacrament of power' (*ibid*., 37).

In this perspective, Agamben suggests, the process of *sacratio* that makes the *homo sacer* sacred works properly as a curse, according to which a subject due to specific infringements of the law is posed outside the legal and political community and is exposed to the absolute right of death.

The relevant point, here, is that Agamben offers an intriguing suggestion for the purposes of this chapter when he claims that the curse 'marks out the *locus* in which, at a later stage, the penal law will be established. It is precisely this peculiar genealogy that can somehow make sense of the incredible irrationality that characterises the history of punishment' (*ibid*., 38). Following a well-established historiography, thus, Agamben traced back the experience of the curse in ancient Greece and Rome the matrix of what has been later developed as penal law and the whole system of penalties and punishments, which are part of the practice of the law. In this sense, he locates precisely the sphere in which it is possible

[434] Gernet (1984), quoted in SL, p. 35.

to look at the emergence of a "legal violence", as an unavoidable element in the functioning of the law.

More important, in light of the questions raised in the second part of this thesis, is the fact that the speculations included in Agamben's archaeology of the oath, allow for the critical reconsideration of law as a performative activity. In the concluding sections of *The Sacrament of Language*, in fact, Agamben makes clear that the stake of a critique of the oath is represented by the possibility of penetrating the intimate performative character of language (and, therefore, of the law). Indeed, the fixation of the ritual components of the oath, in which the curse assumed a privileged function, developed with the specific purpose of making the words composing the statement of the oath to take place.

In the sphere of the law, the curse (and the subsequent evolution of penal law) absolved the same function: ensuring the actualisation of law's statements. The force of law that sustains human societies, 'the idea of linguistic enunciations that stably obligate living beings, that can be observed and transgressed, derive from this attempt to nail down the originary performative force' of language, and represents, 'an epiphenomenon of the oath and of the malediction that accompanied it' (*ibid.*, 70). The law, thus, is one of the oldest attempts – along with religion – to guarantee the concretisation of words in the outside world; the law – with its whole set of institutions and organised implementation of violence – in this perspective, is aimed at the actualisation of the performative character of the language.

It should be now clear in which way Agamben's archaeology of the oath represents, also, a genealogy (and archaeology) of legal violence. The system of penalties and punishment that the law entails finds its paradigmatic figure in the curse [*maledizione* from *malus dicere* – to say wrong], as an accessory element that has been elaborated in the past to punish perjury and to render the statements of an oath actual. The curse has been used to guarantee the respect of the law, to give to the words of the law a force that the weakness of human language does not have. While performativity represents the essential character of human language, men find themselves in the paradoxical position of not being able to guarantee

the correspondence between language and the world. Something other than language is needed to make the speech act to take place: to avoid language to misfire.[435] The establishment of legal procedure, in the form of the administration punishments, but also religion and rituals in general, are practices that have been developed to guarantee the performativity of language.

In this perspective, the development of penal law in the West as an organised, systematic form of implementation of violence, but also – more generally – the whole set of formal penalties typical of administrative law, is functional to the concretisation of the law's letter. Observed from the point of view of Agamben's archaeological enterprise, the violence preserving and sustaining the existence of the law is something historically determined; the evolution and technicalization of practices that have from time to time supported the substantial weakness of human language, which even though performative in its essence, is perpetually exposed to the possibility of failing. A significant consequence of this approach to law and violence is the explicit de-substantialisation of legal violence. Law and punishment are forms of organised violence that, being historically determined, are not genetically inscribed in the destiny of the human race. This opens up the possibility of thinking the separation between law and violence anew.

Violence and the Subject (on Bare life)

The bearer of the "link between law and violence" – the proper subject of law and sovereign power – for Agamben, is bare life. The exercise of violent legal means, necessary support of the maintenance of the legal order, has as its primary target and subject bare life, the mere fact of human living. As we have already seen in the previous chapter, the subject – what lies at the bottom ground – of legal imputations and responsibility is the "impersonal" bodily organic life, with its natural function and needs. The efficacy of law and sovereign power, and ultimately the existence of the political

[435] See: Austin (1962).

community, becomes possible, in this perspective 'through an abandonment to an unconditional power' (HS, 90), that is to say, though the production of bare life.

Here, *bare life* does not have to be confused with the simple natural life, *zoē*. Life becomes bare when politicised when is exposed to the real possibility of death under the sovereign ban. Bare life, thus, does not pre-exist the polis; it is rather the product of the entrance and subjugation to the sovereign ban: 'from the point of view of sovereignty', Agamben writes, 'only bare life is authentically political' (*ibid.*, 106).

The possibility of being killed, the exposition of life to death, represents the obscene – in the sense of out-of-scene – core of the politico-juridical conception of the state. Since at least Hobbes the precondition for the emergence of the state has been represented as a state of nature; an *archi-past* dominated by natural human impulses to arbitrary violence and appropriation. It is the reciprocal exposition to violence and the possibility of death, and the human self-interest to the preservation of life and property, the ground for the emergence of the state. The political community, the Commonwealth, in Hobbes terms, consists in consigning the right-to-kill, which every individual has in the state of nature, to the sovereign. The protection from others, therefore, is the counterpart of an absolute right to kill (or to punish) of the law and sovereign power.

As Agamben notes, the first appearance of 'bare life' – as the mere fact of living and as the main subject of legal imputations, penalties and violence – is included in the *writ* of 1679 *Habeas corpus*. This piece of law that has been regarded as foundational of modern Western democracies contains the first explicit statement of the inclusion of the *zoē* as the main reference of law. The text affirms that

> We command that you have before us to show, at Westminster, that body X, by whatsoever name he may be called therein, which is held in your custody, as it is said, as well as the cause of the arrest and the detention.[436]

[436] *Praecipimus tibi quod Corpus X in custodia vestra detentum, ut dicitur, una cum causa captionis et detentionis, quodcumque nomine idem X cemeatur in eadem, habeas coram nobis, apud Westminster, ad subjiciendum* (HS, p. 124).

This legal text that sanctions the rights of the individual to a fair and motivated imprisonment, for Agamben is paradigmatic of the capture of the bodily existence within the boundaries of the law as its primary subject. 'It is not the free man and his statutes and prerogatives', he claims, but rather the 'corpus that is the new subject of politics. And democracy is born precisely as the assertion and presentation of this "body": *habeas corpus ad subjiciendum*, you will have to have a body to show' (*ibid.*, 124). The act of showing the body of the subject imprisoned along with the reasons for its detention was intended as a form of guarantee of the same subject from any unlawful imprisonment. This implies, however, that for the law, the *corpus* represents the ultimate subjects of both freedom and rights, and of the punishment. Agamben summarises this aspect when he claims that

> the same legal procedure that was originally intended to assure the presence of the accused at the trial and, therefore, to keep the accused from avoiding judgment, rums-in its new and definitive form-into grounds for the sheriff to detain and exhibit the body of the accused. *Corpus* is a two-faced being, the bearer both of subjection to sovereign power and of individual liberties (*ibid.*, 124 – 125).

The body, the mere fact of living, though is the ultimate subject of the law: is the bearer of rights freedom and liberties – of the *bios*, of the person and of all the forms of life through which human beings experience their being human; and at the same time is the place, the target, of legal violence.

The law, thus, needs a 'body in order to be in force' (*ibid.*, 124), and the proper subject of law, the element upon which becomes possible to exercise a proper power of subjection, is ultimately bare life: the human being with its naked, impersonal, existence. It is on the naked body of humans that the law intervenes, and it is through the body that it can implement the punishment of its transgression. Nevertheless, the corporeal existence of the subject is also the site of the protection and care of legal and political power. Modern democracy with its whole assemblage of institutions has a distinct biopolitical essence since it is created in order to protect the very living of the individuals and in the same times necessitates

of the *flesh*, of the body, to exercise its power. Agamben, in this regard, writes:

> modern democracy does not abolish sacred life but rather shatters it and disseminates it into every individual body, making it into what is at stake in political conflict. And the root of modern democracy's secret biopolitical calling lies here: he who will appear later as the bearer of rights and, according to a curious oxymoron, as the new sovereign subject (*subiectus superaneus*, in other words, what is below and, at the same time, most elevated) can only be constituted as such through the repetition of the sovereign exception and the isolation of corpus, bare life, in himself (*ibid.*).

Bare life is thus, the subject (as *sub-jectum*, as thrown at the bottom) of law and sovereign power, and the ultimate bearer of rights and penalties.

Agamben exemplifies his conception of *bare life*, through a number of paradigms (the *homo sacer*, the *Musselman*, etc.). Among these examples, the one offered by the paradigmatic right of the *vita necisque potestas* [right to life and death], belonged to the *pater familias*, as in Roman law, is in regards to the questions faced in this chapter, particularly significant. The rights of the *pater*, gives to the father an absolute right over the life and death of his son. 'This power', Agamben claims 'is absolute and is understood to be neither the sanction of a crime nor the expression of the more general power that lies within the competence of the pater insofar as he is the head of the *domus*'. It is, simply, the expression of the 'father-son relation': in the very instant in which 'the father recognises the son in raising him from the ground he acquires the power of life and death over him' (*ibid.*, 87-88). The right of the father is not a consequence of an event or an infringement of law or customs; the *vitae necisque potestas*, Agamben sustains, 'immediately attaches itself to the bare life of the son, and the *impune occidi* that derives from it can in no way be assimilated to the ritual killing following a death sentence.' This counts as a direct acquisition of the destiny of the son by the father, for the sole reasons of having recognised the son 'qua' son (*ibid.*).

Despite being alien to any reference to the public and the political sphere (since it refers only to the sphere of the *domus*), the right of life and death of the father represents a sort of paradigmatic figure exemplifying the essence of sovereign power. As Agamben suggests – following here Yan Thomas:

the *patria potestas* was felt to be a kind of public duty and to be, in some way, a 'residual and irreducible sovereignty'. And when we read in a late source that in having his sons put to death, Brutus 'had adopted the Roman people in their place,' it is the same power of death that is now transferred, through the image of adoption, to the entire people. The hagiographic epithet 'father of the people,' which is reserved in every age to the leaders invested with sovereign authority, thus once again acquires its originary, sinister meaning. What the source presents us with is therefore a kind of genealogical myth of sovereign power: the magistrate's imperium is nothing bur the father's *vitae necisque potestas* extended to all citizens. There is no clearer way to say that the first foundation of political life is a life that may be killed, which is politicized through its very capacity to be killed (*ibid.*, 88-89).

At this point, it is useful to reflect upon the father/son relation in Roman law, since it shed further light upon Agamben conception of sovereignty. The *pater* is that authority which has absolute power over the life of his son for the sole fact of having recognised it as his son. The son, consequently, is immediately exposed to an unconditional power of death represented by the authority of the father, for the sole fact of having being recognised as a son. What makes the son exposed to the right of the father is his recognition as a son; that is the entrance of a subject – in the form of an infant – into the sphere of law, under the legal category of "son" [*filius familias*].

The figure of the son in Roman law is exemplary of what Agamben has defined as the leading performance of sovereign power: the inclusion of life (in the form of bare life) into the realm of law. The son – as much as the citizen, the voter, the porn star, etc. – pays for its recognition – its acquisition of rights and the enjoyment of being a member of a family, society, and so forth – with the possibility of his/her legitimate suppression. The figure of the *filius* is paradigmatic for the existential dimension of the subject under sovereign power. The entrance into the political community, aimed at gaining a certain degree of security, is paid back with the possibility of being killed by the sovereign. Bare life, the form that mere life assumes when trapped into the sovereign ban, consists in the existence of the subject when a power that is sovereign in this regard has decided on the deprivation of all its rights except the right to be killed. Therefore, bare life is a form of existence whose removal and abandonment into the hands of

the sovereign represent the necessary presupposition of the establishment of the political community.

Bare life, thus, is not something natural, or more original; something that constitutes the immutable nature of the subject. It is, rather, the product of the very structure of sovereign power and the law: the result of the possibility of implementing (legally) violence. If the law to be valid needs violence, bare life – the *zoē* as the subject of legal violence – is the necessary presupposition the law needs to be effective. 'All living beings are in a form of life', (UoB, 277) Agamben claims, and the crucial matter here is that every form of life – as the pre-ordained set of institutions, habits, rules, etc. that renders the animal-human a person (and therefore properly human) – has at its core (as a "proper substance") bare life. Humans, thus, pay for the faculty of being recognised as human, with the possibility of being the subject of legal-sovereign violence. Therefore, Agamben could claim that the proper subject of a political community structured upon the exercise of sovereign power in the form of a valid law, is bare life: a subject of the violence that makes the law functioning as law, the bearer of rights and the ultimate object of the care of the sovereign government.

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At this point, it should be clear how and why bare life has to be considered as the outcome of the encounter between the mere life of the human (*zoē*) and the possibility of implementing sovereign violence. Bare life represents the subject, what lies (presupposed) at the bottom of the very existence of human beings under the shield and the sword of law. Bare life is, thus, the substance, upon which all the forms of life, constituting the essence of the singular individual, rest. Consequently, it represents a proper existential category, referring to the naked bodily existence of the subject (of the law and sovereign power).

The emergence of bare life has to be considered as the proper mechanism for the production of subjects. In Agamben's terms, indeed, bare life is not something "more original", but is always the result of the encounter between a body – *zoē* – and a form (or threat) of legal (in the sense also of legitimate) violence. Bare life appears at the moment in which mere

life is included in the realm of law, categorised according to specific forms and institutions and exposed to the absolute power of a sovereign. It is, thus, the political community the ultimate source of bare life. The historical development of law and politics, as a way of staying together constructed upon the acceptance of rules, custom and institutions and the promise (obligation) not to infringe them (under the threat of punishments), permitted the emergence of bare life. It is a peculiar performance of the legal and political order to divide the happy life of the man/animal, into bare life and form of life.

The process of subjection – in the sense of the creation of subjectivities – always involves a certain form of violence. If, as Agamben noted, bare life is the 'ultimate' subject, the substance of all different and contingent forms of life, then legal violence is the necessary element in the process of the establishment of subjects, since it is the possibility of implementing violent means, legally, that gives rise to bare life in the first place. In this sense, the splitting of the subject – between a substance (a body, naked life, etc.) and an essence (a form of life) – is the result of the possibility of the exercise of violence sovereignly: that is to say, without committing a crime.

CONCLUSION

The constant presence of the thought of Agamben as a pivotal reference for scholars inclined to offer a critical account of the global political situation represents to some extent an anomaly. His political and philosophical writings are imbued with theology, philology, linguistics, poetry and an acute understanding of the history and theory of the operations of law; all framed upon an erudite handling of classic philosophy. His style and methodology, hinged upon the idea of paradigm and philosophical archaeology, render his writing style often allegoric, enabling his shifting between different subjects and semantic planes. Agamben's political points, too, are neither immediately accessible nor easily appreciated as viable, especially since they are often displaced on the level of ontology. However, such a liminal and shifting thinking is what renders his thought particularly useful. The more than two decades' long series *Homo Sacer* has traversed the borders of academic disciplines, providing renewed sources of inquiry for the orientation before the contemporary widespread biopolitical violence and economic administration of life. This thesis is in a way a tribute to the relevance of an author, whose sophisticated work continues to encourage the critical thinking of the present.

With this research, I tried to expound, analytically, some of the central themes of the critical account of legal and political thought that Agamben has offered in his *Homo sacer* series. The eight chapters composing this work are thought of as proposing specific theoretical paths through Agamben's oeuvre, which in their autonomy and mutual interaction aim to offer a, hopefully, meaningful contribution to the field of continental legal philosophy. More specifically, I argued that Agamben's *Homo sacer* project provides a fundamental theoretical framework for the comprehension of law and sovereign power in contemporary biopolitical regimes. The central

hypothesis that this thesis has sustained is that Agamben's theorisation of biopolitics offers a way out from the theoretical deadlocks that Foucault's work has, inadvertently, left exposed in the current discourse on biopolitics. Agamben succeds in this in two main ways: first, he redefined the contours the theory of sovereignty in relation to biopolitics (shading light over the tight bond that ties together sovereign power, life and governmental practices); second, with the concept of "form of life" he has disclosed a biopolitical interpretation of law, providing, also, the ground for an innovative theory of the subject.

This work, consequently, has been structured in two parts. The first part has been organised around Agamben's engagement with the question of sovereign power. Rather than focusing on the problems of the state of exception or the camp – given that the critical literature on such topics is more than abundant – I proceeded with the analysis of sovereignty in its relation with (social) life and government; putting ideally, in this manner, Agamben's thought in dialogue with Foucault's. The second part of the thesis, instead, has been devoted to the disentanglement of the concept of the "form of life". A form of life is a life that has been put in form, actualised in a given (legal or social) institution, and trapped under the yoke of sovereign power. While the tone and the plane of analysis of the two parts could be sometimes divergent, they intersect on a central point: sovereignty as the power to establish the criteria of normality of the political community, to decide on the forms of life that are "inside or outside" the legal and political order. Sovereignty, in this regard, is the power that lays down, from time to time, the limits of the social and political life of the state, and in doing so, decide which forms of "life" are a part of it (and thus worthy of protection), and which are excluded.

I now conclude by summarising my reading of Agamben's analyses of sovereignty and "form of life", retracing the main points I consider crucial for the comprehension of this thesis.

The sovereign and the normality of life

Due to the importance of Schmitt's thought in the argumentative economy of Agamben's *Homo sacer* series, I began this thesis with a chapter on the Schmittan theory of sovereign power. Differently than the common critical approach to this theme (which favours Schmitt's "exceptionalist" thought), I tackled this issue by trying to bring to light sovereignty as principally a normalising power. For Schmitt, in fact, the crucial performance of the God-like sovereign consists in the determination of the boundaries of the normal framework of life of a given social group. The original institution of a political community, thus, happens through a process of normalisation, through the creation of a normative order that is also a distinct form of life for that community. The sovereign action, thus, lays down the conditions of normality for the subsistence and validity of a legal and political order.

In the first chapter, I have also sought to position the theme of sovereignty in relation to life. The normal, in Schmitt's perspective, represents a certain form of life, to which the members of the community (and of the state) must adhere. The normal situation consists in habits, institutions, norms of conduct structuring the living conditions of a given group. What is crucial to Schmitt is that normality is a decisive founding presupposition of the legal and political order and that, indeed, the original performance of a sovereign power is to produce such a condition. The normality of a given form of life is, thus, the presupposition of every social and political union.

Agamben embraces this peculiar "normalising" action of Schmitt's idea of sovereign power. Significant, in this perspective, is an assertion included in the first volume of the *Homo sacer* series: 'the sovereign decides not the licit and illicit but the originary inclusion of the living in the sphere of law or, in the words of Schmitt, the normal structuring of life relations, which the law needs' (HS, 26). The sovereign decision toward the definition of the normal consists, for Agamben, in the delimitation and codification of the specific aspects of life that are deemed normal. This implies, though, the possibility of the exclusion of what is considered as inconvenient, perilous or simply not aligned with the presupposed and set criteria of normality. In this perspective, the law is functional to the detection and fixation of the

normal; it operates, in Agamben's terms, the proper inclusion of life into its realm. This is, ultimately, the sense of the idea of the inclusion of the living into the calculation and operation of sovereignty and law.

In line with what Schmitt suggested in his theory of sovereign power, also for Agamben, a normalised "form" of life is the primary function of sovereignty, as well as the unavoidable element granting the law the possibility of its efficiency and validity. However, this determines a peculiar relation between the sovereign, law and life. If a certain normal framework of life is needed to guarantee the validity of the law, this implies that a determinate form of life is a precondition for the subsistence of a legal order. However, since the legal order and sovereign power are called to regulate, to create and stabilise the life of a given community, a certain form of life is also the main object of sovereign power and law. *Life, thus, is at the same time a precondition and the content of the order*. Agamben, borrowing the term from Nancy, calls this paradoxical relation, *ban*. Life stands in a relation of the ban with the law in the sense that it constitutes its presupposition – and, thus its external reference as normal situation – and its content – since it represents the object law is called to regulate.

Differently than Foucault, who sees the relationship between sovereignty and the living in negative terms - only in the form of "to kill or to let live" - I have argued that in Agamben's thought is present a conception of sovereign power that escapes such a negative characterisation. It is true that the sovereign capture of life and the inclusion of the living into the realm of law is for Agamben possible only with the production of bare life (that is, to the exposure to an absolute right to deliver death); but this does not imply that sovereign power does not have at the same time a "positive" productive and creational function.

For an ontology of politics

As I suggested in the second chapter, a large part of Agamben's philosophical effort aimed at demonstrating how the way in which the West has conceived his political and legal categories has been influenced by the manner in which the very essence of "human being" has been thought. In other words, the categories founding politics and law owe their logical

structure, meaning and functional relationship to ontology. The very structure of the ban, characterising sovereign power in its relation with the contingency of human life, follows the logic of what Agamben has defined as a "relation of exception". This is nothing more than the very logic of "presupposition", according to which something is included, through its exclusion and placement as a foundational ground.

The structure of the exception that Agamben has defined starting from the relation between *zoē* (animal life) and *bios* (a politically qualified life – a form of life), constitutes the inner logic of the juridical tradition and of many of the experiences and phenomena that Agamben has analysed in his philosophical work. The *polis* is founded on the scission of life between mere vegetative life and politically qualified life. The human is defined through the exclusion-inclusion of animality, and law through the exclusion-inclusion of anomy and violence. For Agamben, the point of the insurgence of the relation of exception and the logic of the presupposition has to be found in Aristotle's ontology and especially in his theory of the subject [*hypokeimenon*] as well as his elaboration of the relation between potentiality and act. Aristotle's ontology has left to Western thought a proper "dispositive" that had a decisive influence in the way humans have thought their essence as humans and the rules of their being together.

As Chapter two and three have tried to emphasise, for Agamben, the juridical and political tradition of the West has been influenced in its conceptual development by ontological matrixes that have traversed history ever since antiquity. A significant example of this influence is the articulation of the so-called constituent and constituted power, which is the dominant way in which modernity has conceived the relation between the agent founding the political order (the people) and the organisation that such order has. Much like the very idea of potentiality, constituent power is thought as the power preceding and conditioning the constituted power; however, in doing so, it finds itself in an irreconcilable heterogeneous position with respect to its own creation. Constituted power, in fact, exists only as an expression of a legal and political order, while constituent power is the external and never fixed potentiality to create the order.

As Agamben has suggested in his theological genealogy of government in *The Kingdom and the Glory*, the ontological dispositive of potentiality had a decisive impact on the way in which sovereignty and government have been conceived, thanks principally to the mediation of Christian theology. Through the process of secularisation, theology transmitted to legal and political thought the essential structure of the ontological dispositive upon which the theories of sovereign power and government have been ultimately construed. The relationship between constituent and constituted power, thus, is modelled upon the divine distinction between God's absolute power (*potentia absoluta*), which rests as the absolute potential outside the created order, and God's ordained power (*potentia ordinata*), that is to say, God's divine creation.

In examining the influence, that Christian theology had in the Western conception of power, Agamben – as I argued in Chapter three – has been able to rethink the relationship between sovereignty and government (reconnecting in this way what Foucault had divided). The articulation between the two planes of God's power (absolute potential and mundane, providential government) forms the structure of what Agamben defined as a bi-polar governmental machine that constantly divides and articulates the plane of the transcendent legitimisation and the immanent praxis of governmental action and administration. The idea God's power has been translated into the political and legal language, making of the bipartite schema of the divine government of the world the model for the legitimisation of sovereign government. Therefore, the immanent government of "men and things" – logically and practically – has to be thought as the manifestation of an external, sovereign-transcendent source, whose original position functions as a transcendent-legitimating instance.

This peculiar ontological aporia allowed Agamben to reconsider the emergence of the biopolitical subject *par excellence*: the population. As I sustained in Chapter four, the idea of the population appeared as a counterpart of the idea of popular sovereignty. When in modern time, the people became the sovereign source of all forms of ordained power (becoming the ultimate bearer of the constituent power) it has inherited the ontological structure of the bipolar machine. In this way, the people – while

being considered the chief constituent agent – has been pushed into the sphere of the transcendental legitimation. The election of the people as sovereign, thus, made the people disappear, leaving the place as subject *and* object of the political, governmental care to the de-politicised mass of the population. Keeping the point of view of the bi-polar governmental machine, I have concluded that the population represents the actual (existential) dimension of the sovereign people, which in the moment of exercising its political potential as constituent agent disappears.

Form of Life

The second part of this thesis has been devoted to the investigation of Agamben's idea of form of life. With "form of life", he intends precisely the capacity of law, social norms and institution, to encase the living in forms. As I suggested, with the idea of the form of life, Agamben expresses the faculty of norms to codify and institutionalise the human living. A form of life would be, in this perspective, the whole set of rules, habits and institutions that give shape to the everyday life of the subject; namely the abstract juridical and social identities – the voter, the worker, the journalist, the student, but also the HIV-positive, the transvestite, the porn star, the elderly, the parent, the woman etc. (MWE, 6-7).

The main problem with the idea of the form of life, as I argued, is that Agamben – while facing on many occasions the question of the relationship between law and life – does not provide an organic definition of such an idea. He offers a brief definition of the form of life in the volume *The Highest Poverty*, when he claims that 'form of life would thus be the collection of constitutive rules that define it […] paraphrasing the scholastic saying *forma dat esse rei* (form gives being to the thing), one could state here that *norma dat esse rei* (norm gives being to the thing)' (THP, 71). Here, Agamben characterises the relationship between law and life ontologically. Like in the Aristotelian conception of "form", the norm gives being to the thing. The norm, thus, is formative of the human living. In stating the equivalence between "norm" and "form", Agamben is addressing the reader to a peculiar ontological understanding of human subjectivity. Like the Aristotelian form, the norm constitutes the being of the thing, starting

from the substance of organic human life. The form, in fact, needs a substance – a raw matter – to be actualised in a given form. In this sense, as I argued in Chapter five, the form of life is always the form of a substance; it is the form that mere human life takes under the action/operation of norms, institutions and habits.

Much like the Aristotelian matter (the *hypokeimenon* – the subject), for Agamben, human life is a formless-potential, a life without a specific form or vocation, which in order to be experienced as human life, needs to be institutionalised and *made* human. What constitutes primarily our human living is the repeated and obligatory forms that human culture produces. A form of life, thus, consists of the composition of all those social and legal codifications through which human beings experience their being human.

The paradigm of the monastic rule, which Agamben has presented in the volume *The Highest Poverty*, as a form of regulation of life that is so detailed that the life of the monk is rendered indistinguishable from the rule, is an example of a form of life. The *habitus* of the monk is his/her specific form of life. However, the form of life of the monk (the *habitus*) does not constitute the "whole" of the existence of the subject "monk"; rather it represents "the form" of the life of the monk. In every human form of life, it is present a reminder: organic animal life, the mere fact of living, which represent the hidden foundation of every human subjectivity. This is what I suggested in Chapter five through the reading of Wittgenstein's *lebensform* and Aristotle's conception of form: the whole, the set of essential institutions, custom and rule, which goes to determine human life rests upon "something animal" – the mere fact of living. However, the distinction between the substance of organic human life and the form of life does not imply a dislocation of the two spheres but takes place immanently to the very plane of human existence.

It is implicit in Agamben's idea of the form of life the paradoxical structure of the Aristotelian ontological-dispositive. If in fact it is the form that "gives being to things", in the sense that it is the form that makes a thing "such" thing, and by the same logic it is the "form of life" that gives being to the individual life of the subject, then what constitute the essential

of one's form of life depends on something that is acquired by the subject. The different sets of forms of life, which goes to compose the singular form of every human subject (and which distinguishes one another) are a determination of something potentially present in the mere fact of living – which is common to all humans. However, this implies that what makes the singularity of the individual subject is dependent on something that is external with respect to the very plane of the existence of the individual. The form of life of the subject, what constitutes the most properly subjective aspect of the individual, is dependent on something that is ultimately historically determined through contingent socio-political and legal processes.

The Performativity of Law

Agamben's conception of form of life encompasses the image of the law in its "constitutive" function and performative action; this is the sense of the idea of "constitutive rule" that I analysed in Chapter five. The paradigm of performativity in law assumes that law, being an essentially linguistic practice, creates its own objects – fictions – that have the power to put in form the world they are supposed to regulate. The law is capable of creating new worlds out of old ones in a process, which one could describe with Nelson Goodman as *making fact from fiction*.[437] From this perspective, all norms and institution are fictitious, in the sense that they are human artefacts that do not correspond concretely to something in the outside world. Nevertheless, the fictions of the law have a real effect and contribute to the construction of the human world. The objects of law are in a way, abstractions, reformulations of tendencies and modes of representations of human behaviour. Their operation consists in the constitution of a specific human environment, thanks to and through their performativity.

In the concluding Chapter six, through a reading of Arnold Gehlen's anthropological interpretation of the imperative form of law and human institutions, I have argued that the law has a peculiar anthropological function: it constitutes a proper human environment, the specific form of life of human being. The whole set of different imperatives, taboos, rules

[437] Messner (2012), p. 544. See also: Goodman (1978).

and obligations, give shape to a formless human life. As Gehlen suggested, human life lacks preordained (genetically formed) instincts, which are – for other animals – necessary for their interaction with their environment. Social and legal norms, thus, organise the living in "institutions" through which the individual is constituted as a human and as a member of a given community. But, in doing so, social, legal and political institutions go to form a "proper" human environment. Human life is always shaped and formed by rules and institutions (and more generally by what is called "culture"), which are all elements that are stabilised in patterns of behaviour that work by expressing some level of obligation and force.

In Chapter seven, I have furthered this argumentative line through the analysis of the legal conception of the "person", which in the general economy of the second part of the thesis, works as a paradigm for the comprehension of the particular legal categorisation of human life. In the evolution of Western law, the idea of the person assumed the role of a touchstone for the establishment of different legal (and political) subjectivities, offering the criteria for the determination of different statuses and forms of life. As I argued, the apparatus of the person makes of the law, and of legal categorisation, a proper anthropological machine, which produces different thresholds of the "human", by opposing and articulating the human and the animal (or the inhuman more generally). Moreover, the person allows the elucidation of the division of life, between a fictitious, social, juridical side and an "insufficient", animal, excluded part; between a "qualified form of life" and the "organic substrate of the mere living".

As with every performative speech act, the law is exposed to the possibility of failing in taking place. In other words, the law can miss the moment of its concretisation. There is no absolute guarantee that the predicaments of the law are met or followed. Thus, as chapter Eight has shown, the text of the law needs to be enforced to be such. The law needs violence and coercion; the norm of the law, without force, is a dead letter. It is the conjunction of the text of the law and its violent means – characteristically, but not exclusively, in the form of an organised structure of punishment – that can grant the performativity of the law. However, as I argued following Agamben's argumentation, one of the effects of legal

violence is the production of bare life as a necessary ground for the application of the law. Bare life, in this regard, is a life exposed to the possibility of being subject to a sovereign violence that being *sui juris* is "legal" by definition since it cannot be judged according to the dictates of the law.

Toward a theory of the subject

As I suggested in the Introduction, through the idea of "form of life" (the capture of human life into the machinery of law and sovereign power), Agamben advances a theory of the subject and the description of the process of creation of subjectivities, modelled upon the logical structure of the "ontological-biopolitical-dispositive". Human individual subjectivity is the outcome of a division, expulsion and presupposition of an "element" (bare life) in relation to another element (a form of life). The distinction between *bios* (the qualified life of the member of the *polis*) and *zoē*, which Agamben has introduced at the very outset of his *Homo sacer* research, traverses the very existence of human beings, forming the two polarities that – immanently – determinate human subjectivity. Human beings become individual subjects, through the separation and articulation of a "bare life" (the *zoē*, the common presupposition of a generic life for all human beings as captured by law and sovereign power), and a qualified "form of life" (as what makes the subject as singular-personal subjectivity).

As I tried to demonstrate throughout the second part of this thesis, the encounter between life, sovereign power and the law triggers a mechanism of subjectivation. The articulation of bare life and a qualified life, which represents, for Agamben, the fundamental structure of human existence, is, in fact, the key performance of sovereignty. The fundamental function of sovereign power – and of the validity of the law – is the production of bare life; the transformation of the concrete bodily existence of the human into a site of the exercise of power in the form of a legal (authorised) sovereign violence. Bare life, thus, is an existential dimension, the substance, the 'ultimate subject', (UoB, 209) upon which the form of life rest.

It is worth here stressing out that bare life could be ultimately seen as the product of the belonging to a political community as structured upon a normative legal order. Bare life emerged, as a political product, in the historical development of the forms of political association of human social groups. It is the idea that a community is necessarily founded upon the obligatory adherence to institutions, rules, customs and authorities and the promise to not infringe them, which gave room to the emergence of bare life. It is through the evolution of legal punishment and guilt that something like the possibility of being legally the subject of violence emerged. In other words, the isolation of a sphere of life as the "ultimate subject" of sovereign-legal violence is a peculiar performance of the legal and political order. The process of subjection – in the sense of the creation of subjectivities – entails as a constitutive element a certain (legal) form of violence: the division and articulation between a substance (bare life) and a qualified form of life is in this sense the outcome of the very possibility of the exercise of sovereign legal violence.

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