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**'Agamben, the Exception and Law'; Thomas Frost; University of Southampton, UK; PhD Student; tmf3@soton.ac.uk; Keywords: Agamben, exception, violence.**

Giorgio Agamben's philosophy is currently the subject of intense study and critique. Agamben's later 'Homo Sacer' work in particular has spawned a large secondary literature over the past several years. Many scholars, such as Slavoj Žižek and Judith Butler, have tried to use Agamben's work to fashion a critique of Western politics and offer avenues of resistance for oppressed peoples. To do so misses the key point of Agamben's work, namely that it concludes that the entirety of Western political and philosophical thought is trapped in a nihilism that it cannot escape from, no matter how 'radical' such thought tries to be. The law to Agamben is part of a biopolitical system that has operated from the time of Aristotle until the present day, a system that makes life the central nexus of law and power. This paper outlines Agamben's theory of the State of Exception, a phenomenon that Agamben argues is not only relevant to how law operates in emergencies or exceptional circumstances but is the basic structure of modern political life, and challenges the basic act of lawmaking itself. Agamben concludes that the exception allows sovereign power to violate international law with impunity whilst at the same time claiming that they are following the law. Any attempts to 'reform', 'improve', 'critique' or 'reimagine' the legal system only serves to perpetuate the suffering of individuals, as paradoxically the more individuals are empowered or protected with legal rights the more they are likely to suffer at the hands of sovereignty.

4,997 words.

## Agamben's Philosophy

Giorgio Agamben's work on political philosophy has generated a huge secondary literature (Calarco & DeCaroli, 2007; Norris 2005). In particular, scholars such as Butler (2004) have tellingly interpreted Agamben either as a theorist of emergency powers or as a Leftist or Marxist political theorist. Instead, Agamben is a philosopher concerned primarily with ontology; his concern throughout his various works concerns the continual redefining of the 'human' and the potential impacts of this for political existence. Agamben is primarily focused upon what is meant when 'life' is referred to.

Agamben expands upon this point at the beginning of the most well-known of his books, *Homo Sacer*. In doing so he turns to the thought of Aristotle, and in particular a reinterpretation of the *Politics* and specifically Aristotle's definition of man as a political animal. Agamben begins his analysis with the observation that the Greeks did not have one single word to refer to 'life'. The observation that languages have more than one word to designate a concept is not in itself unusual, but what is unusual is noting that a concept as fundamental as 'life' is defined in more than one way. Such an ambiguity is vital to Agamben's conclusions about the way in which power relations can exploit and redefine life itself.

Aristotle distinguished between two forms-of-life in the *Politics*, namely *zoē*, life shared by all living things, be they gods, animals or men, and *bios*, political life and designated as the proper end of man. *Bios* is always held in relation to *zoē*, as *bios* is built upon the *zoē* of man – political life is built upon natural life (Aristotle, 1984: 1278b, 23-31). This *bios* is a life created through rights and duties that are inscribed directly upon the bodies of individual *zoē* through the very fact that they are alive. This can clearly be seen through the various international rights conventions and treaties that have been promulgated, especially since World War Two. 'Human rights' are given to individuals due to the very fact that they are alive; the body is thus imbued with certain political and legal rights. This also directly ties political existence to the nation state, as the individual only becomes *bios* through being born within a sovereign state.

What is key to understanding Agamben's argument is his claim that political life, which by extension includes the rights inherent to *bios*, cannot be understood as a concept in and of itself. The rights inherent to *bios* gain their meaning through their grounding themselves against *zoē*; political existence is therefore relational, grounding itself against that which it is not. Agamben builds upon this, positing that the decisive figure of Western politics is that of *nuda vita*, or bare life (Agamben, 1998: 6). Bare life can be seen as politicised natural life, *zoē* that has entered the *polis* but does not have the rights inherent to *bios* (Agamben, 1998: 4). Bare life gives political life its meaning by allowing *bios* to use it as a concrete referent to which political existence can be measured against. This reasoning is not as abstract as it may seem. Agamben points to the relational aspect of linguistics to explain. The concrete utterance of speech does not mean anything without reference to a general scheme of language that must exist behind it to give it meaning (Agamben, 2005: ). As it is for language, so it is for life and political existence.

The issue that modern political existence has not resolved, according to Agamben, is precisely what life is. Today we have dissolved the distinction between *bios* and *zoē*, as there is only 'life' (although the two terms do live on in the lexicon through the words biology and zoology). This means that in modernity, every individual is *bios*, has political existence. Yet the political structure conceals within itself the very figure of bare life that allows the structure to operate, as modern political existence cannot admit that bare life exists; to do so would be to deny the very universalism of the notion of human rights.

Agamben's arguments can seem quite counter-intuitive at first, so it is important to consider Agamben's own admission that he is not a historian, and his analyses are, in a similar way to the work of Michel Foucault, not meant to provide a definitive historical view of political existence (Raulff and Agamben, 2004: 610). Agamben thus explores in his works classical distinctions of the political-philosophical tradition (such as public/private) and questions how the system operates. Agamben argues that the system always operates through oppositions (*zoē* and *bios* would be one of these oppositions), but that there will always be points where the oppositions are indistinguishable, termed zones of indistinction; by understanding these zones, the whole operation of power within a structure may be understood (ibid., 612). Bare life can be seen as a paradigmatic figure, representing the political fiction of the idea that every individual is endowed with certain inalienable rights. This is a fiction as this premise is based upon the opposition between political life, *bios*, and natural life devoid of political rights, *zoē*. The implications of the figure of bare life for the operation of law is to be found in Agamben's reinterpretation of Foucault's writings on biopower.

### **Foucauldian Biopower**

Biopower was a theory of power's operation which Foucault developed in his works *The History of Sexuality* (Foucault, 1978) and *Society Must Be Defended* (Foucault, 2003). Foucault was a philosopher of power, trying to unconceal the structures of power's operation in the social body and in particular focusing upon how power created the subject. Foucault's earlier works concentrated on disciplinary power, best illustrated in his work on the micro-physics of power in *Discipline and Punish* (Foucault, 1977). Disciplinary power increased the utilitarian force of the individual body through defining behaviour as normal or deviant, policing society through excluding the abnormal. In contrast, biopower concerns the juncture of two terms in particular, power and life, a juncture which when explored requires the redefinition of both terms (Genel, 2006: 44). Beginning in the eighteenth century, life itself became the focus of power. This, Foucault argued, was a society's 'threshold of modernity' (Foucault, 1978: 143).

The Foucauldian conception of biopower argued that power was now exercised in the social body through disciplinary and normalising mechanisms designed to transform and influence human life, such as the introduction of national censuses and mass vaccination programmes. Thus Foucault viewed

biopower as a positive, rather than a negative mechanism, focusing on the protection and intensification of life.

In constructing this argument, Foucault deliberately attempted to move away from 'classical' negative views of sovereignty that focused upon the sovereign's power to take life (Genel, 2006: 48; Hobbes, 2006). Foucault saw sovereignty as ineffective for the task of regulating life itself; instead, biopower superimposes itself over the classical sovereign right of the sword (Foucault, 2003: 249-250; Foucault, 1978: 88-90). Foucauldian biopower does not abandon sovereignty, but instead both succeeds and is bound to sovereign power. Technologies of biopower are separate from the sovereign realm but still maintain a relation to the sovereign and the juridical, as both forms of power may be applied in the same circumstances to the same event, and the exercise of one necessarily affects the other.

Foucault sketches a picture of power relations throughout the social body which involves several forms of power acting in different ways and methods and managing to cover as large a surface of the body of the population as possible. Thus disciplinary power functions on the individual, and complimented and dominated the juridical exercise of power, focusing upon the individual's body and its behaviour, aiming to transform and improve the body in the process; biopower addresses itself to populations as a whole, which are distinct from the concept of society, and deals with man as a species rather than an individual (Foucault, 2003: 138, 243-244; Foucault, 1978: 241).

However Foucault's hypothesis of biopower should be seen as limited, as Foucault himself noted that it was not a refined enough form of power for the types of detailed analyses that characterised his works. Indeed, Foucault's own work quickly shifted emphasis to the study of the question of the State and of governmentality in the field of analysis of the micro-physics of power (Foucault, 2007: 377-382).

### **Agambenian Biopower**

Agamben radically reinterprets Foucault's hypothesis, claiming that biopower began not in the 1800's, but with Aristotle's distinction between *bios* and *zōē*. Such an argument is light on historical evidence, and indeed has been criticised on precisely this point (Fitzpatrick 2005: 51). However, the historical inaccuracies of Agamben's analysis should not detract from the philosophical arguments that he makes. Agamben's argument is that biopower today pervades every aspect of the social body, a conclusion shared by other authors (Hardt & Negri, 2000: 12). Agambenian biopower is continually extending its hold over the whole of life and in turn every human action. In so having this aim, disciplinary institutions and mechanisms end up getting subsumed within this totalising biopower. Every disciplinary mechanism operates from within a biopolitical system that exhibits control through everyday, mundane structures of domination that constantly operate.

With the proliferation of biopolitical regulation, increasing the rights that people have actually increase power's investment on bodies. The more rights that biopower gives to individuals, the more vulnerable those individuals are to

those rights being removed. Therefore human rights, whilst being a victory against State power, have not liberated subjects and transformed them into citizens with rights, but trapped them within the very biopolitical power from which they sought to escape (Patton, 2007: 204; Agamben, 1998: 121).

Within this biopolitical order exists the figure of bare life, both produced by and denied by that same biopower. Agamben's radical position comes from his aligning the creation of bare life to the exercise of sovereignty, and in particular the exercise of the sovereign decision. Unlike Foucault, Agamben argues that sovereign power remains the most important part of the political system as it makes the ultimate decision that defines political life, the creation of bare life (Patton, 2007: 203; Agamben, 1998: 122). Biopower therefore does not need to single out specific groups for special measures – sovereign power needs no outside reason to act directly against life through excluding life from the rights invested in its very body. Every individual is considered a potential suspect or criminal, 'mankind has been declared the most dangerous of classes' (Agamben, 2004: 168).

Biopolitics and sovereignty are therefore inextricably linked. In order to inscribe *bios* within political life *bios* needs to find definition and ground itself against bare life. Life is subjugated to this sovereign power which not only defines life but also gains meaning through the creation of bare life, and its abandonment outside of legal protections (Carl Wall, 2005: 37-38).

### **The State of Exception**

What is curious about Agamben's conception of biopower is not just that bare life is created by sovereign power, but specifically that this creation of bare life will be *legal*. In explaining how the deprivation of rights and abandonment of individuals, indeed, any individual, outside of legal protections can be legal, Agamben turns to the work of Carl Schmitt. Agamben coins the term 'state of exception' from Schmitt, and he gives it a very different meaning from the one the Weimar jurist ascribed to it (Schmitt, 2005: 5).

Schmitt argued that the sovereign could be identified because it was only the sovereign who could declare a state of exception existed. For Schmitt, the exception truly was an exception; it was a period completely separate from the normal legal order, and was instituted in order to preserve the legal order in the face of grave threats to its existence. With the exception, the sovereign suspended the normal legal order allowing them to take whatever measures that was necessary to preserve the order; those measures would all be legal as the laws prohibiting certain actions had themselves been suspended. In this way Schmitt's state of exception was a true exception, in the sense that it could be both spatially and temporally distinguished from times of normality. This is by no means an abstracted constitutional theory; processes of derogation from international law provisions apply the same structure as Schmitt's exception, namely that a sovereign State has to apply for a derogation order that suspends the normal laws, replacing them with an exceptional legal order.

Agamben makes his position clear by arguing that he feels that it is not possible to distinguish the norm from the exception. There are two main theories of the exception, both of which argue that the exception and norm can be kept distinct. The first are represented by those processes of derogation, and it argues that the means for creating an exception will be contained within the legal order, meaning that the exception can be both spatially and temporally limited by the law. The second views the exception as essentially extra-judicial, arguing that the law cannot pre-determine the scope of the exception, and meaning that the exception is left as a political, rather than a legal matter (Agamben, 2005: 21-23).

It is Agamben's argument that both of these positions are incorrect, meaning that the legal order's view of what the exception is happens to be fundamentally wrong, calling into question that very order's operation. Agamben's exception is a limit zone, neither inside nor outside the juridical order (ibid.). By siting the exception within the juridical order, the exception, which suspends that order, is contained within the very object that it is suspending, which is a contradiction in terms. Likewise, if the exception is treated as other to the law and purely political, then it is contradictory for the juridical order not contain a lacuna precisely where this emergency situation is concerned (ibid.). Rather, the exception is a zone of indistinction where the inside and outside of the juridical order blur with one another, and do legality and illegality.

To support this provocative thesis, we can turn to the example of 'necessity', which Agamben also discusses. Necessity is recognised as a complete defence in English criminal law to a criminal act that has been committed.<sup>1</sup> Yet what is the status of the act that is deemed 'necessary'? Agamben correctly identifies that the necessary act is inherently ambiguous. The necessary act cannot be legal, as otherwise if it were so then it would not require justificatory declaration from a court. Neither can the necessary can be purely factual, as the legal decision operates not prospectively from the time of the judgment but retrospectively determines the act as legal or illegal. Instead the act exists in a zone of pure indistinction, neither as fact nor law, where all reflections upon its legality will be made *ex post facto*.

The necessary act illustrates the zone of indistinction at the heart of the legal order, and belies the fiction of the legal 'system'. The very use of the term 'legal system' presupposes a definite, defined, self-contained, self-enclosed construct that contains neither inconsistencies nor contradictions. It should be noted that this is not the same as stating that an individual law or laws are contradictory or nonsensical. The idea behind the legal system is to state that whilst laws may be contradictory, the solution will always be found through the law; thus the concept of a self-referential system is reinforced. Agamben thus challenges the very concept of a ordered, logical system of laws, instead arguing that the question of legality is not based upon logic, but rather a concrete decision that leads to the notions of legality and illegality becoming unclear and indistinct.

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<sup>1</sup> *Re A (Conjoined Twins: Surgical Separation)* [2000] 3 FCR 577.

Agamben thus argues that the exception leads to all legal determinations being deactivated (Agamben, 2005: 50). This does not mean that the exception as a zone of indistinction is a 'legal black hole' (Steyn, 2004: 1). The law in the exception has lost its force and is empty of content, allowing it, like the necessary act, to be reinterpreted in any number of ways. The exception is therefore constituted by legality.

Returning to Agamben's claim that it is through the sovereign decision that bare life is created, the implications of the state of exception means that bare life is created through legality; the creation of bare life is legal as the laws in force are able to be suspended and reinterpreted by sovereign power (Agamben, 2005: 28-29; Agamben, 1998: 3; Norris, 2005a: 271).

### **Benjamin, Agamben and Divine Violence**

The analysis of the state of exception leads to an apparently depressing conclusion. Sovereign power can use the language of rights to justify violations of rights, and in turn create bare life not through suspending the law, but through passing a plethora of legal and administrative measures that withdraw or restrict many of the rights invested in the body. The law becomes the problem, not the solution. It is sovereignty's appropriation of legality that provides the basis for the removal of rights and duties from *bios* through the law.

The exception is a zone of indistinction within the legal order that is instituted every time a concrete decision is made; thus any attempt to subsume or contain the exception within the law will not work by definition. The law then does not contain the exception but rather nourishes it, and the process of passing more law and instituting more legal protections will always fail. Extra legality simply gives the exception an opportunity to empty the new legality of content and re-site the zone of indistinction.

Agambenian biopower aims to totalise over every human action, yet it is the exception which prevents this totalisation as it is through the exception that bare life is created. The exception is also vital for biopower, as without the exception and the sovereign creation of bare life, political life will not be able to ground itself and give itself meaning. If *bios* does not have grounding, then relations of biopower will not be able to exploit *bios* and extend to the relations of *bios* that exist (Agamben, 2005: 51, 57-59).

The legal order aims to totalise itself but always fails in its totalisation, just like the biopolitical aims to totalise itself but equally fails. Yet it is through this very failure that bare life is created and political life is able to ground itself and find meaning. It is the very system's failure that provides its success. Every failure to subsume the exception within the law actually provides the very legality which the system requires to give *bios* its content.

Therefore Agamben's solution to this legal conundrum is to look beyond the law, back to the ontological problem of life itself. In exploring his own way forward, Agamben turns to the work of the German Marxist philosopher, Walter Benjamin. Benjamin, influenced by the work of Max Weber, illustrated in his essay *Critique of Violence*, '*Zur Kritik der Gewalt*' in the original



German the close relationship that exists between law and *Gewalt*, translated literally as violence but which signifies legitimised force, juridical power, authority, dominion, might and control (Weber, 2004: 33-94; Benjamin, 2004; Derrida, 1990: 973-980; Lowrie, 2005: 949).

Benjamin argued that the law and violence are intertwined and cannot be separated. Violence is the foundation of law, although today the law seems not to recognise its violent past (Benjamin, 2004: 236-252). Modern law has developed out of the violent revolutions and wars of the past and it preserves itself through violence today, stopping challenges to the law and legitimising its own actions (*ibid.*, 244).

Benjamin posited two forms of violence to illustrate the connection violence has to law: 'law-making violence' and 'law-preserving violence'. Law-making violence refers to violence used against the existing laws and conditions with the effect of constituting new laws, whereas law-preserving violence maintains the authority and laws of the current system (Newman, 2004:572). Both types of violence cannot be separated within the law that is intertwined with them. Even if violence is directed towards changing an individual law in particular, it still operates within the confines of the legal system and so sustains its legal authority (Benjamin, 2004: 243; Derrida, 1990: 993).

Agamben's exception can be understood as a unique instance of law-making violence through the suspension of legality in the zone of indistinction. The exception extends the legal violence Benjamin explored beyond its own boundaries by making it possible for extra-legal actions to acquire legal status. To support this contention Agamben discusses the history of the term 'force of law', which describes those actions that although not legally authorised, nonetheless draw upon the violence that underpins the law's operation: 'decrees, provisions, and measures that are not formally laws nevertheless acquire their "force"' (Agamben, 2005: 38). The exception deactivates the law that is contained within it but in doing so it produces a violence that has "shed every relation to law", namely the legal violence exercised by the sovereign in creating bare life (*ibid.*, 52; Agamben: 1998, 59).

Benjamin's identification of the dialectic of law-making and law-preserving violence meant that it was not possible for any revolution to break free of the dialectic unless that revolution transcended the violent dialectic itself, and by extension the law as well. Benjamin argued that only divine violence could shatter the dialectic of law-making and law-preserving violence; divine violence is a violence of pure means. Law-making violence and law-preserving violence act as means to ends, which Benjamin claims catches individuals in an endless spiral of violence. In order to avoid slipping back into the same spiral, a violence of pure means is able to destabilise the violent dialectic and create a new state of order, away from the means-end relation.

This esoteric discussion lends heavy influence to Agamben's own political philosophy. Just as Benjamin wanted a violence of pure means to overcome the violent dialectic, Agamben argues that only a politics of pure means can overcome the biopolitical order. This politics of pure means must, primarily, have reference to the ontological issue of life itself. Until politics can address the issue of what is meant by the term 'life', the figure of bare life will still

haunt Western legal and political orders. It is this ontological message, that has often been misconstrued by commentators on Agamben's work.

### **The Ontic Use of Agamben**

Agamben's work has been used to fashion a critique of dominant political ideology by theorists and academics on the political left. Bare life has been equated by Agamben himself with the figures of Jewish inmates at Nazi concentration camps (Agamben, 2002), the refugee pending deportation, (Agamben, 2000) and the detained suspected terrorists at Guantanamo (Agamben, 2005). This however does not mean that bare life only represents those individuals who appear to be victims of hegemonic political systems.

Slavoj Žižek and Judith Butler use the concept of bare life as the basis of a radical critique and rethinking of the basic structures of Western politics and capitalist democracy. Butler appropriates bare life as a way of critiquing American foreign and domestic policy, aiming for a redefinition of the democratic project to better protect the dispossessed and minority groups (Butler, 2004). Žižek specifically critiques Butler's use of Agamben, arguing that bare life:

‘Should not be watered down into an element of a radical-democratic project whose aim is to renegotiate/redefine the limits of in- and exclusion, so that the symbolic field will also be more and more open to the voices who are excluded by the hegemonic configuration of the public discourse’ (Žižek, 2002).

For Žižek, Butler's use of bare life limits the concept. Žižek's aim is to destabilise the very foundations of the liberal-democratic project itself, aiming to answer “the burning question of how to reformulate a leftist, anticapitalist political project in our era of global capitalism and its ideological supplement, liberal-democratic multi-culturalism” (Žižek, 2000: 4).

Butler and Žižek, however, have both missed the main thrust of Agamben's philosophy. Butler represents a school of thought which sees bare life as representing politically marginalised figures who need to be brought back into political life. Žižek represents a much more critical view of Agamben, questioning the fundamental basis of the political system. However Žižek does not fully appreciate the true implications of Agamben's thought. It is not enough to call into question the basis of the political system as the fundamental position of bare life has not yet been questioned.

Without questioning bare life and its importance to the maintenance of political life, bare life will always end up being created and recreated. In this respect, Agamben argues that the questions of what we mean when we refer to ‘life’ and ‘law’ need to be considered again before a truly political response can be made to the problems and aporias of the exception, something that Leftist thought has not yet done.

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