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The Power of Purity: Preliminary Notes for an Archaeology of Modern Jurisprudence

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Abstract

In this paper I will try to subsume what Carl Schmitt referred to as the three types of juristic thought – positivism, decisionism and institutionalism – under the same 'signature of power'. With this expression I refer here to a general enunciative function that informs (legal) thought, forcing it to perform an (ex-ceptional) articulation of (form of) law and (force of) life. My suggestion is thus that it is possible to interpret the different approach to the law question of two fatherly figures of modern jurisprudence – Hans Kelsen (positivism) and Carl Schmitt (decisionist-institutionalism) – in a way which, while mantaining that there is indeed a difference between their theories, points also towards a more fundamental partnership which concerns the very form (i.e. ex-ceptionality) of their questioning. The purpose of this paper is thus to show that the fundamental differences between these two approaches become indistinguishable if re-considered in the context of a broader problematisation of power which, following Giorgio Agamben's reinterpretation of Foucault's work on biopolitics, can here be defined as an ideology of govern-mentality according to which, simply put, sociality can be reduced to one, two-sided, operation: government/self-government through a decision on the form of law, to be perfomed at different levels, including thought. Legal theory as practiced by Kelsen and Schmitt is, in this respect, governmental or biopolitical, because it institutes a fictional threshold of indifferentiation between law (form) and life (force), whose preservation, by means of further (ex-ceptional) articulations (i.e. inclusive-exclusions), becomes the jurist's fundamental task. Moreover, given the central role of both Kelsen's positivism and Schmitt's decisionist institutionalism for modern legal theory in general, a critical reflection on the act of (legal) theorising as such as an act of power is made possible. The modern tradition of legal theory can thus be interpreted – in spite of its increasing complexity and fragmentation (which was already reflected, at the beginning of the last century, in the fragmentation of legal theory into positivist, institutionalist and decisionist stances) – as preserving thought's power to relate law and life. One possible alternative to a theory of (i.e. that belongs to) power is, I think, a practice of critical observation (a study) of the power of theory.

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> By remaining entirely free of all politics, [the Pure Theory] stands apart from the ebb and flow of life. (Kelsen 1992; p. 3)

> Any content whatever can be law; there is no human behaviour that would be excluded simply by virtue of its substance from becoming the content of a legal norm. (Kelsen 1992; p. 56)

Introduction

Hans Kelsen's pure theory of law and particularly his hypothesis of a basic norm, i.e. *Grundnorm*, which grounds the overall validity of every existing legal system, is still today, almost one century after its original formulation, the object of extensive scholarly debate. One of the possible explanations as to why the interest in debating this, by now, old idea never gets old is that, with Zartaloudis, it:

> may be the most significant attempt at reaching the entry point to an inquiry into the limit of law (…) The notion of this 'mere hypothesis' anticipated that the limit concept of the law which takes the form of a presupposition and which forms the law's *sine qua non* (retaining its own conditionality while referring its source or foundation to its outside) is the reaching of an impasse in legal foundations where theories of legal foundations still circulate and are thought without really knowing any longer what is being talked about (2008, pp. 283–284).

Kelsen's theory, from this perspective, does not simply provide a very interesting account of law's foundation. It is, more radically, foundational for theories of legal foundations themselves. As 'an impasse', it can be read, in other words, as a foundational event within the modern history of legal theory. In the first half of this work, I would like to develop this intuition by reflecting on the structure of Kelsen's theorising through the lens of Giorgio Agamben's philosophical problematisation of the relation between *law* and *life*. From Agamben's *biopolitics* of law I derive, in fact, a general account of (bio)*power* as an *enunciative function of ex-ceptionality*, i.e. of *inclusive-exclusion of* (*the force of*) *life in/from* (*the form of*) *law*. Legal theories themselves can thus be read as forms of (bio)power to the extent that it can be shown that (and how) they incorporate this enunciative function of exceptionality – and it is precisely in Kelsen's work that, through the figure of the *jurist*, the function of exceptionality finds its foundational (for modern legal theory) formulation.[1]

[1] Particularly influential for the formulation of this thesis is the observation, made by both Schütz (2008; p. 123) and Zartaloudis (2008; p. 283), that, arguably, Kelsen's work anticipates the conception of (state of) exception as theorised by Schmitt and later by Agamben. One of the main aims of this paper is to present arguments to support this observation.

To demonstrate this, the second half of this work will delve into the similarities between Kelsen's work and the exceptionalism of one of his main intellectual and political adversaries, Carl Schmitt. The work of Schmitt is particularly relevant in this context because it incorporates both decisionism and institutionalism and thus if, with the help of Agamben, this work is read in tandem with Kelsen's positivism, the resulting picture is one in which the three traditional schools of legal theorising appear *analogously* bound by a function of exceptionality. Schmitt's *decisionist institutionalism*, specifically, can be understood as an attempt to re-appropriate the enunciative function of the theorist, i.e. *the jurist*, as laid down by Kelsen with his positivist theory of the *Grundnorm*. If in Kelsen the jurist appears as the one who institutes and preserves a fictional and functional *zone of indistinction* between *form of law* and *force of life*, in which the latter merely represents a zero-degree of the former, what characterises Schmitt's institutional decisionism (and, arguably, many other decisionist and institutionalist approaches to the law question) is, fundamentally, a specular attempt to conquer this zone by re-thinking the form of law as a zero-degree of force of life, i.e. life as a sovereign force.

My final aim with this work is thus to suggest that perhaps the whole tradition of modern legal theory could be experienced anew (i.e. studied) as preserving and reproducing a *foundational signature* of exceptionality (i.e. inclusive-exclusion) of law (form) and life (force). In this respect, the whole paper can be read as offering some preliminary notes for what could be described as a general *archaeology of modern jurisprudence*. These notes suggest that the foundations of modern legal theory are biopolitical and that legal theorising itself can thus be interpreted as a bio-political endeavour. One critical question to be asked in this regard is not (only) what other configurations of (bio)power can theory produce but also whether another option, other than the endless production of new reconfigurations of power, is available. It is suggested here that one alternative task for criticism, the task of the archaeologist of modern jurisprudence, could be the *destitution* of the *power of theory* – that is to say, the suspension of the urge to theorise – to be performed precisely as a *praxis* of *study* of the biopolitical foundations of legal thought.

A Pure Theory of in-Distinction

The pure theory of law developed by Hans Kelsen maintains, in his own words, that law dynamically 'proceeds from the general (abstract) to the individual (concrete)' (1967, p. 237). These opposing dimensions – general and individual, abstract and concrete – constitute poles of a field, the law, *ambiguously* separating and holding them together. This ambiguous construction of law takes at least two forms in Kelsen's work. To understand this though it is first necessary to examine his notion of the *Grundnorm*, as it is from there that these ambiguities originate.

In one of its possible formulations the *Grundnorm* represents a *fiction of legal cognition*, making the legal order intelligible to *jurists* as a space in which 'citizens ought to obey legal norms which are valid in accordance with the historically first constitution' (Duxbury 2007; p. 6). Obedience, in this formulation, is thus tied to the notion of validity, the idea that a 'legal norm is valid because it has come into being in

the way prescribed by another norm' (Kelsen 1941; pp. 62–63). Validity, in turn, rests on the concrete operations of legal officials who, through acts of both legislation and jurisdiction, are bound to *create* new norms that would represent, at the same time, the *application* of pre-existing norms.[2] The *Grundnorm* is, in this respect, fictional because it is 'not posited by a real act of will' but, in order for a legal order to become intelligible, a jurist must think *as though* such a norm were indeed posited (Kelsen 1986; p. 116). The legal order, in other words, becomes cognisable only if the jurist imagines that the *Grundnorm* had posited that norms ought to be *both applied* and *obeyed* in accordance with the first authorised norm, i.e. the constitution.[3]

The two forms of ambiguity alluded to before are intertwined with these two dimensions of application and obedience.

The first form of ambiguity lies in the fact that every norm of the legal order is simultaneously both created (through the application of a pre-existing norm) and applied (through the creation of a new norm that will follow from it). Each norm of the legal order represents at the same time both an act of (creative) application and an act of (applicative) creation: the 'application of law is at the same time creation of law' (Kelsen 1967; p. 234). In summary, every norm of the legal order must be authorised by the constitution, which in turn is authorised by the *Grundnorm* which is, thus, nothing but a (fictional) principle of validation. The chain of validation commences then with a constituency that *applies*[4] the *Grundnorm* and, *in doing so*, *creates* a constitution whose laws authorise a legislative body to create new laws representing, in turn, the application of pre-existing (constitutional) laws; the constitution also authorises a judicial body to adopt decisions that represent, at the same time, acts of application of pre-existing laws (created by the legislative body) and of creation of new norms, namely the specific content of an executive order which can only be applied and, in this sense, is not creative. It can thus be argued that the normative chain initiated by the *Grundnorm*, which is in turn meta-normative(ly created), *commences and ends with application*: on one side of the chain, the constituency, in order to create a constitution must (logically) apply the *Grundnorm* and, on the other side, the executive order must merely apply the content of the sentence.

The second form of ambiguity follows precisely from these premises and concerns the relationship between validity and so-called efficacy. While validity refers to what, abstractly, ought to happen (e.g. a citizen's obedience; adjudication in conformity with pre-existing legal norms; legislation in conformity with the constitution; etc.) *efficacy* refers to what actually happens (e.g. whether a citizen actually obeys the norm; whether legal officials concretely apply and create norms, etc.). Their relation-

[2] There is no distinction between legislator and judge in Kelsen's theory: both create new norms (laws and decisions) by applying pre-existing norms (older laws and decisions).

[3] A state without constitution too, the argument goes, has a material constitution, comprising only those rules that regulate and 'explain the ultimate basis for the law-making power [legislative and judicial alike]; those laws beyond which there are no more rules of positive law' (Orakhelashvili 2019; pp. 86–87).

[4] To speak of application here is partially inappropriate for the same reason that it is partially inappropriate to speak of the *Grundnorm* as a norm. The Grundnorm is a meta-juridical or meta-normative norm, one that makes legal cognition possible, and therefore it would be more appropriate to speak of *Grund-application* or *meta-application*. However, it is Kelsen himself who claims that '[t]he making of the first constitution can likewise be considered as an application of the basic norm' (1949, p. 133).

ship, however, is as ambiguous as (and in this respect analogous to) the relationship between creation and application. According to Kelsen, in fact, efficacy, i.e. actual observance or actual application, is *incidentally instrumental* to, but not a *necessary cause* of the validity of the legal order. Kelsen, in other words, stresses that a legal order is valid not *because* it is efficacious but only *for as long as* it is efficacious (1967, p. 212). This means that while validity and efficacy are theoretically independent, *de facto* (a *factum* constructed by the theory), a legal order ceases to be valid when it ceases to be efficacious. Along these lines, Marmor suggests that for Kelsen a legal order that is not 'actually (generally) followed by the relevant population' is not valid either (2021, p. 5).

Similar to application and creation, the pure theory institutes an impure, ambiguous zone in which efficacy and validity are both separate and indistinguishable. The pure theory tries to differentiate two poles that, at the same time, are presented as inseparable and, in this respect, rather than a distinction it provides for an in-distinction: an injunction (for legal thought) to *articulate together*, in a seemingly stable way, logic and interpretation, veridiction and assertion, form and content, idea and reality, law and life.

Legal De-Ontology

These ambiguities stem ultimately from Kelsen's general epistemological stance on legal cognition which could be described as a (legal) *de-ontology* in order to stress that, paradoxically, it produces a deontologisation of the law through the institution of law as a zone of indistinction between *is* (ousía, οὐσία) and *ought* (déon, δέον).

This operation rests on a reinterpretation of Jellinek's theory of state dualism. Jellinek, whom Kelsen himself calls 'unparalleled master' (Klink and Lembke 2016; p. 209), conceptualised the state as an objectively *existing* entity observable from two different, but related, domains, namely legal – as 'a system of norms' – and social – as 'a real association of people' (Somek 2006; p. 755). In essence, the state, as an existing reality is 'an organisation of power' provided with 'a double function – it provides society both with social and legal order' (Klink and Lembke 2016; p. 216). As a social order, the state exercises its *power* over a *people* and within a *territory* by establishing 'a social-psychological synthesis of human relationships', themselves governed by the force of interest, '*Zweck*' (Kersten 2021; p. 258). However, the state can only fulfil this role as a legal order, utilizing 'the legal ability (…) to set legal norms into legal actions to pursue individual interests' (ibid., p. 256) which is the ability – to borrow Jhering's famous formula – to use the law as a means to an end. Public law, the law of the state, represents precisely 'the construction of [the state's] will' as a coherent whole (ibid., p. 257)[5] and the end of the legal order, in this respect, is the coherent organisation of the ends of its population.[6] This interplay between the

[5] The search for coherence is never-ending since 'every constitution is fraught with gaps' and therefore endlessly subjected to interpretative transformation (Jellinek 2000; pp. 55–56).

[6] The law in general (public and private) is 'a function of society', namely 'to structure social relationships and to give normative orientation in the social world' (Kersten 2021; p. 260).

psychological reality of the social domain, the force of interest, and the normativity of the legal domain, the form of law, is achieved by attaching *both* (valid) 'legal consequences' to (efficacious) 'factual occurrences' (Klink and Lembcke 2016, p. 207) – Jellinek calls this the 'normative force of the factual' – *and* factual consequences to valid occurrences.[7] In summary, the state *is* a shifter, a two-sided power transforming normality into normativity (force into form) and normativity into normality (form into force).

Kelsen develops Jellinek's idea of a separation between legal and the social perspectives on the state (form and force) and yet he rejects the idea of the state as an entity with an objective reality. In Kelsen's theory, in fact, the state exists solely as an object *produced* within legal reasoning, which means that the state *does not pre-exist* the law. If then the state is *only* a legal product, it means that it is *not*, at the same time, also a social product. In other words, every social perspective on the 'state' represents a social interpretation of a purely *legal* object. Moreover, for Kelsen, asserting that the state is a legal object means that 'the state' is nothing more than another term for the logic of validity of the legal system which, in turn is, at least potentially, a *stateless logic*. Although in its historical development, the law tends to conceptualise its own validity through the category of the nation-state – and the unity of wills and interests purported by Jellinek is, in this respect, nothing more than a fictional presupposition of the law, 'a construct (…) provided by the legal point of view' (Somek 2006; p. 759)[8] – this operation is not, at least in theory, *necessary*.[9]

As a result, 'the ideal reality of the state is not manifest in a feeling of community' (Somek 2006; p. 771) that could be objectively measured by sociological analysis. Jellinek's formal scheme of the two perspectives is maintained but emptied of its force. Kelsen's theory can thus be described as *a theory of law devoid of substance or force*, namely, *a theory of law as form*.[10] In his own words:

> [i]f it can be shown that the state as conceived by politics and differentiated in contrast to law, "behind" the law, as the "bearer" of the law, is just as much a duplicating "substance" productive of pseudo-problems like the "soul" in psy-

[7] I refer specifically to 'the legal idea of the alteration of facticity' (Lepsius 2019; p. 15) and, more particularly, to the (social) conformity to legal rules which follows from the fact that 'legal argumentation takes place in an institutional setting bringing about decisions that are enforced, if necessary, by coercion' (Klatt 2019, p. 59). This might even be called 'factual force of the normative', provided that it is distinguished from what Jellinek meant with this expression, namely, a legal subject's belief that 'there is a higher normativity (…) that transcends the enacted law and that may amend and improve it' (Klink and Lembcke 2016, p. 209).

[8] According to Kelsen this is true for Jellinek too: 'the system, under which the majority of "ruling relationships" appear as the unity of the state, is nothing other than the legal system, and (…) this system is reflected in Jellinek's constantly repeated assurance that the state is fundamentally the law' (Somek 2006; p. 759).

[9] Kelsen is thus committed to 'a view of world law' (Fillafer 2022; p. 442). According to this view the state is simply 'a template of a global legal order' in which, in turn, international law becomes 'a filter of validity' of municipal law (Fillafer 2022; pp. 438–440).

[10] Here 'form' represents 'the unity of the norm system' (Somek 2006; p. 763) as the only content of the law, that is to say, a form 'based on content-independent reasons' such that 'nothing turns on the substance of norms' (ibid., p. 767). Kelsen's theory is a theory of form because, as Klink and Lembke observe, 'from a legal perspective (…) it does not matter at all where the law derives its content from' (2016, p. 214).

> chology, or "force" in physics, then there will be a stateless theory of the state, just as today there is already a psychology without a "soul" … and just as there already is a physics without forces (Kelsen in Fillafer 2022; p. 427).

As suggested by Somek, one of Kelsen's intentions is to *deontologise* the state, namely to prove that any attempt, political or sociological, to think the state as something different from a mere normative system reflecting 'the deontic modalities of law' is doomed to fail (2006, p. 756). The state is, for Kelsen, nothing but 'the validity of a legal system', and the *Grundnorm* serves as a 'scheme of interpretation for a multiplicity of human acts, whose unity is to be found only in the unity of the system of norms that invests these acts with the meaning of acts of state' (Somek 2006, p. 756). Therefore, Somek continues, Kelsen 'considers all talk of the state [and, therefore, of law] *qua* "real association" or "supra-individual being" to be devoid of empirical content' (ibid., p. 757), and his theory represents an 'immanent critique of dualism and sociological approaches in general' (ibid., p. 765) to the law question.

In getting rid of the state as a social construct, however, Kelsen is bound to presuppose a generic force of life that, insofar as it is a presupposition *of* the law, can only be conceptualised as the simple fact that the law *is* observed and applied because it *ought* to be. The force of life becomes the normatively charged ground of every legal operation. This is reflected in his famous account of the norm being constituted not by the due behaviour but by the due sanctioning of the illegal behaviour, i.e. norm as sanction.[11] As Agamben stresses though:

> [t]o 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. The problem of violence—like that of pleasure—cannot easily be expunged from law and ethics and constitutes a tangent point between the two ontologies. As in Kant, being and having-to-be are articulated together in the pure theory of law in the manner of a fugue, in which separation refers to a tangent and this latter again to a separation (Agamben 2017; p. 749).

The thought of validity (what *ought-to-be*), in other words, always presupposes the possibility of efficacy (that which *is*, either in the form of concrete application or concrete observance) as its condition of thinkability. Having-to-be presupposes being and the two are, in this sense, differentiated through their indifferentiation, i.e. indistinct. Kelsen himself seems to suggest this when claiming that:

> [t]he validity of a legal system governing the behaviour of particular human beings depends in a certain way, then, on the fact that their real behaviour corresponds to the legal system (…). This relation of dependence, which may be characterized figuratively as the tension between "ought" and "is", can only be defined in terms of an upper and a lower limit. The possibility of corre-

[11] That is why Kelsen also claims that '[i]n the narrower, specific sense of the term, only law creation and law application [and not law observance] are called legal functions' (1967, p. 237).

> spondence may neither exceed a specified maximum nor fall below a specified minimum (Kelsen 1992; p. 60).

Validity presupposes a 'tension between ought and is', an ambiguous zone of indistinction, whose ambiguity is further fostered by the absence, in Kelsen's argument, of any criterion to circumscribe it – that is, to establish what the maximum and minimum of correspondence should be.

By and Large

Kelsen's is a theory of law's *potentiality* in which form (validity) can be distinguished from force (efficacy) precisely because the latter represents the actuality of law. Nevertheless, law's potentiality incorporates actuality, creating a zone of indistinction between the two in the form of a *possibility of actuality*. For Kelsen, in fact, on one side the validity of a norm is not *immediately* dependent on the norm being also *efficacious*, i.e. *actually observed or, when not actually observed, actually applied*. A posited norm is *immediately* valid simply because it has been posited – insofar as it is expression of the legal system's overall validity. On the other side though, the immediate and independent validity of a norm is ultimately *conditioned* by 'the possibility of its efficacy' as determined by both natural contingencies (Burazin 2021; p. 8)[12] and/or by social circumstances that by and large render the application of the norms of the system to which the individual norm belongs impossible.[13] In other words, a norm is (conditionally) valid even if it is not observed or applied (inefficacious) but it is *not* valid if it *can neither* be observed *nor* applied: if it is *impossible* (ibid., p. 8). A norm is impossible every time there is *no actual* reality (natural and socio-political) to which it *could* refer.

The introduction of a peculiar logic of *potentiality* within legal reasoning allows Kelsen to incorporate Jellinek's theory of the normative force of the factual while simultaneously rejecting it (one could say, to include it by excluding it): according to Kelsen, in fact, the condition of validity of a norm is *the abstract possibility of efficacy*, rather than efficacy itself. That is the case because, as stressed by Burazin, 'it is in the nature of law to address itself to the reality which is not identical with it (i.e., with the validity of law), with the aim of *influencing* this reality' [italic mine] (ibid.). Essentially this means that law's force (against Jellinek) is not to be found in reality but (somehow, with Jellinek) in the fact that law *can address itself* to reality, namely in the *form* of the relationship between norm (form) and reality (force) presupposed by the norm (form) itself as its *conditio sine qua non*. The factual, within this scheme, does not have any normative force in itself but is formally treated *as if* it *could* have it. This is law's peculiar power.

[12] Efficacious norms cannot prescribe behaviours that violate the laws of nature.

[13] For example, in the United States after 1776 a *Grundnorm* 'under which the Queen-in-Parliament is the ultimate source of valid law' (Green 2016; p. 70) refers to a system whose application has become overall impossible.

Efficacy itself is thus for Kelsen the (legal) fiction of *a reality where rules can, by and large, be observed and applied*. Observance, in this respect, is not a condition of validity in itself but only to the extent that its logical opposite, non-observance, is likely to trigger 'the judicial finding that there obtains a concrete state of affairs which is the condition for a sanction' (Kelsen 1991; p. 141).[14] Efficacy (life), in other words, becomes *efficacy of validity* (life of the law), namely, the idea that when a norm is concretely not observed it will be by and large concretely applied. One of the possible formulations of the *Grundnorm*, in this respect, is precisely that 'one ought to comply with an actually established, by and large efficacious, constitution, and therefore with the by and large efficacious norms, actually created in conformity with that constitution' (Kelsen 1967; p. 212). The abstract enunciation of the principle of validity, in this respect, coincides with the *possibility* of an actual system of implementation and enforcement of norms. Yet, by turning efficacy into the possibility of overall efficacy, i.e. efficacy of validity, Kelsen is at the same time able to separate efficacy and validity, namely, to claim that a norm is valid even when concretely neither observed nor applied[15] and, ultimately, that the whole legal order is valid not *because* it is efficacious but only *for as long as* it is so.[16] Kelsen's *Grundnorm* makes efficacy and validity in-distinct.

The *Grundnorm*, the formula of validity, transforms what could be generally described as an actual power-to-relate law and life (instead of an actual relation between law and life) into the *conditio sine qua non* of validity. Jellinek's normative force of the factual becomes the power to think life through, precisely, a *dynamic* of validity, i.e. degrees of validity (conditional and full) which corresponds to a dynamic of efficacy, i.e. whether and to what extent norms can be *by and large* applied when not observed. Force does not stem from life but is projected onto it by the holder of the power to think the relation between law and life, namely, by the jurist. The force of the factual belongs neither to life nor to law but to the one who is *able* to relate them. As Green observes, in fact, when Kelsen claims that 'a normative order is considered valid only if it is by and large effective', paradoxically, he is not making a legal statement but a psychological/epistemological one (2016, pp. 69–72) which concerns the idea of the norm, rather than the norm itself, the idea of its force as shared, first and foremost (this is the paradox) by *jurists*.

The psychological, subjective attitude to the norm of individuals – the normative force of the factual – which, up until this point, had been excluded from the pure theory, becomes central to it as the psychological/epistemological attitude of jurists who should be willing to 'interpret the legal meaning of events in a manner that enriches this meaning' (ibid., p. 71) – that is to say, as what jurists think is the normative force

[14] Burazin thus suggests that '[a] norm loses its efficacy and, consequently, its validity when non-applied by and large in the case of its non-observance (violation), irrespective of whether or not the norm was non-observed by and large' (2021, p. 15).

[15] Burazin observes that a legal norm can still be valid, even if it is completely inefficacious 'as long as there is a by and large efficacious legal order in place, that is, as long as there is the possibility that the norm acquire (if completely inefficacious from the moment of its positing) or reacquire (if inefficacious from a later moment) its efficacy' (2021, p. 17).

[16] Klink and Lembke similarly stress that 'Kelsen acknowledges that the law's effectiveness is a precondition for legal validity but denies that the law's efficacy is a reason for its validity' (2016, p. 221).

of the factual. Judgements about the force of the norm are not legal and yet, Green continues, they provide 'an epistemological requirement in interpreting social events legally'.[17] More precisely:

> Kelsen's principle of efficacy can be understood as the epistemological demand that one interpret the legal meaning of events in a manner that enriches this meaning. It need not follow that law is reduced to social facts. The condition for the validity of the law remains the presupposed basic norm, a norm that stands outside the causal order and so does not depend for its existence upon social facts (ibid., p. 71).

Potentially, one could argue, (the *Grundnorm*'s) validity exists in a vacuum, outside both time and space[18] (as a pure form of law) but in order for this potentiality to be truly communicable, the concrete possibility of its actualisation (the force of life as a means of law's application) must be also thought. The normative force of the factual is turned into an injunction to think life as a zero-degree of form of law. The normative force of life is the jurist's power of thought.

As mentioned at the beginning of the paper, the normative hierarchy of a legal system begins and ends with *application* (as the application of the *Grundnorm* through the creation of a constitution and the application of an executive order, respectively). There is, however, a meta-normative event that occurs *before* the law, thus falling outside the realm of validity (and therefore of application) while simultaneously making it possible: since Kelsen, this event is *not* life, but the act of *creation* of the *Grundnorm* – that is to say, the institution, performed by the jurist, of a *relat-ability* between law and life.

The Fictious Physical Person

Even the internal structure of individual norms, as conceptualised by Kelsen, reflects the ambiguous nature of law's potentiality discussed thus far and which rests on the fictional normativisation of life as performed by the jurist.

Law's form can be expressed as a connection, within each individual norm, between legal condition (*if* delict) and legal consequence (*then* punishment). For any given norm 'a material fact falling within the scope of the antecedent clause [legal condition] triggers the legal consequence' (Paulson 2001; p. 56), namely the (possibility of the) actual enforcement of the rule by a legal official, and this particular

[17] For example, if one were to interpret the practice of US legal officials 'in light of an inefficacious basic norm (for example, one under which the Queen-in-Parliament is the ultimate source of valid law) (…) everything that purported officials in the relevant territory have been doing for the last 240 years [would be] without legal consequence (except, perhaps, as treasonous acts)' whereas 'once one adopts a basic norm that validates (…) the U.S. Constitution and laws enacted pursuant to it, a wealth of legal meaning emerges' (Green 2016; p. 71).

[18] Green, using the US constitution as an example, argues that the *Grundnorm* authorising it, in order for the pure theory to be really pure, 'would have to be no less existent when dinosaurs roamed the earth than it was in 1787' (2016, p. 50).

connection, between a material fact (legal condition) and a legal consequence (actual enforcement), is called by Kelsen (peripherical) *imputation*. In order to stress the material foundation of legal norms, Kelsen speaks of both the legal condition and the legal consequences in terms of 'material facts' and suggests that imputation, the link between legal condition and legal consequence, becomes intelligible by means of an *analogy* with natural causality, namely the principle linking together causes and effects (Kelsen 1992; p. 25). Compared to the linkage between cause and effect, that between legal condition and legal consequence is 'just as inviolable': *like* from causes *must* follow effects, so from legal conditions *ought to* follow legal consequences. However, what follows from this analogy between material causation and imputation is, paradoxically, law's immateriality, namely the idea that 'in the system of law (…) punishment follows always and without exception from the delict, even if, in the system of nature, punishment may fail to materialize for one reason or another' (ibid.).

In other words, the norm attaches to certain material circumstances and behaviours a legal consequence (*like* nature attaches effects to causes) and, in this sense, it needs a material reality in order to produce its legal effects and yet, at the same time, the norm's (legal) existence is independent from the material occurrence, in the real world, of an actual punishment following from an actual violation of the norm. Legal norms are, in this sense, truly inviolable: they exist as norms even when, for whatever reason, they are not applied in the real world, in spite of the fact that they ought to have been applied.

Then, what about the normative status of the individual whose material behaviour triggers the legal consequence? Peripherical imputation, i.e. the linkage between (material) legal condition and (material) legal consequence, presupposes the existence of a (material) individual, the addressee of the legal consequence, who, nevertheless, is excluded by legal cognition and replaced with what is described by Kelsen as a 'fictious physical person', that is to say, not a human being but 'the common point of imputation for the material facts of human behaviour that are normatively regulated as obligations and rights' (1992, pp. 47–48). Whereas in reality there are human beings as 'biological-psychological concept(s)' who sustain the pains and pleasures concretely *caused* by the application of a norm, in law's reality there is only the fiction of a 'physical person',[19] namely 'the personified expression of the unity of norms governing the behaviour of one human being', 'the common point of imputation for the material facts of human behaviour', 'a heuristic notion of legal cognition – a notion that might well dispensed with, that facilitates the exposition of the law, but is not necessary to it' (ibid., p. 48).

Just like the state, contrary to what Jellinek believed, does not exist in reality, so too the physical person is not a biological-psychological concept. Both the state and the physical person exist only as legal categories and both represent, as far as Kelsen is concerned, dispensable legal categories, namely, not-necessary means of legal cognition. And yet, these fictions presuppose a reality that *exists*, or perhaps

[19] Kelsen himself, Paulson stresses in a note to Kelsen's text, 'places physical within quotation marks', in order to stress that physical person, in law's terms, 'does not mean the human being' (Kelsen 1992; p. 47).

better, *is supposed to exist* to the extent that its existence makes the application of norms possible.

A Grammar of Exception

The principle of peripherical imputation is thus the ordering principle according to which 'material facts are brought together in the legal system' and this connection between 'elements brought together within the reconstructed legal norm' is given 'grammatical' expression by the ought-form of law (Paulson 2001; p. 60). In Kelsen's own words:

> Any norm establishes between two elements a connection which can be described by a statement to the effect that under certain conditions a certain consequence ought to take place. This is the grammatical form of the principle of imputation in contradistinction to that of causality. (1950, p. 11).

The pure theory of law represents, or at least this is what Kelsen wanted it to represent, *the grammar of the law*. Despite being very critical of Kelsen's approach, Goodrich has developed further in his work this linguistic analogy, suggesting that both legal science and linguistics are 'concerned with the relationship of a set of general rules – a grammar, or the substantive jurisprudence of the totality of legal norms in force – to the circumstances of their application or realisation in speech or judgement' (1990, pp. 11–12). Following this analogy, modern legal theory (and Kelsen's work is paradigmatic in this respect) would be constituted by what Goodrich has defined as a 'formalistic exclusion of semantics', the (theoretical) institution of the law as a *langue* (as opposed to *parole*) emptied of all 'diachronic facts [as, precisely,] the blind forces set against the organisation of the system of signs' (ibid., p. 22). Goodrich presents Kelsen's theory (along with Hart's) as a grammar of norms that pre-emptively corrupts any proper engagement with the problem of legal semantics, specifically 'the semantics of rule application' (ibid., p. 57).

The analogy between law and language is the central focus of Giorgio Agamben's fascinating theoretical speculations on the state of exception – a political operation through which not only the normal relationship between protasis and apodosis of a legal norm but, more generally, between the legal order as a whole and reality is suspended. In his own words:

> [j]ust as linguistic elements subsist in *langue* without any real denotation, which they acquire only in actual discourse, so in the state of exception the norm is in force without any reference to reality. But just as concrete linguistic activity becomes intelligible precisely through the presupposition of something like a language, so is the norm able to refer to the normal situation through the suspension of its application in the state of exception (2017, p. 197).

It would be, however, a mistake to assume (as some did) that at stake in this analogy is simply a critique of more or less authoritarian forms of suspension of the law

(national or international) and the related (political) production of forms of so-called *bare life*. To understand that Agamben's analogical criticism is directed not (just) at the exceptional suspension of the law but at the law as such in its *normal* functioning, there is no need to read between the lines. It suffices to continue reading:

> [i]t can generally be said that not only language and law but all social institutions have been formed through a process of desemanticization and suspension of concrete praxis in its immediate reference to the real. Just as grammar, in producing a speech without denotation, has isolated something like a language from discourse [so] law, in suspending the concrete custom and usage of individuals, has been able to isolate something like a norm (…) (2017, p. 197).

Law and language refer to life (therefore *including* it into its own operations) precisely by suspending their relationship with it (therefore founding their own intelligibility on its *exclusion*). The state of exception, in other words, is a *paradigm* of a particular *signature* that characterises law and language more generally, namely, the signature of ex-ceptionality (from latin *ex-capere*, 'taken-outside'). Perhaps, Agamben's most accessible description of the function of exceptionality is provided at the very end of his *Homo Sacer* series, where this is described precisely through an analogy with language:

> something is divided, excluded, and pushed to the bottom, and precisely through this exclusion, it is included as *archè* and foundation (…) in happening, language excludes and separates from itself the non-linguistic, and in the same gesture, it includes and captures it as that with which it is always already in relation (…) the *archè* is constituted by dividing the factical experience and pushing down to the origin—that is, excluding—one half of it in order then to rearticulate it to the other by including it as foundation (Agamben 2017, pp. 1266–1267).

This logic, according to Agamben, is *presuppositional* because in excluding a certain object it constitutes it as a *foundation* – something that must be *presupposed* for the logic to be operational.[20] Moreover the 'politico-juridical tradition' is said to produce its own foundation(s) according to this logic (ibid., p. 1265). The categories of legal cognition can, I think, also be ascribed to this tradition. Agamben's treatment of some legal categories is particularly instructive in this respect. For example, when discussing the Roman law doctrine of *res nullius* ('things that are not the property of anyone') Agamben argues that, to the extent that 'the first one who collects or captures them becomes ipso facto their owner, they are only the *presupposition* of the act of appropriation that sanctions their ownership' [italic mine] (ibid., p. 997). Similarly, while discussing Savigny's conceptualisation of possession as 'both a right and a fact [*Factum und Recht zugleich*], namely, fact according to its nature, and equivalent to a right in respect of the consequences by which it is followed', Agamben suggests that

[20] In this respect, Agamben speaks indistinguishably of 'structure of exception' and 'structure of presupposition' (2017, p. 1266).

'[t]he *factum* of possession forms a system, in this sense, with the right of ownership' (ibid.). In this respect, Agamben concludes that:

> the very structure of law (…) is constitutively articulated on the possibility of distinguishing *factum* and *ius* [excluding *factum* from *ius*] by instituting between them a threshold of indifference, by means of which the fact is included in the law (ibid., p. 996).

It is therefore my contention that the state of exception is for Agamben a paradigm of the ex-ceptional (from latin *ex-capere*, 'taken-outside') structure of both law and language. To put it simply, the ex-ception is the structure of life's inclusive-exclusion that makes law (and language) *intelligible*. This is true at the level of individual norms as well. The legal norm includes life, making of it a condition of validity, i.e., by excluding it through the suspension of concrete custom and usage which, in other words, becomes a zero point of imputation: the legal condition of a legal consequence. It is not by chance that another paradigmatic instance of ex-ceptionality is, according to Agamben (2017; p. 25), the *lex talionis* as formulated in the Laws of the Twelve Tables (*si membro rupsit*, *talio esto*), namely, a pre-modern example of peripherical imputation: legal condition (*si membro rupsit*) ought (*esto*) to produce legal consequence (*talio*).

For Agamben, as for Kelsen, this structure provides the form not just for individual norms but for the juridical order as a whole which, according to his philosophical-historical narration[21] 'constitutes itself through the repetition of the same act without any sanction, that is, as an exceptional case' (ibid., p. 25). Agamben, in fact, hypothesises that *talionis* might derive from *talis* ('amounting to the same thing') and thus that '*talio esto*', in its original formulation, might be interpreted not simply as the punishment of a certain violent act ('*membro rupsit*') but rather to 'its inclusion in the juridical order, violence as a primordial juridical fact' (ibid., p. 26).[22] The *lex talionis* symbolises the law-founding repetition of violence, namely, the institution of the legal order as a space from which violence is banned (excluded) through its monopolisation (inclusion).[23] But, practically, this amounts to the institution of a valid ought-form which is – or better, can be – efficaciously administered and, in this respect, Agamben's account of law is fully Kelsenian.[24]

[21] With 'narration' I mean the use of historical evidence for the sake of philosophical speculation. Agamben's narration is not an account of how the Laws of the Twelve Tables shaped ancient Rome's society. The exception is a paradigm of intelligibility of the past firmly situated in the present (Crosato 2019; p. 294).

[22] Kelsen similarly suggests that one of the paradoxes of law, understood as a coercive order, is that 'the coercive act of the sanction, is of exactly the same sort as the act which it seeks to prevent (…); that the sanction against socially injurious behaviour is itself such behaviour (1949, p. 21).

[23] Agamben speaks of a 'political curse' which 'marks out the locus in which, at a later stage, penal law will be established' (2017, p. 329).

[24] Schütz has similarly observed that Kelsen's *Grundnorm* 'comes close to Agamben's concept of law as suspended by a state of exception' (2008:123).

The Critique of Formce

Agamben aligns with Kelsen's idea that the illicit 'is not a fact standing outside, much less in opposition to, the law, but a fact inside the law and determined by it' (Agamben 2018; p. 21). At the same time though, inspired by Yan Thomas's work on the 'sanctity' of Roman law, he also suggests that a legal system, while initially conceptualising illegality as a 'legal hypothesis' – with 'the rule [as crime] and the sanction (…) articulated in one same conditional proposition' (ibid., pp. 16–17) – will eventually evolve by fictionally distinguishing between primary and secondary norm, namely, a presupposed normal behaviour (the rule of conduct) and an abnormal one to which a sanction is attached (rule of decision).[25] Similar to Savigny's treatment of possession and property, lived life becomes a *force* of law – action which can comply with the law – and thus forms a system with the crime/sanction, which however for Kelsen represents the only true expression of the pure *form* of law, i.e. *validity*. But even for Kelsen this is contingent upon *presupposing* the *efficacy* of the valid norm. Validity and efficacy, from this perspective, form a system and the *Grundnorm* represents Kelsen's attempt to articulate them into an in-distinction.

Agamben, I think, makes implicitly the same argument when he suggests that 'the sanction does not create only the illicit, but at the same time, by determining its own condition, above all affirms and produces itself as what must be' (ibid., p. 22). Through the emergence of a distinction between primary and secondary norm 'the law denounces the transgression as an infraction of the imperatives that it has pronounced' and, thus 'turns the sanction towards itself' (ibid., pp. 17–18), thus founding self-referentially the myth of its inviolability, i.e. *sanctitas*: the myth of law as a system of rules which presupposes a 'general and abstract prohibition of violating legal injunctions as such' (ibid., p. 17).[26] The expression '*lex sancta*', in fact, indicates that the law is 'enclosed (…) by a protective barrier' (ibid., p.18) and that therefore cannot be violated, even when it is violated (that the law is violated is actually possible precisely as a consequence of law's inviolability). The fiction of law's *sanctity*, in this respect, appears analogous to Kelsen's idea of the state as the fiction of a given territory in which a certain population obeys the law and, more precisely, to the idea of validity as the possibility of efficacy (which does not exclude the inefficacy of individual norms in concrete circumstances). Furthermore, the myth of *sanctitas* finds its counterpart in the myth of a man to be 'accused', in the sense of 'caused', 'called in question',[27] a man who, like K. in Kafka's *The Trial* 'by the very fact of living is constitutively called into question [*in causa*] and accused' (ibid., p. 7). But this is precisely what is at stake in Kelsen's fiction of the 'physical person': the institution of the individual as a fictional zero-degree of imputability.

[25] In accordance with the maxim '"*Contra legem facit, qui id facit quod lex prohibet*", "He acts against the law who does what the law prohibits" (Paulus, in Digest, 1.3.29)' (Agamben 2018; p. 17).

[26] It is in this sense that the sanction 'produces itself as what must be' (Agamben 2018; p. 22).

[27] In Italian, '*chiamato in causa*', with the Latin word '*causa*' meaning both 'cause' and 'judgement'. Agamben speaks of a process of 'interiorisation of guilt', the constitution of the subject as 'culpable' (2018, p. 9).

What Agamben does is to further problematise, philosophically and ethically, Kelsen's intuition regarding the ought-form of law. While Kelsen views the apriori of the legal order as 'an immediate given of our consciousness' (Agamben 2017; p. 748), Agamben questions it as an object encountered by thought in a mediated form, namely, the form is-ought in which *is* (life) and *ought* (law) are always already co-implicated violently, that is to say, ex-ceptionally, i.e. through an inclusive exclusion.[28]

The *Grundnorm*, the foundation of legal cognition, is *not*, in this respect, an ought-form but rather a form which constitutively and necessarily presupposes a force, a zone of indistinction between form and force (a *formce*) that must be articulated by (legal) thought into two realms, a form of law (i.e. *ought*) and a force of life (i.e. *is*) instrumental to the former's purposes and, therefore, included (in law) through its exclusion (from law). The *Grundnorm* represents a zero-degree of normative force of the factual, signifying the institution of reality as the sphere to which law must be able to refer in order to be applied, that is to say, in order to continue to exist as a form.

Agamben's reflection on the state of exception as a situation in which, 'on the one hand the norm is in force [*vige*] but is not applied (it has no "force" [*forza*]) and, on the other, acts that do not have the value [*valore*] of law acquire its "force"' – in other words, the state of exception as 'an anomic space in which what is at stake is a force of law without law [force-of ~~law~~]' (2017, pp. 198–199) – is thus a paradigm of the ex-ceptionality of law as this is concretely cognised and applied in unexceptional, i.e. *normal*, situations. In this context, the difference between the exceptional and the normal situation is not properly grasped if considered qualitatively. It is rather a matter of degree, as Agamben seems to imply when he describes the state of the exception as 'the place where the opposition between the norm and its realization reaches *its greatest intensity*' [italic mine] (ibid., p. 197). In a state of exception, arguably, the ex-ceptionality of the law – namely, law's ability to *include* an object (life) whom, at the same, law (as form) constitutes as an *outside* (life as force-of ~~law~~) – is in full display and becomes, therefore, more directly graspable and cognisable. But exceptionality is already at stake, only less evidently, in much of the discussion on the relationship between validity and efficacy, or in the conceptualisation of the physical person and the state as juridical fictions, just to mention some examples.[29] To the extent that the *Grundnorm*, according to Kelsen, grounds the validity of all legal norms but is not itself a juridical norm, one could argue that the *Grundnorm* possesses the force-of ~~law~~.

An actual instance of what may be interpreted as a state of exception has, indeed, due to its concrete political implications, a more evident and direct relevance for a critique of power but the realisation that the state of exception is only one instance of law's exceptionality might as well require a reconfiguration of the very idea of power

[28] Moreover, this encounter is mediated also in the sense that to be encountered is not an apriori but a *historical apriori*, an object which is handed over by a tradition of violence (i.e. ex-ceptionality), to be understood here as a philosophical constellation of historically relevant paradigms of inclusive-exclusion.

[29] It is relevant to stress that, according to Agamben, the state of exception is a '*fictio* by means of which law seeks to annex anomie itself' (2017, p. 199).

with respect to criticism and, particularly, *legal criticism*. Power, from this perspective, would be actualised every time legal communication presupposes an *ex-ceptio* (i.e. inclusive-exclusion) of life. Power would be, first and foremost, the power of thought, i.e. thought (and therefore language's) ability to include by excluding as reflected, for example, also in legal theory's attempts (such as Kelsen's) at organising the relationship between law and life. The function of exceptionality, more than providing a political tool to denounce particular distortions of the juridical order, is to provide a *methodological tool* that makes a tradition of the power of thought available for study. Exceptionality makes the thought of the power of thought possible as the practice of (re)collecting instances (paradigms) of such articulation (signature), as these appear throughout the history of thought (and, particularly, of legal thought) which is thus constructed by the inquiry itself as a tradition of exceptionality.

Power becomes therefore a conceptual category *crafted by the inquirer through the inquiry*, and, in this sense, it is *not* something that exists out there in the world. It is, in other words, a *methodological fiction* that makes a certain tradition intelligible as, precisely, a tradition of power. It is not by chance then that Agamben, who famously argued that power reproduces itself by making life bare, is also careful in distinguishing bare from naked or natural life, in a gesture that appears analogous to Kelsen's separation between physical person, which is a legal construct, and human individuality; a gesture which, in other words, mimics the (exceptional) logic of legal fictionality. To speak of power as a fiction of thought, however, does not make its critique less relevant or urgent: it makes it though, admittedly, less oriented towards immediate political action and certainly more contemplative or, in Agamben's words, *inoperative*. To be contemplated are, precisely, certain instances of legal thought (theories, decisions, laws, and so forth) as instances of a function of exceptionality, i.e. a function of (thought's) power.

The function of power can also be described as a function of communication, namely, what Agamben, re-interpreting Foucault, would call an 'enunciative function': a 'sanctioned mode of intelligibility' which allows things to be said in a meaningful way in a given social context (Watkin 2013; p. 12).[30] In order for (legal) meaning to be produced, the (legal) subject who speaks must presuppose a function of intelligibility which does not inform directly the content of the act of (legal) speech but makes it *communicable*. Legal communication presupposes an enunciative function which expresses law's *communicability*, the speaker's ability to speak about law.[31] The question to be asked here is *neither* (1) what the law says *nor* (2) how can the law speak: it is rather (3) how can I – the one who speaks about the law – speak about law's ability to say anything? Kelsen, like any other legal theorist, distinguishes (1) from (2): (1) concerns legal officials and (2) concerns legal theorists or, with Kelsen, *jurists*. The *Grundnorm* is the presupposition of the *jurist*, the one concerned with *legal cognition* rather than with *legal application*; it is Kelsen's own

[30] On this see, more generally, Agamben's work on method (2009).

[31] There is no doubt that material conditions can often limit unfairly the possibility to communicate for certain individuals and groups. These material conditions, however, do not *necessarily* constitute the structure of the enunciative function (at least as understood by Agamben). There is no guarantee that the subjects previously excluded from communication will not reproduce the same enunciative function of power, once they gain the material means to do so.

representation of the enunciative function of the jurist. The question to be asked (3), however, is how can Kelsen, and with him all the jurists, speak? What is presupposed in the very idea that there is a jurist? The answer is: a zone of indistinction between form of law and force of life, a *formceoflaiwfe*, that legal thought must endlessly try to re-articulate.

Like in Kelsen the *Grundnorm* does not coincide with the content of any legal norm but makes such norms intelligible as norms, so exceptionality makes in Agamben not only law but also communication about the law, including legal theory, communicable as an object of criticism. In other words, it is not just the *Grundnorm*, and therefore law, that has the form of an exception. It is the relationship between *Grundnorm* and law (as formulated by Kelsen) to be exceptional in the first place: it is the form of Kelsen's theorising which consists in including (into the *form* of legal cognition) that which it excludes (the *forces* of life as monitored by other disciplines, including, biology, psychology, sociology, economics, and so forth). This operation, i.e. theorising, is *powerful* in at least three senses: first, it is *analogous* to the operation through which violence (force) is legitimated, as sanction, by the legal system which, moreover, preserves itself (form) through its repetition; second, it founds the law on the presupposition of a zone of indistinction between form and force (*formce*) thus creating a space of *jurisprudential* speculation concerning their possible articulation with direct *political* implications[32]; third, and most importantly, insofar as at stake in this operation is the relationship between a form of law and life as a force-of ~~law~~, this mode of theorising is *bio-political*. It refers back to a broader governmental bio-power which preserves itself by sustaining a dialectic with sovereignty and, in this respect, functions by endlessly making decisions on the relationship between life (which it claims to embody without mediations) and law.

The Authority of Life

The idea discussed in the first half of this work – namely that, after Kelsen, legal theory can be experienced (i.e. studied) anew as preserving and reproducing a foundational signature of exceptional power – can be now further developed by reflecting on the exceptionalism of one of Kelsen's most important critics, Carl Schmitt. My hypothesis in this regard is that Schmitt's theory – a blend of both institutionalism and decisionism – can be studied as an attempt to appropriate the enunciative function instituted by Kelsen with his *Grundnorm* by turning the form of law into a zero-degree of force of life.[33] To this purpose, a brief engagement with Agamben's archaeology of the conceptual distinction in ancient Roman law between *auctoritas* and *potestas* (as paradigms of, respectively, force of life and form of law) is necessary.

[32] Think, for example, of the political-rhetorical usefulness, for various non-state actors, of categories developed by socio-legal scholars including, for example, 'semi-autonomous social fields' (Falk Moore 1973) and 'living law' (Ehrlich 2017). On this point see in particular Klink (2009; p. 153).

[33] Similarly, Zartaloudis, referencing Schütz (2008; p. 123), has observed that 'Kelsen anticipated the conception of the state of exception (that his adversary Carl Schmitt theorised)' (2008, p. 283).

In the Roman tradition, Agamben claims, the concept of *auctoritas* referred to the *creative force* (from *augeo*, 'to augment, perfect, produce') of both the *pater familias* and the *patres*, the senators, a force exceeding the formal content of the law, i.e. *potestas* (2017, pp. 232–233). While the *pater familias*, through the formula '*auctor fio*', is able turn the acts of a subject without full legal autonomy into valid legal acts, the *patres* were able to issue, *ex auctoritate*, a *iustitium*, an act which suspends the law and turns potentially all the citizens into bearers of the force to act on behalf of the suspended law (ibid.). *Auctoritas*, in other words, is the legal fiction of a normative force which 'springs from the person' (from life) rather than from the letter of the law, i.e. form as *potestas*. In a typical move, then, Agamben employs philosophically this distinction in order to claim that '[t]he juridical system of the West appears as a double structure, formed by two heterogeneous yet coordinated elements': *potestas* which is 'normative and juridical in the strict sense' and *auctoritas*, which is 'anomic and metajuridical' (ibid., p. 240); in other words, form and force.

Crucially, Agamben further observes that during the 1930s *auctoritas* was used by many scholars, including Schmitt, as the conceptual foundation of a theory of sovereign power modeled after Weber's theory of charismatic power. According to Agamben, this Schmittian approach to the conceptualisation of sovereignty has three fundamental features: (a) sovereignty is characterised by 'unity with the social group', not essentially coercive but rather founded on a generalised 'consent and the free acknowledgment of a superiority of value'; (b) sovereignty is 'defined through psychological categories' of the sovereign so that his power 'can never be derivative but is always originary and springs from his person'; (c) sovereignty 'attains its appearance of originality from the suspension or neutralization of the juridical order', it 'coincides with the neutralization of law' (ibid., pp. 238–239). It is in consideration of these three features that Agamben is able to argue that, paradoxically, '[l]aw's claim that it coincides at an eminent point with life could not have been affirmed more forcefully' than with the theory of sovereignty (ibid., p. 239). *Auctoritas* then becomes a 'figure of law's immanence to life' (ibid., p. 238), which is to say, a paradigm of biopolitics, understood as a signature of the inclusive-exclusion of the force of life into-from the form of law.

Agamben is thus able to speak of a *convergence* during the 1930s between theories of sovereign power, i.e. decisionism, and 'the tradition of juridical thought that saw law as ultimately identical with—or immediately articulated to—life' (ibid., p. 239), i.e. institutionalism. Agamben considers Schmitt the main representative of the first approach, and mentions Rudolf Smend – a German constitutionalist who, like Schmitt, was extremely critical of Kelsen's positivism – as a representative of the second approach. These schools are convergent to the extent that both are theories of the force of law, that is to say, of efficacy as opposed to validity, i.e. the form of law. More generally, both theories ground law's essence on what can generally be described as a force of life, representing a zero-degree of legal normativity.

Schmitt, for example, claims that '[e]very general norm demands a normal, everyday frame of life to which it can be factually applied (…) a homogeneous medium' (2008, p. 13) which, in turn, is constituted and preserved by a sovereign, namely, someone who has the power to mobilise the entire living community against what is represented as another 'community sharing a way of life that negates any other way

of life' (Croce and Salvatore 2014; p. 23), i.e. represented as abnormal.[34] Decisionism, in other words, implies that 'legal norms are based on a previous normality' which, in turn, functions as a 'normative device' in a twofold sense: it is 'made up of standard cases, that provide people with guides for conduct' and provides, therefore, the foundation for legal norms, namely, 'standard cases that acquire a stable form' (ibid., pp. 37–38). Legal norms and the officials administering them (including the sovereign himself) stabilise normality and in this sense in Schmitt's theory: '[r]eality and legal norms presuppose one another. Reality produces standards embodied by norms, whilst norms allow reality to comply with such standards in the long run' (ibid., p. 39). Legal norms are therefore used, through judicial interpretation, as means to stabilise standards of normality within a certain group. In this respect, sovereignty is not exercised by the sovereign alone: it is dispersed among legal officials, judges in particular, who have been authorised by the sovereign to decide on his behalf. Sovereignty, in other words, is the very principle of stabilisation of the conditions of normality within the state, understood as a society comprised of different social institutions.

On the other side, Smend was similarly concerned with a *theory of integration* of individual consciousnesses into the collective consciousness of the state (Korioth 2000; p. 211). Political, legal, and social actors (including individuals themselves)[35] according to his theory, are meant to 'integrate (…) the entire citizenry into national unity', i.e. the state, through the identification of a 'historic stock of common national values' (Smend 2000; p. 221). They engage, more precisely, in what Smend describes as the function of 'formation and maintenance of basic legal convictions' (ibid., p. 220). The state, in this respect, is ambiguously described by Smend as 'an actualisation of meaning' or, better, as an 'actualisation of values' which defines a 'spiritual community' and it has no existence outside the process of integration which defines it (Landecker 1951; p. 41). Even legal officials, in spite of the technical specificity of their activity, play 'a function within a spiritual whole', such that 'it is determined by the whole, orients itself according to it, and its acts determine the essence of the whole' (Smend 2000; p. 222). Constitutional interpretation in particular aims at preserving the state as an integrated spiritual community and a constitution is thus essentially 'a legal instrument of integration' (Lackender 1951, p. 41). With Smend's own words, '[t]he constitution is the legal order of (…) the life through which the state has its reality' (Smend 2000; p. 240), it is what makes integration possible via legal norms. The constitution is thus conceptualised as both norm and integrating reality (Belvisi 2012; p. 65). As a result, for Smend, 'there can be no formal integration without a substantive community of values, just as there can be no integration through substantive values without functional form' (Smend 2000; p. 228). Agamben, in this respect, quotes Smend's claim that:

> the norm receives the grounds of its validity [*Geltungsgrund*], the quality of its validity, and the content of its validity from life and the sense attributed to it,

[34] On this see more generally Wetters (2006) and Fusco's (2017) excellent works.

[35] The individual actively participates to the process of integration in many forms including, for example, not only voting but also reading news-papers (Landecker 1951; p. 41).

> just as, inversely, life must be understood only in relation to its assigned and regulated vital sense [*Lebenssinn*] (2017, p. 239).

It should be clear at this point that Schmitt's and Smend's approaches produce theories of life's force that are, just like Kelsen's,[36] indebted to the two-sided theory of the state ('Zwei-Seiten-Lehre') developed by Jellinek. As an organisation of power, the state was conceived by Jellinek as an *association* founded on an 'agreement of wills', the shared 'perception and acceptance' of the state's ordering ability and, particularly, of its sovereign ability to 'enforce its will against every other social organization (…) by imposing a hierarchical structure on society' through legal means (Klink and Lembke 2016; p. 206). Jellinek's state is, in an almost Hobbesian fashion, at the same time *sovereign* – because it has the power to assert its will against every countervailing or resisting will – and *agreed upon* – because it 'manifests itself in the unity of human beings connected by common purposes' (Somek 2006; p. 756). It is, in his own words, 'a unitary association of settled people equipped with an originary power to rule' (Somek 2006; p. 756). Even more than the theory of state though, it is Jellinek's twofold logic of 'the normative force of the factual' and 'the factual force of the normative' that represents the fundamental condition of existence of Schmitt's and Smend's modes of theorising. But it has been already shown that this logic, at least since Kelsen, can only be understood as a logic of inclusive-exclusion.[37]

Following from the considerations developed in the first half of the paper, it can be now suggested that the history of jurisprudence, after Kelsen, becomes intelligible as a praxis of inclusive-exclusion, namely, of inclusion of what Kelsen himself tried (ambiguously) to exclude from the realm of legal cognition. The convergence between decisionism and institutionalism can thus be understood as the attempt at including within the realm of legal cognition what Kelsen managed to exclude in the form of a presupposition, that is to say, of an inclusive-exclusion. More precisely, my contention is that Kelsen's theory produces a presupposed zone of indistinction between life and law, force and form, efficacy and validity (i.e. the *Grundnorm*), which represents, at the same time, the institution of the jurist as an enunciative function: to make sense of this ambiguous *formce* of law by means of new articulations (i.e. new theories). The act of theorising becomes thus intelligible as the articulating organisation, in and through thought, of *formce* into form and force. Decisionism and institutionalism are *re-presentations* of this enunciative function.

[36] The impact of Jellinek's theory on Kelsen's work was discussed in the first part of this paper.

[37] Arguably, Kelsen's theory itself represents an ambiguous inclusive exclusion of the dualist theory developed by Jellinek, in that it somehow maintains the hypothesis of a double life of the state (legal and social) but inscribing both within the law. Kelsen, it has been observed, uses Jellinek's work 'as an anvil upon which to hammer and shape his own theory' (Klink and Lembke 2016; p. 210).

The Life of the Jurist

It has recently been suggested that Schmitt's institutional turn in the 1930s allowed him to solve the impasse created by his dogmatic focus on the concepts of decision and exception in the 1920s. A systematic study of the different phases of Schmitt's work suggests that his theory embodies a form of *decisionist institutionalism*, according to which the state has 'a jurisdictional power (…) to select and promote only a few of the jural relationships produced in the social realm' (Croce and Salvatore 2014; p. 5). It is, however, my contention that already in the 1910s, with his first published work, *Gesetz und Urteil*, Schmitt laid down the theoretical foundations for the ambiguous mixture of decisionism and institutionalism which would then characterise his later works. Most importantly, a critical overview of this work, which is fundamentally an essay on the functioning of judicial interpretation, suggests that his theory of law was (in the particular sense described in the previous sections) *exceptional* from the start, even before he began to work on the notion of dictatorship. The problem of the convergence of institutionalism and decisionism highlighted by Agamben, in other words, becomes intelligible in Schmitt's work as a convergence between his earlier account of judicial interpretation and his later theory of dictatorship. The reason for this is that these two convergent trajectories further converge towards a common signature of exceptionality.

Schmitt, in *Gesetz und Urteil*, attempts to describe how judges think when they judge. In this context, his focus is on judicial cognition, a particular form of legal cognition which in turn pertains to the broader epistemological framework of the jurist – a category which, at least in Kelsen, encompasses but is not limited to judges.

Contrary to Kelsen, Schmitt argues that a judge's primary concern in deciding a case is not the *valid-application* of a pre-existing legal norm. Judges are primarily occupied with the *efficacious-creation*, through the decision itself, of stable conditions for the issue of future decisions. A decision's main function is to conform not to legal norms but to the 'juristic practice' itself (Schmitt 2021; p. 115). The guiding principle is that a decision is efficacious – and therefore, as far as Schmitt is concerned, legal determinacy obtains – if it can be assumed that an ideal, trained jurist would have decided similarly in those specific circumstances (ibid., p. 103). Legal determinacy, for Schmitt, is not the predictability of a decision based on the letter of the applied statute – it is not, in other words, 'the idea that correct judicial decisions are programmed by legal norms': it is, more subtly, a requirement for judges 'to decide in the way that best fosters and preserves (…) the "calculability" and "predictability" of judicial decisions' (Vinx and Zaitlin 2021, p. 8). As a result, a judge can even go against the letter of the law if they have 'reason to assume that other judges would likewise choose to decide *contra legem*' (ibid., p. 12).

Strict application of a pre-existing legal norm is basically just a possible means for the production of what really matters for judges, namely, 'the abstract significance of the decision as such', a pure-being-decided [*Entschiedensein*] (Schmitt 2021; p. 86). This expression indicates that the predictability of the content of a particular decision is not an end in itself: it is rather a means for the maintenance of a general sphere of decidability, a situation in which decisions (independently from their actual content) are *possible*. For Schmitt, in other words, being able to decide seems ultimately to

be more important than what is being decided (ibid., p. 131).[38] This also means that decisions are not *validated* by an existing norm. Rather, they must legitimate themselves, producing the conditions of their own determinacy (ibid., p. 124).

It is important to stress that the preservation of a sphere of decidability is made possible by an institutionalisation of the social context to which the decision refers, i.e. the decision's representation of its own social conditions. This is not to say, only, that decisions give 'legal specificity to a form of social life that is assumed to be valuable' (Vinx and Zaitlin 2021, p. 14). In order for a decision to be calculable, it must provide a reasonable picture of the society to which it refers, namely, a picture of a society in which decisions, including the one being taken, are possible. A valuable social life is, first of all, one in which decisions are not impossible. Each decision legitimates itself by both acknowledging and shaping the judicial interpretation of the social context to which it will concretely apply. For this purpose, each decision must be thought as addressed to a fictional 'learned jurist', the fiction of an empirical type who, for Schmitt, must be equipped with *both* the technical knowledge of a judge and an 'an understanding of the practical questions of life' (ibid., p. 114). The jurist, more precisely, represents 'the needs of [social] intercourse' (ibid., p. 113) but only insofar as these constitute a means for the calculability of future decisions.[39] The judge must institute within each decision the fiction of a learned jurist, 'an average type of the person whom the judge wishes to convince by offering his reasons' and who represents an ambiguous zone of indistinction between 'human and juristic' (ibid., p. 114) the social order and the legal order, life and law.

This creative process demands some form of reference to the existing legal order, but this reference is, precisely, creative: it expands the possible interpretation of the legal order beyond the limits defined by the actual content of its norms. Every decision represents a suspension of the normative content of the norms it applies, creating anew a context in which decisions are possible – a normal context of decidability, a zone of indistinction between law and society. The decision then suspends the semantic context of the existing legal norm (i.e. it demanticisises it) by instituting the context of (social) normality beyond the legal rule, i.e. the social norm. The judge constructs, from within the decision, a normalised social context in which future decisions by means of law will also be possible. The decision creates a zone of indistinction between the form (rather than the content) of the legal norm and the

[38] Schmitt refers here specifically to situations in which two or more interpretations of the same statute appear equally plausible and, therefore, 'the need to have some decision at all takes priority over the reasons for decision, so that the content is then relatively indifferent' (2021, p. 132). Along similar lines, he also claims that 'what matters is often not the kind and manner of regulation, but rather that there is some regulation at all' (ibid., p. 86) and, similarly, that the main function of a statute is 'to assure that things are determined at all' while 'how and what it determines is the second question' (ibid., p. 88).

[39] Moral and cultural norms and, more general, all 'the norms that one wants to derive from the needs of intercourse (…) [have] significance for practice only in the function of a collaborator in the task of achieving general legal determinacy'; more precisely 'they are capable of grounding the correctness of the decision if their power suffices to give rise to the certainty that they will generally be effective in like cases' (Schmitt 2021; p. 124). And yet, Schmitt adds (quoting Eugen Ehrlich) that '[t]he answer to the question of how another judge would decide may come to change very quickly in the event of sudden upheavals in legal life or in the event of a "tempestuous development of legal consciousness"' (ibid., p. 139).

(ideal)[40] force of the social norm. Sociality is normalised, understood as a normalising force, i.e. the force of normality, but this operation is not neutral; it serves the purpose of making society the potential object of a stream of decisions, of adapting it to decidability. The judge's power to decide, in turn, must employ as its necessary means not a particular legal norm but rather the abstract idea of law as a form. Every decision reproduces the fiction of conformity – the idea that there is a form of law to be *applied* – and the fiction of normality – the idea that there is a force of life that *creates* its own normative conditions.

Social life is internalised into the decision, but always as a zero-degree of force to decide which is, at the same time, a zero-degree of form of law – a pure form without content.[41] Life is instituted as a normalising force that grounds decisions on its normative form. These decisions are, at the same time, decisions on the form of law, on the particular relationship that must be established between life and law. The reproduction, in the decision, of a social norm(ality) is functional to the representation of a context in which decisions can be made by means of law. This means, so to speak, that the only two things that are really abnormal (impossible) are absolute-undecidability and absolute-alegality. To the extent that the function of decidability uses law as its primary means, not any specific norm of law, but the possibility of its form must be retained.

Sovereign Form

As soon as one considers Schmitt's later work on commissarial and sovereign dictatorships as the two species of the genus 'state of exception' (Agamben 2017; p. 194), it becomes clear that what was really at stake in his theory of judgement was a form of law without content. Like a judge, the dictator's fundamental task is to preserve the power to decide. Being in command during a dictatorship means, in general, 'having to decide' (Schmitt 2014; p. 13) and the only stable content of the decision is, self-referentially, 'the fact that a decision as such has been made at all' (ibid., p. 17). The dictator, like the judge, is not bound to a certain content but to the creation and the preservation of a context of decidability. However, while for Schmitt the judge, in order to preserve a context of (normal) decidability is allowed to go against the will or the letter of a particular legal norm, the dictator is allowed to suspend the application of the law altogether, and therefore to 'deliberate without consultation' (ibid., p. 4). At least with respect to decidability, the difference between the judge and the dictator is not qualitative; it concerns the different degree of threat to the possibility

[40] Normality, in Kelly's convincing reading of Foucault, stands for 'a model of perfection that operates as a guide to action in any particular sphere of human activity' (Kelly 2019; p. 2). In this sense, it 'is not synonymous with social conventions' (ibid., pp. 2–3): it is rather an ideal template or representation of sociality, 'an image of society', giving individuals 'a certain conception of the society in which they live and a certain model for their future' (ibid.,:8). In interpreting rules judges provide, at the same time, an ideal, i.e. normalised, representation of society and in this sense 'norms [as opposed to legal rules] do not 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' (Fusco 2017; p. 130).

[41] See notes 38 and 39 above.

of deciding and therefore the means that, in each instance, the one who decides is allowed to employ.

While the judge is allowed to deviate from the letter of a particular legal norm, producing an exception which is contained within the broader limits of the legal system, the commissarial dictator momentarily suspends the application of the whole constitution ('law-implementing norms') in order to re-establish the necessary conditions for the *same* constitution ('legal norm') to be applied again in the future[42]. The function of a commissarial dictatorship is therefore the self-referential creation of 'a condition in which the law can be realised' (ibid., p. 18) or, in other words, the desemanticising suspension of all, or most, legal norms of the legal order. However, this suspension is authorised by the constitution itself, i.e. by 'the existing legal basis' (ibid., p. 119) and therefore is not a suspension of the validity of the constitution as such. On the other hand, sovereign dictatorship is less restrained, as it suspends the validity of the actual constitution, and yet it does so with the purpose of recreating the conditions for a future valid constitution. Its scope, in fact, is the creation of 'a state of affairs in which it becomes possible to impose a new constitution', a constitution 'that is still to come' (ibid., p. 119).

In Kelsen's terms, one could argue that the sovereign dictatorship does not suspend the meta-normative principle of a *Grundnorm*. The sovereign dictator is still bound to a *Grundnorm* because his function is to maintain the possibility of a *Grundnorm* beyond any actual constitution. With Agamben, the sovereign decision is 'juridically formless (*formlos*), [and yet] it represents a "minimum of constitution"' (2017, p. 194): it is, so to speak, *restrained* by the idea of the juridical order, itself understood as a space in which norms are valid because decisions have to be made, a pure form of law which, as Agamben would say, 'no longer prescribes anything' other than 'the zero-point of [its] own content' (ibid., pp. 44–45).

In a specular manner, in Kelsen's theory the legal order is presented as a space in which decisions have to be made *for the sake of validity*. The decision as a creative act is subordinated to the logic of validity insofar as the former represents, in Kelsen's argument, merely a means for the preservation of *sanctionability*, the power to *apply* legal norms. Not only, in fact, it is true that in order to preserve the validity of the system, judges cannot cease to decide because when they cease, by and large, to do so – i.e. when the system loses its efficacy – the system loses its validity. Most importantly, Kelsen does not provide any substantial criterion to establish when a created norm's *content* conforms with the content of the applied norm. If validity means that an individual, including a legal official, 'ought to conduct himself as the norm prescribes, (…) not that the individual necessarily behaves so that his conduct actually corresponds to the norm' (1941, p. 50),[43] then the valid norm for legal officials is the one that *they ought to apply* and not the one that *they concretely create*. Whatever they concretely create with the decision is a valid norm insofar as it *repre-*

[42] The concrete application of the constitution is suspended in order for the 'existence' of a 'binding legal basis' – whose 'technical means of action' have been suspended – to keep existing (Schmitt 2014; p. 118).

[43] Technically, for Kelsen, legal norms are primarily directed to the organ which executes the sanction and, in this sense, 'only the organ can, strictly speaking, obey or disobey the legal norm, by executing or not executing the stipulated sanction' (1949, p. 61).

sents the application of another, pre-existing legal norm. But this is a formal, logical, requirement and not a substantial one.[44]

Kelsen is not explicit about it, but it is possible to argue that, for the sake of validity, what matters is not that the norm is applied correctly – that is to say, interpreted through the creation of a new norm which conforms to the applied norm: what matters is that the created norm is formally *represented as resulting from the application of a pre-existing valid norm*. [45] It cannot be otherwise, since the creative moment of a judicial decision – the act of interpreting a norm in order to issue an order – is (much like the act of observing a norm) impure to the extent that the actual content of decision is not fully pre-determined by the norm and remains discretionary, indeterminate, ambiguous.[46] What is valid, pure, about the decision is only the fact that it represents the formal application of another norm of higher rank which, however, in turn cannot *logically* determine the content of the norm of lower rank.[47] Since the decision on validity is limited to an ascertainment of *whether* a certain legal norm 'establishes or does not establish the alleged legal obligation', it follows that the decision on *how* the norm does so is left to the indeterminate, impure, evaluation of the judge (Kelsen 1990; p. 134).

Kelsen of course is not claiming that, given a certain legal norm, *every* decision is possible but only that an *indefinite* number of decisions can be validly derived from the same legal norm and that it is not therefore possible to know in advance the exact content of the norm created by the judge.[48] Moreover, it is possible for a decision to appear inconsistent with a pre-existing legal norm and yet, as long as the decision is not invalidated by another decision, the first decision will remain fully valid. Along these lines, Kelsen claims, within a valid legal order, 'a single legal norm may be valid but not efficacious in a concrete instance, because as a matter of fact, it was not obeyed or applied although it ought to have been' (1941, p. 51).

Moreover, in principle, there is no semantic limitation to validity either, in the sense that, as Kelsen himself observes, there is no actual human behaviour that can escape the potential scrutiny of the law.[49] All human behaviour can be made legally relevant, which is to say that, in potency, there is not such a thing as *alegal* behav-

[44] The minimum (formal) requirement of every created, i.e. lower, norm is that 'the higher norm must at least determine the organ by which the lower norm has to be created' (Kelsen 1949; p. 133).

[45] Schmitt makes, I think, a similar point when he points out that in Kelsen's pure theory what matters is not *how* the content of a decision is derived from positive law but only *the fact that*, in principle, such content can be derived from positive law (Schmitt 2021; p. 91).

[46] Kelsen 1990; p. 128.

[47] Kelsen in this respect stresses '[i]n terms of the positive law, there is simply no method according to which only one of the several readings of a norm could be distinguished as 'correct'' (1990, p. 131). Along these lines, Schmitt claims that Kelsen's theory of validity disregards all the elements that cannot be conceptually deducted from positive law and, in this sense, does not concern itself with the method of judicial practice. For this very reason, Schmitt continues, there is no contradiction between his approach (which is instead focused on the problem of judicial interpretation) and Kelsen's (2021, p. 91).

[48] Similarly, Agamben stresses that if it the application of a norm was immediately derivable from the norm 'there would have been no need to create the grand edifice of trial law' (2017, p. 200).

[49] In his own words: '[a]ny content whatever can be law; there is no human behaviour that would be excluded simply by virtue of its substance from becoming the content of a legal norm' (Kelsen 1992; p. 56).

iour. In this sense, Kelsen's generic idea of law is analogous to Agamben's (critique of Kant's) idea of a self-legitimising 'form of law in force as an empty principle (…) and that thus neither prescribes nor forbids any determinate end' (2017, p. 46). Such a pure form, Agamben continues, 'is all the more pervasive for its total lack of content' (ibid., p. 47) because it represents 'the empty form of relation' which, as such, 'is no longer a law but a zone of indistinguishability between law and life' (ibid., pp. 51–52). Even in Kelsen life is not simply separated from the pure form of law: it is rather excluded from law through the presupposition of their indistinction, that is to say, of an endless power to make life juridically relevant. It is life lived under the dome of 'a legal order [which] is always applicable' (Kelsen 1967, p. 247).

An order which is always applicable is a gapless order, which nevertheless preserves itself through 'the fiction of the gap' waiting to be filled; the fiction of a 'difference between the positive law and desired law' (Kelsen 1990; pp. 135–135) or between application and creation. The act of judicial interpretation involves bringing about the desired law while preserving the positive law, i.e. preserving validity. Schmitt's take on decidability appears, therefore, specular to, and consistent with, Kelsen's idea of a pure applicability: while the former examines positive law from the perspective of desired law, the latter examines desired law from the perspective of positive law. However, both must theorise along the lines of this tension between positive and desired law, application and creation, validity and efficacy, form and force. Law's efficacy, in this respect, concerns how a jurist *desires* to represent socially the pure sanctionability of law; how, by including life into a framework of pure applicability, they want to normalise or socialise the law. But what jurists strive for is never simply an ideal social content; it is a content *of the law*, a desired *law*. This means that in desiring whatever it is that they desire, they desire at the same time the form of law, or even better, the *formce* of law, the in-distinction of form and force, i.e. the *Grundnorm* as the power to articulate form and force, ought and is, duty and desire, law and life.

Interestingly, while with Schmitt, it is through the state of exception that the sovereign's desire for a form of law in force without significance becomes explicit, likewise with Kelsen 'the significance of the basic norm becomes especially clear when a legal system, instead of being changed by legal means, is replaced by revolutionary means' (1992, p. 59). In such instances, to be fulfilled is 'the presupposition of legal cognition', namely that 'what is to be valid as norm is whatever the framers of the first constitution have expressed as their will' (ibid., p. 57). However, this does not simply mean that the law embodies the will of the sovereign-constituent power;[50] it also means that the will of the constituency 'is to be *valid* as norm', that it must become force of (the *form* of) law. Kelsen's assertion that 'coercion is to be applied under certain conditions and in a certain way, namely, as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers' (ibid., p. 57), implies that what constituent power *must want* is, first of all, the form of law (coercion *bound to the conditions* set in the constitution) and, only

[50] For Kelsen it is 'irrelevant whether the replacement [of an old order with a new one] is effected through a movement emanating from the mass of the people, or through action from those in government positions' (1949, p. 117).

through it, a particular (legal) content. This also means that the form of law, what the constituent or sovereign power must want, cannot be separated from force as violence, i.e. from coercion and, in this respect, as Kelsen himself claims, the form of law is nothing but a certain 'organisation of force' (1949, p. 21), an inclusive-exclusion of force in/from form, a *formce* to be administered and preserved.

Both Schmitt's and Kelsen's theories, in this respect, are theories of (what Agamben would describe as) a 'pure form of law beyond its own content – a being in force without significance' (2017, p. 47), or better, of a form of law which includes its content by excluding it, that is to say, by presupposing a *formce* of law to be articulated into form and force of law, a *power* to administer the articulation of law and life. In Schmitt's this translates into a theory of law as pure decidability (law as a zero-degree of life) whereas in Kelsen this translates into a theory of law as pure applicability or sanctionability (life as a zero-degree of law).

In Schmitt, both the sovereign and the judge are concerned with the institutionalisation of life as 'a normal condition as a homogeneous medium in which [the law] is valid' (Schmitt 2014; p. 118). Life is transformed into a 'homogeneous medium', a means for the preservation of a pure decidability on the form of law. Even in the state of exception the preservation of pure decidability is bound, if not to the form of law, at least to the possibility of its form. This is why Agamben argues, in a quite Kelsenian fashion, that 'at issue in this suspension [i.e. the state of exception] is, once again, the creation of a situation that makes the application of the norm possible' (2017, p. 196). Sovereign dictatorship establishes a dialectic between law and not-yet-law – between a power that has not become law *yet* (constituent) and a power that has finally become law (constituted) – and institutes the jurist (i.e. the judge as the one who has to think as a jurist) as the figure of its preservation. Similarly, the *Grundnorm* is the presupposition of validity, without which 'no human act could be interpreted as a legal (…) act' and it functions, in this respect, as the foundation of 'juristic consciousness': it 'make[s] explicit what all jurists, mostly unconsciously, assume when they consider positive law as a system of valid norms and not only as a complex of facts' (Kelsen 1949; p. 116). Both *sovereignty* and the *Grundnorm* represent the contact between law and life as a 'reciprocal grounding' (Agamben 2017; p. 239) in which they constitute each other representatively as form and force, validity and efficacy. *Sovereignty* and *Grundnorm* are, in this particular sense, two attempts at naming the same thing, namely, the form of the relation between law and life.[51] They both represent an enunciative function, the jurist, whose endless task is the inclusive-exclusive articulation of law and life.

A Biopolitics of Jurisprudence

Kelsen's theory, at the risk of oversimplifying his argument, can be seen as an attempt to exclude from the domain of legal cognition strictly understood what Schmitt tried

[51] This is how Agamben can be interpreted when he claims that 'Sovereignty is, after all, precisely this "law beyond the law to which we are abandoned," that is, the self-presuppositional power of *nomos*' (2017, p. 51).

to re-include in it: *the authority of life*.[52] The theoretical whole that emerges from the merging of their approaches takes, in itself, the form of an inclusive-exclusion which points towards the ambiguous biopolitical nature of modern law, namely, at the same time, sovereign and individualised, abstract and embodied, formal and material, normative and normalising. The pure theory which, in Kelsen's words, 'by remaining entirely free of all politics, [] stands apart from the ebb and flow of life' (Kelsen 1992; p. 3), actually serves as an entry point into biopolitics (its zero-degree point) which, in turn, is characterised precisely by 'the ingraining of rational-scientific, socially generated norms within the legal discourse' (Martire 2017; p. 13).

It should be therefore stressed that Kelsen's theory appears consistent with the interpretation of the role of modern law in the production of a biopolitical sphere of govern-mentality – the space for the 'correct management of the productive life of (…) men in their relations (…) customs, habits, ways of acting and thinking' (Foucault in Martire 2017; p. 6); in other words, a space in which the government of population requires the implementation of techniques of self-government. Specifically, the Foucauldian claim that freedom is not defined in opposition with power but is rather a pre-condition for its stable exercise – a product of power that 'transforms [the subject] into an agent who is both the passive recipient of norms of conduct and their active (…) operator', and thus 'into a well-integrated member of society' (ibid., p. 24) – appears consistent with (although not equivalent to) Kelsen's critical account of freedom. Freedom is for Kelsen that which is made possible by the act of imputation: 'human beings are free because we impute reward, penance, or punishment, as a consequence, to human behaviour, as condition, in spite of its determination by causal laws, because this human behaviour is the end-point of imputation' (1950, p. 8).

Along these lines, Kelsen also claims that it is only by presupposing a *Grundnorm* – a certain organisation of force – that it is possible to speak of individual or collective interests in the form of subjective rights and that, conversely, the doctrine of the 'priority of rights' – according to which 'a right is an interest protected by law' – constitutes a powerful, though somewhat legally inaccurate, political ideology (1949, pp. 79–80) to be employed for the efficacious administration of a certain legal community (ibid., p. 84).[53] This view aligns with the Foucaultian claim of a nexus between law and the various normalising apparatuses of modern society, and particularly, the claim that law is 'a framing discourse that makes possible the field of action of the subject (…) upon which biopolitical strategies can be efficiently enforced' (Martire 2017; pp. 105–106). As Martire observed, by allowing that which is not forbidden – an ability which in turn presupposes, with Kelsen, that 'there is no human behaviour that would be excluded simply by virtue of its substance from becoming the content of a legal norm' (1992, p. 56) – the legal logic institutes human freedom as 'subject[ion] to the abstract, all-encompassing, seamless web of law' (Martire 2017; p. 110) producing what Martire calls the '"framing effect" of modern

[52] Life as an authoritative, self-organising source and the sovereign as the authority administering life's self-organisation.

[53] Kelsen speaks in this sense of a general interest of the legal community, comprising legal officials, as well as physical and juridical persons (1949, p. 84).

law, which surrounds all potential acts of the subject within a very peculiar grid of power/ freedom' (ibid.).

From a phenomenological stadpoint, 'the subject experiences power and freedom as an unspecified legal subject', encountering 'a specific framework of power that she can navigate in order to construct her own freedom' and it is therefore possible to claim that '[t]he syntax of modern law (…) map[s] human subjectivity within a grid of intelligibility elaborated in accordance with the paradigm of the norm' (Martire 2017; p. 111). In other words, the syntax of modern law operates as a syntax of 'legal normalisation', whose function is 'the creation of the normal legal subject' (ibid., p. 117) (i.e. the physical person) as an illocutionary *universalising* fiction that 'opens […] life to the scrutiny of competing discourses of knowledge and apparatuses of power' (ibid., p. 114). This universalising effect does not entail 'an actual equality before all laws, but, more subtly, the equal potentiality of all being subject to all laws' (ibid., p. 108) and more broadly, to a general (self-)governability of life, defined by different regimes of normalisation. The fiction of the legal subject, in this respect, is not simply the fiction of a subject that can be governed (i.e. sanctioned) but also that of a subject that is capable of self-governance.[54]

Along these lines, Lindahl has recently developed an unorthodox reading of Kelsen – a 'phenomenologically inspired account of legal intentionality' (2013, p. 119) – in which the legal order stands for the 'primordial' understanding of the world in terms of command (ibid., pp. 120–121). In his reading, 'law appears, from the practical perspective of those whose behaviour it regulates, as a normative unity to the extent that it differentiates and interconnects who ought to do what, where, and when' (ibid., p. 17). As a result, not only the behaviours of legal officials but sociality as such is structured by an 'ought form' that makes it possible for the social agent 'to understand something as something in law' (ibid., p. 132). These *somethings* are 'spheres of validity of legal norms', as well as 'concrete apriori of the legal order', and they function as 'boundaries of empowerment' defining the limits of what someone can do, their own 'sense of possibility' (ibid., pp. 132–133). Social subjectivity, in other words, is informed by the enunciative function of the law: the signature of legal cognition becomes the signature of social cognition as such.

The point here is not to ascertain whether and to what extent this view is accurate. The point is rather to reflect that the fact of its existence is intelligible as an instance of a broader process of *juridification* that shapes modern society, coinciding with the emergence of bio-power. With Martire, in modern societies, '[t]he intensity of the manifestation of law [i.e. sovereignty] has decreased (…) but its presence is now almost endless and all-encompassing', providing 'the absolute co-ordinates outside of which human life cannot be conceived' (2017, p. 112). Even Walter Benjamin, a significant influence on Agamben's thought and, like Kelsen and Schmitt, a central figure of the Weimar culture, wrote in his *Kritik Der Gewalt* about this process – the diminished intensity of law's manifestation paired with an increased pervasiveness of its presence – in terms of a decay of the law which becomes less confident in its own coercive power, 'the victorious power' of the first constituents, and tries to prevent

[54] After all, even legal norms presuppose a rule of conduct, a normal behaviour that the legal subject must be capable of observing autonomously.

the occurrence of extra-legal violence by setting new ends to its legal means (2004, p. 245). Among the examples of this entropic expansion of the legal order, Benjamin mentions legislation concerning 'the limits of educational authority to punish', the introduction of a 'right to strike' and, most importantly, 'the prohibition of fraud' which indirectly represents what he calls 'a diminution of pure means' – a potential restriction on 'the use of wholly non-violent means' and specifically an intrusion into 'a sphere of human agreement that is nonviolent to the extent that it is wholly inaccessible to violence: the proper sphere of understanding, language' (ibid.).

In Benjamin the juridification of life coincides with the juridification of language as such and I think that it is telling that in the essay, 'On Language as Such and on the Language of Man' (2004, pp. 62–74) Benjamin speaks, diminishingly, of the emergence of the bourgeois experiencing of language as, merely, a means (signifier) for the end of communicating a certain content (signified), questioning precisely the instrumental logic (i.e. means and ends) that, in *Kritik Der Gewalt*, he places at the centre of his critique of law.[55] This critique is conceived by Benjamin as, also, a critique of what he sees as the two schools of legal theory, natural law and positivism, that 'meet in their common basic dogma', i.e. instrumentality: 'natural law attempts, by the justness of the ends, to justify the means, positive law to guarantee the justness of ends through the justification of means' (2004, p. 237). Both law and language, for Benjamin, come to be experienced, with modernity, as empty forms in force without signification – or better, as forms (means) that can be related to an excess of signification (ends), to a force of life that can be formalised. This experience is also the experience of legal theory as a dialectical oscillation between two poles, positive and natural, means and ends, form and force.

This potentiality of ex-ception, i.e. inclusive-exclusion of form and force, is *a signature of sociality* or, perhaps, more simply, of a certain (biopolitical) way of thinking about sociality. In the modern age of biopolitics, to be juridified is theory itself and, as far as legal theory is concerned, this translates into *a form of thinking which jurifidies life*. Instead of proposing new possible articulations of law and life, new formulations of their in-distinction, a possible task for criticism is the meticulous study of the whole *juristic* tradition as a tradition of ex-ceptional articulation of law and life.

Conclusion

Jurists may not necessarily be directly involved in the practical application of the law. However, their function is to preserve law's ex-ceptional power in all its manifestations, including legal theory itself. Jurists must preserve the possibility to articulate the indistinction of law and life (the indistinction of form and force, i.e. *formce*) since the impossibility of this articulation would coincide with their disappearance, the collapse of the enunciative function that they embody. The jurist, as an ideal type, symbolises the institution, at the level of thought, of the possibility to articulate together

[55] For a reflection on Benjamin's critique of the problem of instrumentality in relation to law, see Forzani (2023).

form and force of law, the (an-archic, i.e. self-originating) act of *creation* of a *Grundnorm*. It represents, in this respect, one possible manifestation of the sovereign power to found and preserve the relationship between law and life. Kelsen's work makes this operation of thought intelligible. I do not know whether this operation exists independently from the method that makes it intelligible. A more sceptical approach is to assume that Kelsen's remarks about the 'ought-form' as a logical presupposition of law are only possible within a historical horizon, a horizon in which that logic has consolidated as particularly effective for the purposes of a juristic understanding of the world. To a sceptic who studies the legal tradition this logic is neither a transcendental a priori of cognition nor a biological feature of the brain. It is, more simply, a *historical apriori*, a modern, biopolitical signature of inclusive-exclusion that makes possible, in the present, a philosophical study of the history of legal thought as a biopolitical history.

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