UNIVERSITY OF
FORWARD
THINKING
WESTMINSTER

WestminsterResearch
http://www.westminster.ac.uk/westminsterresearch

The Study of Exception: A methodological reflection on Agamben's problematisation of the relation between law and life

Forzani, Francesco

A PhD thesis awarded by the University of Westminster. © Dr Francesco Forzani, 2022.

The WestminsterResearch online digital archive at the University of Westminster aims to make the research output of the University available to a wider audience. Copyright and Moral Rights remain with the authors and/or copyright owners.

University of Westminster

The Study of Exception

A methodological reflection on Agamben's problematisation of the relation between law and life

Francesco Forzani

Thesis submitted in partial fulfilment
of the requirements for the degree of Doctor in Philosophy
London, March 2022

Abstract

This thesis engages, from a methodological perspective, with Agamben's problematisation of the relation between law and life. More specifically, Agamben's work on law is here considered as a veiled reflection on the potentiality of study as a form of non-instrumental praxis, i.e. study as a means without ends. The political element of Agamben's critique of law, it is suggested, resides in his attempt at developing a method to reflect on the conditions of possibility of power, to be understood as a form of thought – i.e. the power of thought – which has left its mark, or better, its signature, on the politico-juridical tradition of the West, determining the ways in which life has been conceptualised and, eventually, lived by the subjects who have inhabited this tradition. This signature, practically, is a signature of instrumental-exceptionality which performs a fundamental biopolitical-anthropogenetic function: it allows to functionally relate an 'inside' and an 'outside' of man, for the purpose of constituting (and preserving) the world as a governable space, a space in which life could be made (and thought as) governable. The law has played, and still plays, a fundamental role in producing this space and, in fact, it can be studied as a priviledged field in which this signature of exceptionality/instrumentality has organised the governability of life through the functional articulation of a form (of law) separated from life and a force (of life) which animates it from the outside (in pseudo-immanent or pseudo-transcendental terms). This considerations ground the experience of study as a sort of wandering among the ruins of legal thought, a virtual space in which power finds its expression precisely in the endless attempt at producing an articulation of form and force of both law and life. The (dis)function of the student, from this perspective, is to expose this articulating practice without partaking (uncritically, i.e. by presupposing it) to the process of its reproduction. As a result, Agamben's work provides a critique of legal theorising itself as an articulating practice and, therefore, also the possibility to study the law anew, an experience of study as a means without end. But this also means that the signature of power is, at the same time, a signature of study: in other words, a means of both constitution and destitution.

Declaration of academic integrity

I declare that all the material contained in this thesis is fruit of my own work

Acknowledgments

I would like to thank my supervisory team, Andreas, Julia and Oliver, for their support, encouraging words and stimulating conversations throughout this long period of gestation. In particular, thanks to Andreas for trusting in me and for giving me the freedom to explore, and to Julia, for the stimulating time spent teaching and thinking together.

Thanks to Claudio, Emmanuel, Gustavo, Ola, Hobeth and Ursus for sharing with me the path of research and, most importantly, for their friendship.

Thanks to Bob and Masa for reminding me that theory is nothing without humour.

Thanks to my brother, to Michele and to Serena for reminding me, in their own ways, that, no matter what one writes, music is what will always matter.

Thanks to my mother and to my father for the example(s) they have set and for the role it played in my thinking and writing.

Finally, of course, thanks to Gaia for her partnership and for all the adventures we had in these last four years.

Table of Contents

In……..i-xvi

Threshold (or 'On Benjamin')……1

Benjamin's Ambiguity……..4

MacCormick's Ambiguity…...10

The Ambiguity of Instrumentality……15

Juridical Means, Natural Ends…..24

Language Without Ends…...34

Threshold (or 'Law's Sphere of Reference')……43

The Ought of Intelligibility…..47

The Organisation of Potentiality…..55

Co-Implication……62

Sacer-Sanctus…...74

Language in Between Kelsen and Schmitt…..79

The Living Law…...93

Threshold (or 'Factum Loquendi, Factum Pluralitatis')…..101

Zero-Degree(s)…...108

Oath and Ethos…...115

From Institutional Nature to Natural Institutions…...128

The Body of Law……139

Threshold (or 'The Other Side of Law')……148

Other Than Form……151

Force: The Countryman and the Doorkeeper……161

Sociological Jurisprudence……172

Legal Pluralism…..181

The Ungovernable…..193

Study…..202

Out (or 'A Glossary')…...214

Bibliography……229

Μαντεύομαι, ἔφη, σκοπεῖσθαί σε, εἴτε παραδεξόμεθα τραγῳδίαν τε καὶ κωμῳδιαν εἰς τὴν πόλιν, εἴτε καὶ οὔ.
Ἴσως, ἦν δ’ ἐγώ ἴσως δὲ καὶ πλείω ἔτι τούτων οὐ γὰρ δὴ ἔγωγέ πω οἶδα, ἀλλ’ ὅπῃ ἂν ὁ λόγος ὥσπερ πνεῦμα φέρῃ, ταύτῃ ἰτέον.
Καὶ καλῶς γ’, ἔφη, λέγεις.

[The underlying point of your inquiry seems to me’, he said, ‘to be whether or not we’ll allow tragedy and comedy into our community’
‘It could be’ I said ‘but it may be far broader. I certainly don’t know yet; we must let our destination be decided by the winds of the discussion’.
‘Well said’ he commented]

Plato

In

The purpose of this work is to provide an account of how the law can be *studied* from within the context of legal academia once this question is approached through the peculiar lens provided by Giorgio Agamben's *theory of exceptionality* and, specifically, by his problematisation of the – *exceptional* – relation between 'law and life'. The thesis thus provides a methodological problematisation of Agamben's work on law, with the purpose of re-orienting the debate around issues of biopolitics in relation to law, critique and theory. My purpose, in this respect, is not to develop a new biopolitical theory of law nor to present a systematic account of Agamben as a critical legal theorist, but rather to suggest that his work provides what could be defined a biopolitical critique of legal theory itself, or a critique of legal theory as a biopolitical endeavour. While much has been written on the relevance of Agamben's work for the redefinition of issue of politics and legality, very little attention has been given to the exception as a *methodological* tool to study the law and to Agamben's reflections on law as reflections on the meaning of study.

Agamben's work on biopolitics concerns, in general, what he calls the problem of the relation between law and life – "the institutional integration of life"[1] – and, in this respect, it constitutes a broader and perhaps even more ambiguous field of problematisation than the one offered by Foucault's overall limited biopolitical problematisation of law[2]. Agamben's biopolitical problematisation of the relation between law and life is, more precisely, a *philosophical problematisation* and, as a consequence of that, it has been suggested that Agamben "neutralises the historical specificity that Foucault himself has assigned to his term"[3]. This is only partially true: it is true because Agamben's biopolitics stretches back to ancient Greek and begins specifically with (what Agamben interprets as) Aristotle's attempt at distinguishing between political (*bios*) and natural life (*zoe*); it is however false because Agamben, like Foucault, is concerned with the present and specifically with the influence that *modern* biopolitics has on modern man's experience. However, this influence does not determine the experience of the present only: it also allows to reconstruct our modern experience of

---

[1] Zartaloudis, 2010:145.
[2] For a theoretical problematisation of Foucaut's biopolitics in relation to law see: Golder & Fitzpatrick (2009); Ewald (1987, 1990); Hunt & Wichkam (1994); Beck (1996); Davies (2008a); Muller (2011); Rose, O'Malley & Valverde (2009); Rose & Valverde (1998); Walby (2007); Wikcham & Pavlich (2001), Braverman (2016), Kelly (2019). For a comparison between Foucault's and Agamben's biopolitics see: Genel (2006), Patton (2007), Frost (2010), Snoek (2010), Calarco (2014), Lemm (2017).
[3] Heron, 2011:161.

the past too, so that it is possible to argue that Aristotle can be read and interpreted biopolitically only *after* man has crossed the threshold of modernity. Agamben, in other words, is concerned with the past for the sake of the present but this concern produces a methodology that re-constitutes anew both the past and the present. His philosophy is a philosophical-historical critique of the present.

In order to understand this, one has to take into account how Agamben's philosophy operates, namely, as an 'intensity', a modality of problematisation "that can suddenly give life to any field" and, therefore, has not pre-defined subject and boundaries[4]. Philosophy is for Agamben always a 'philosophy of terminology', and terminology is 'the poetic moment of thought' which means that the philosophical use of terms implies, also, the production of a new field or the opening of a given field to new possibilities for thought[5]. This is, I think, a crucial aspect of Agamben's work on law and politics, which tends often to be overlooked in most of the secondary literature, namely that what Agamben is mostly concerned with is the creation of new possibilities for thought through the re-definition of the very boundaries that make thought historically possible. To be biopolitical, in this respect, is the form of modern man thought and action, of the political operations that organise his life in the present and, ultimately, of the tradition in which these are embedded and the task of Agamben's philosophy is to make that form intelligible.

Biopolitics from this perspective is not only the politicisation of life as such, "the entry of *zoe* into the political sphere", but the very constitution of Life as a zero-degree of thought and therefore, with Watkin, the possibility of "transmission of the signature Life through time and across discursive formations"[6]. The signature Life stands here for the simple idea that, for modern man, there is "a raw fact of existence before the

---

[4] The full passage reads as follows:

> "[p]hilosophy is not a discipline of which one can define a subject and boundaries (as Gilles Deleuze attempted to do) or, as it occurs in universities, pretend to trace a linear and hopefully progressive history. Philosophy isn't an *essence*, but an *intensity* that can suddenly give life to any field: art, religion, economics, poetry, passion, love, even boredom. It resembles something more like the wind or the clouds or a storm: like these, it suddenly produces, shakes, transforms and even destroys the produced place, but just as unpredictably, it passes and disappears".

A translation from the original interview for the Italian newspaper *La Repubblica* can be read at this link: https://jcrt.org/religioustheory/2017/02/06/philosophy-as-interdisciplinary-intensity-an-interview-with-giorgio-agamben-antonio-gnolioido-govrin/ [30/10/2021].

[5] Calarco, 2014:97.

[6] Watkin, 2013:184.

political"[7], and that (political) thought can define what this raw fact of existence is, thus also making its government possible. This signature renders intelligible not only the present but also the past, or better, our relation with the past, which is why Watkin stresses that it is the *same* in different contexts and across time, but it "allows for very different things to occur politically"[8]. Across time and space, one finds different paradigms of the life signature, exemplifying the different ways in which 'existence before the political' can be represented and constituted as subject of (and subjected to) government[9].

In this sense, Agamben's biopolitics provide what could be defined an ontology of the present which Chryssostalis, with Foucault, describes as a critical interrogation of "the ways in which specific types of knowledge, power, and the self, 'are', or come into being"[10]. Foucault's focus here is on modernity but he makes clear that rather than an epoch the word 'modernity' identifies an attitude, or an ethos, which has several features (that he borrows from Baudelaire) including, break with tradition, an eagerness to grasp reality in order to transform it (to realise it) and, relatedly, abandonment to processes of self-production[11]. Agamben's biopolitical critique, I would argue, is the attempt to embody this modern figure by exhibiting its limitations. The embodiment of modern man is, specifically, the student who at the same time represents the attempt to reflect on the limitations of this modern attitude by exhibiting the ways in which the world becomes intelligible to him. Biopolitics is, in other words, modern man's signature of intelligibility, which makes the study of the past (an archaeology) possible precisely as a break with tradition, as a way to constitute it anew.

It is at this point that law becomes important. Agamben's take, which is shared by many authors[12], is that law has had a constitutive role in the formation of the western tradition modern man wants to break with. That tradition can therefore be studied from scratches and re-organised biopolitically and this is worth doing for at least two reasons. The first is that modernity is not characterised by a disappearance of the legal form but rather by its naturalisation, coupled with the legalisation of more natural forms of (self)domination through, for example, the institution of "an ongoing communication

[7] Ibid.
[8] Ibid.
[9] Foucault stresses this point in several texts, including 'The Subject and Power' (1982), 'What is Enlightenment' (1988) and 'Politcs and Reason' (1990).
[10] 2005:22.
[11] 1988:39-42.
[12] For example, Supiot (2017) and Kelley (1990).

between the power of discipline and the power of law"[13]. More generally, and beyond discipline, it has been suggested that it is "not law, but adopting a legal form and a law-like proceeding [that] is becoming a universal asset"[14] of modernity, as reflected, for example, in what social theory has described as a 'constitutionalisation of society'[15]. From the point of view of the individual, it is even possible to speak of modernity as characterised by a general process of 'juridification', which interests subjects at the level of how they understand themselves and others and their mutual relations under the framework of a shared legal order[16]. To investigate how the legal form has come about, in this respect, might turn out to be useful for a proper understanding of the modern experience. The second reason is that, being the being who wants to break with tradition, modern man can question his own desire to break with it; he can question this break as something problematic in itself, a desire which might even turn out to be a (counter-)product of tradition itself. Schütz in this respect suggests that 'antinomianism' matches western legal evolution since at least early Christianity[17] and that, for this reason, the very ideal of autonomy (as the term itself implies) tends always to be converted into a form of law[18].

It is with this in mind that one can read Agamben's remarks about his own desire to write as a desire for self-realisation which, however, could not avoid a (studious) confrontation with the problem of law. In his own words:

> "[l]eaving secondary school, I had just one desire – to write. But what does that mean? To write – what? This was, I believe, a desire for possibility in my life. What I wanted was not to 'write', but to 'be able to' write. It is an unconscious philosophical gesture: the search for possibility in your life, which is a good definition of philosophy. Law is, apparently, the contrary: it is a question of necessity, not of possibility. But when I studied law, it was because I could not, of course, have been able to access the possible without passing the test of the necessary"[19].

---

[13] Hunt and Wickham, 1994:46.
[14] Zartaloudis, 2018:1.
[15] Teubner, 2012.
[16] Blichner and Molander, 2008:47.
[17] 2005:71.
[18] Ibid:74.
[19] Online interview: https://www.versobooks.com/blogs/1612-thought-is-the-courage-of-hopelessness-an-interview-with-philosopher-giorgio-agamben [30/10/2021].

The desire to write, as a desire to make life possible, becomes itself possible only through a 'test of the necessary', the study of law, as if this desire were rooted in and belonged to law from the start.

Considered that even for Foucault the 'philosophical ethos' which should animate the (modern) researcher is one of self-reflective interrogation of what makes us historically determined beings – 'the contemporary limits of the necessary' – then it could be suggested that Agamben's researcher, the student, is the one concerned with how 'the problem of the relation between law and life' has constituted her as a biopolitical subject and, more generally, of how the relation between law and life can be interpreted as producing biopolitical subjectivities in general, before and after the threshold of modernity. Agamben's biopolitics represents a critical engagement with what has been recently defined the 'anthropological function' of the law[20], and more precisely with the fact that law has an anthropogenetic function: it articulates man's experience of becoming human.

To critically engage with this as a problem means to develop what Walter Benjamin, in his 'Critique of Violence', has defined a 'philosophical-historical view of the law'[21], which would consider the 'critical intersections' between philosophical and legal thought. Agamben's theory of exceptionality provides, in this respect, an account, i.e. a problematization, of the process of juridification of life in its anthropogenetic dimension, namely, of the *experience* of law as the experience of the inclusive exclusion (from 'ex-capere', i.e. 'taken outside') of life in and by law, the inclusion of life in law by means of its exclusion. The critique of 'the state of exception', in this respect, should not be interpreted as the attempt to question a particular juridico-political aspect of modernity – such as, for example, the widespread adoption of emergential forms of government as the only conceivable way to do politics – but rather as the paradigm of a more comprehensive representation of the anthropogenetic experience as a biopolitical experience through which potentially every subject is constituted as the product of a separation between a raw fact of existence and a qualified form (of law and life).

[20] Supiot, 2017.
[21] 2004:238.

In general terms, the biopolitical experience Agamben has in mind is one in which all human beings are constituted as bare life abandoned to or presupposed by a form of law which has lost for them all possible meaning. In his own words:

> "[e]verywhere on earth men live today in the ban of a law and a tradition that are maintained solely as the 'zero point' of their own content, and that include men within them in the form of a pure relation of abandonment. All societies and all cultures today (it does not matter whether they are democratic or totalitarian, conservative or progressive) have entered into a legitimation crisis in which law (we mean by this term the entire text of tradition in its regulative form, whether the Jewish Torah or the Islamic Shariah, Christian dogma or the profane *nomos*) is in force as the pure nothing of revelation. But this is precisely the structure of the sovereign relation, and the nihilism in which we are living is, from this perspective, nothing other than the coming to light of this relation as such."[22].

This is a radicalisation of Benjamin's remarks about the experience of the adult –as opposed to the youth – namely, of 'the meaningless of life', "experience devoid of meaning and spirit"[23]. Nancy has described philosophically this experience as that of 'an interminable abandon of the essence of being' which constitutes our sense of the world as, precisely, 'a world that abandons us'[24]. Modern political problems, such as the generalised crisis of legitimacy of political institutions and the related spectacularisation of political action (and ultimately of social acts and relations themselves) are to be read within this broader framework of problematisation which concerns ultimately the relation among us and between us the world (as mediated by the law).

In this sense, it is not only true that Agamben's work represents equally 'a critique of society' and 'a diagnosis of cultural crisis'[25]; it is also the case that to study the law means, from this perspective, to make the (necessary) biopolitical experience of a *crisis of the legal form*. In this respect, it should be noted that the critical legal project in general can be represented, with Chryssostalis, as always involving the experience of crisis[26].

---

[22] Agamben, 2017:45-46.
[23] 2004:3-4.
[24] "We have no idea, no memory, no presentiment of a world that does not abandon us, a world that holds man in its bosom" (Nancy, 1993:42).
[25] Zartaloudis, 2010:145.
[26] 2005:20.

Technically, the crisis of the legal form, is represented by what many critics have described as the problem of *legal indeterminacy* – namely, in its most radical manifestation, the idea that "following a rule is an empty concept" which cannot determine its own application[27] – and Agamben can be interpreted as reinscribing this problem of legal interpretation into a broader critique of the desemanticising nature of contemporary politics which "all over the planet unhinges and empties traditions and beliefs, ideologies and religions, identities and communities"[28]. From this point of view, it is the (modern) form of law itself that breaks with tradition, becoming, precisely, a 'form in force without signification' that is unable to provide a coherent narrative of the world that it regulates[29]. This has, of course, its positive aspects, and in fact, it is precisely the ascertainment of the limits of the legal form that has been turned by critical legal scholarship into an opportunity to develop new theoretical configurations (spatial, material, feminist, nonhuman, etc.[30]) beyond a theory of form. My contention though is that Agamben's approach to the law question could be developed in a quite different direction, namely, not towards the formulation of a new semantics for the now emptied form of law, but rather towards a theory of the limit in which to be experienced would be the very threshold or gap that separates the form of law from whatever it is that gives it force.

The indeterminacy of the legal form can in fact be reframed methodologically as the fragmentation of law's essence which, in turn, turns into the proliferation of different attempts to grasp this phantomatic fragmented essence of the law: the proliferation of theories of law that would somehow reconcile the law with itself and with the world. Fragmentation is, from this perspective, the fragmentation of the ends of law and therefore of the possible interests (both practical and theoretical) that can be attached to it. At the level of theory, this is reflected both in the proliferation of uses of theory itself as a means to different ends, as well as in the proliferation of theories that would set new ends for the law. The experience of the study, as an experience of fragmentation, is the experience of being exposed to this irreducible complexity and, relatedly, to a growing tradition of ruins of thought left behind by an unstoppable process of differential proliferation. The critical experience of fragmentation, in other words, is also the exposure to the lack of a shared

[27] Croce & Salvatore, 2013:144.
[28] 2007:83.
[29] For a somehow similar argument, Murphy (1997).
[30] See for example Davies (2017) and Philoppopoulos-Mihalopoulos (2014).

terrain of dialogue, which is reflected in the (just, and yet, worth problematising) proliferation of seemingly unrelated school of thoughts, sub-disciplines, inter-disciplinary approaches, political agendas, groups of interests, etc., a proliferation which produces the fragmentation of academic communication and might even imply the actual absence of a community.

Within this critical scenario, my suggestion is that Agamben's theory of exceptionality could provide the means *not* to overcome this problem – in order to find some sort of lost essence of the law that would re-constitute a lost community of legal scholars – but rather to experience it as a problem, and more precisely, in order to experience the lack of communication among theories as a signature of their communicability. More precisely, each theory develops its own, independent, form of communication by presupposing a general communicability in the form of a signature of form and force (of law) that, for each theory, are both made indistinguishable and articulated together. The student then, is the one who encounters this communicability in every theory. Lewis, who has developed a systematic account of Agamben's notion of study in the context of education, has argued (in a way which is reminiscent of Benjamin's remark that "the individual can experience himself only at the end of his wandering"[31]) that the student is precisely the one who produces a constellation of signatures and in doing so is left "freed to wander, achieving a kind of maximal flexibility to explore whatever remains in the wake of nihilistic world collapse"[32]. In the wake of this collapse what remains, among other things, is also a tradition of theorising and the student can experience herself in and through her wandering among the ruins of theory.

My contention is, more precisely, that Agamben's theory of exceptionality can be re-interpreted so as to provide a critical account of the legal tradition (the tradition of thinking about the law) as split into two spheres of law, i.e. form and force, and, relatedly, of legal theory as the ongoing attempt to render them indistinguishable (*forиa*, a hybrid of Italian 'forma' and 'forza') in order to articulate them. The sovereign exception which, according to Agamben, renders law and life indistinguishable in order to maintain the possibility to decide on their articulation[33] is, therefore, a philosophical representation – a paradigm – of the exceptional structure of legal theorising itself. In this sense, Agamben's theory of exceptionality provides a methodological tool to explore (i.e. to

[31] 2004:5.
[32] 2013.
[33] Agamben, 2017:55.

study) the politico-juridical tradition of the West and its ‘architectonics’ or ‘signature’ of form and force.

From a more comprehensive methodological perspective, Watkin has stressed how Agamben approaches the Western tradition as a field traversed by what Watkin calls the signature of the ‘common-proper dialectic’, a “conceptual structure dominated (…) by an *economy* made up of an element which seems to found the phenomenon and a series of subsequent elements which appear to actualise this founding element or simply which are allowed to occur because of a held-in-common foundation”[34]. This *economy* of assimilation of the proper into the common has been formulated in politico-juridical terms by Zartaloudis as a ‘Law of the law’, a “pseudo-dialectic between a foundational power (i.e. a sovereign law) and a founded power (its immanent government and execution)”[35]. While Zartaloudis’ concern is more with the politico-ideological use of certain claim to transcendental values as a tool of legitimation of an immanent praxis of government, my interest is to interpret the very act of theorising as inheriting this dipolar structure, reproducing it as an articulation of force and form that grounds a general ‘ideology’ or ‘ontology’ of decidability.

The experience of study is therefore experience of the *forиa* of the (legal) tradition, the experience of ‘power’, understood as ‘the organisation of the potentiality’[36] of (legal) thought. Crucially, for Agamben power is said to be grounded on a ‘force’ which can be found ‘everywhere’ (‘even within ourselves’) and which ‘constrain[s] potentiality to hang fire within itself’, so as to realise the ‘isolation of potentiality from its act’, its ‘organisation’[37]. Power is, first of all, the power of thought (or thought as power), which is to say, a form of isolation and organisation – in other words, of *articulation* – of two spheres within thought itself. Potentiality and actuality, if thought from the perspective of power, constitute a ‘bipolarity’, so that power represents the field in which these two poles become indistinguishable and articulable. Power from this perspective is neither *in* potentiality nor *in* actuality: it is rather the *sovereign structure* (of thought) which organises (articulates) potentiality and actuality together. Its force rests in its structure, i.e. its form which is exceptional precisely because it consists in that it maintains itself in relation to an exteriority, including that which exists outside its ‘jurisdiction’.

[34] 2013:xi
[35] Zartaloudis, 2010:x.
[36] Agamben, 1995:71
[37] Ibid.

From this perspective, this project is particularly indebted to Zartaloudis' re-interpretation of Agamben's work – as expressed in his scheme of the two laws ('the Law of law') – also because he has been the first to stress the potential utility of Agamben's work in the context of a general inquiry into the limits of legal theorisation[38] as, precisely, a form of organisation of legal thought. He is also one of the few authors, within the so-called critical legal movement[39], who has stressed that no proper understanding of Agamben's critique of law is possible if his work is not interpreted, at the same time, as providing also an experience of reading and thinking[40] as such, the experience of studying[41]. This work moreover observes, as a general methodological principle, Zartaloudis' suggestion that "in theorising, we have nothing to admit and nothing to recommend […and that t]o study the law, rather than advocating it, means to observe and safeguard the non-fusion of the juridical and the non-juridical, law and life"[42]. To study means, from this perspective, to both observe and resist processes of juridification of life and thought itself[43] and, thus, to avoid the instrumentalization of philosophy for legal purposes[44]. This particular understanding of 'study' – which, I interpret as equidistant from (and therefore, equally close to) most critical and conventional forms of legal theory – has deeply influenced my approach to the so-called 'law question'.

This thesis then tries to bring closer to each other Agamben's notion of study and his critique of law, which is to say, in different terms, it tries to make indistinguishable methodological and ontological aspects of Agamben's work, or to put it again differently, issues of method and issues of theory. Agamben's theory (or ontology) of law is a reflection on the method of its study and this is what makes it particularly relevant, perhaps even more than what normally are dealt with as substantial aspects of his thought, such as the notion of *bare* or *sacred life*. *Sacralisation*, the *exceptional* production of a zero-degree of life, a life banned from the sphere of both law and religion, is a procedure which occurs at the level of thought or, with Agamben, of the '*matter of words*'[45], that is to say, at the level where one "simply finds the words to say"[46]. Sacralisation or

[38] See for example: 2005, 2010, 2011.
[39] For an history of the movement and its current status of fragmentation see Davies (2008b) and Douzinas and Gearey (2005).
[40] For a similar argument, coming from outside legal academia, see Lagaay and Schiffers (2009).
[41] 2010:xiii.
[42] Ibid:3.
[43] Murray & Zartaloudis, 2009, Zartaloudis, 2010.
[44] Zartaloudis, 2018.
[45] 1995:37.
[46] Ibid.

exceptionality is, in other words, an operation of power – understood, again, the organisation of the potentiality of thought – *as* this emerges from within a practice of study. It is an operation of power no more than it is the exposure of the operation of power, or actually, it is the way in which power operates only *insofar* as it is the way in which it is exposed as such. In other words, it is an ontology of power only insofar as it is the methodology that puts this being into words. It provides a theory of power only insofar as it provides the *experience of its study*.

That is why, following his own suggestions[47], in the secondary literature that deals with the archaeological dimension of his methodology[48] it has been stressed that Agamben's signatures, including of course also sacralisation and exceptionality, occur *after* its concrete manifestations[49]: more precisely, the 'moment of arising' (*archē*) of the signature has the temporal form of a 'future anterior' in the sense that "it occurs only after the inquiry into its historical status is complete" and "[i]t is produced (…) by the inquiry that it structurally produces"[50]. In this sense, and only in this sense, Agamben archaeologies have, paradoxically, very little to do with the past: they concern the intelligibility of the present and allow, with Calarco, to shed light on the present from where the researcher observes the past letting emerge the ontological nature that links the two[51].

The experience of law is, in other words, the experience of its study, and, from this perspective, the theory of exceptionality is not, as often suggested in the secondary literature, a theory of law or a theory of sovereignty[52], but rather a 'theory of the study of law', which is to say, a *methodological* reflection on the meaning (the means and the ends) of the very practice of theorising about the law. The student then is not concerned with the communication of law, but rather with its *communicability*, that is to say, "not what a statement means but that it is taken to be meaningful" and, "that it exists as the statement that it is, which is not dependent on its content for its actual meaning but on who says it from which position, and how it is immediately intelligible amongst a group of other subjects for a sustained period of time in relative consistency"[53]. The subjects who actualise law's communicability constitute a community of people who, more or less

[47] 2007.
[48] See, among others, Crosato (2019) and Watkin (2013).
[49] Watkin, 2014:xv.
[50] Ibid:32.
[51] Crosato, 2019:294.
[52] See for example Humphreys (2006), O'Donoghue (2015) Frost (2010) and McLoughlin (2010).
[53] Watkin, 2014:13.

consciously, shape and are shaped by the limits of what they are allowed to say, namely, the structure of their speech. This thesis is thus concerned with the study of law as with the attempt to *think* the structure that shapes the very possibility of saying something about law, and relatedly, with the identification of the community of speakers (subjects) that partake to this possibility. The community itself, in other words, is not simply given but rather presupposed and in need of being exposed as a community. The task, in this sense, is not to solve the crisis of the legal form but to find a language to that would give it temporary expression, which means that *communicability* is both problem and solution: it is a problem because it represents a limitation imposed upon the *potentiality to communicate* but it is the solution in that only by exposing the limits of communication one can become aware and thus really make the experience of the crisis.

In this respect, a good starting point for a reflection on communicability in relation to law is, as it will be discussed more in detail in the following pages, Walter Benjamin's Critique of Violence, and specifically his claim that legal theory is possible only as the articulation of a logic of means and ends, such that, in his own words:

> "If natural law can judge all existing law only in criticizing its ends, then positive law can judge all evolving law only in criticizing its means. If justice is the criterion of ends, legality is that of means. Both schools however meet in their common basic dogma: just ends can be attained by justified means, justified means used for just ends. Natural law attempts, by the justness of the ends, to justify the means, positive law to guarantee the justness of the ends through the justification of the means"[54].

To the purpose of a re-interpretation of Agamben's work on law as a work on study, this fundamental *signature*, i.e. the dialectic between means and ends, constitutes one of the most important legacies of Benjamin, in that it grounds, in different terms, Agamben's conceptualisations of both exceptionality and study. While, on one side, law's exceptional articulation of inside and outside (form and force) is, in fact, a re-proposition of Benjamin's legal dialectic between means and ends, on the other, Agamben ends up defining study – via Benjamin's theory of language as pure mediality – as, precisely, a 'means without ends'. In this sense, while the legal theorist is always somehow trapped

[54] 2004:237.

into a logic of instrumentality, the student is left free to wander, without ends, among the ruins produced by this logic.

From this perspective, the studier is to be distinguished from the theorist and, as Agamben suggests, from the researcher more in general. That is because the researcher is bound to the logic of instrumentality, in the most basic sense that his research has to be a means to an end which is, so to speak, outside of himself. As we are taught since the very beginning of our experience as researchers, the paradigm of research is grounded almost dogmatically on the so called 'so-what?' question which, inevitably, turns this practice into a mandatory search for an imperative outcome – '*a final text*' that 'makes it abundantly clear why other people *should* be reading' – one which is normally conducted in a perennial state of necessity – 'the necessary aspect of writing in a publish or perish environment'[55]. Within this horizon the thesis becomes, to put it simply (and indeed reductively), a means to pass the examination. Moreover, from a methodological standpoint, for the researcher, method and theory have to be kept separated and articulated into a logic of mutual instrumentality.

Agamben's approach and methodology make these assumptions problematic insofar as his work can be interpreted as a process of self-reflection and ultimately, as the production of a form of life, called student[56]: this means that the praxis of study represents the indifferentiation and, therefore the disarticulation (disinstrumentalisation) of subject and object of research, of method and theory, of methodology and ontology, of the subject who speaks and the subject of tradition.

Along these lines, this thesis argues that Agamben's biopolitics does not offer a biopolitical theory of law, nor a biopolitical problematisation of particular legal phenomena, but rather a biopolitical critique of the very act of theorising or, in other words, a critique of the biopolitical element of theory itself and, perhaps, of thought more in general. In this respect, while being influenced by the existing literature on law and biopolitics, this work is only tangentially concerned with the themes developed there, in the sense that this literature is considered here relevant only to the extent that it provides material for a broader reflection on the meaning of study as a particular form of problematisation, an intensity. It is therefore possible to argue that this work is more

---

[55] Selwyin, 2014:1.

[56] Kishik similarly argues that "neither Agamben's life nor his work can really make a lot of sense independently of one another, because they both operate in the zone of indetermination that we call 'life work'" (2012:4).

concerned with 'study' than with 'law', or better, that its main focus is the study of law – the study of its theorisation – which means that it does not aim at re-shaping any existing theory of law, nor at producing a new one.

There is, in this respect, a growing – and yet mostly underdeveloped – interest, on one side, in the biopolitical element of legal education[57], and on the other, in a critical reflection on the notion of study in the work of Giorgio Agamben[58], but these two aspects have not yet coalesced into a general reflection on Agamben's potential take on the form-of-life of the law-student. Moreover, both approaches tend to omit the fundamental implications that Agamben's work has for research rather than education. The student, or studier, in Agamben's work is not (only) someone to be educated: it is, potentially, also the researcher herself. The student or the idea of the student, represents a critique of the very act of researching and, from the perspective which interests me here, of the act of theorising. But this implies a reflection on two dimensions that, while being well developed in their own terms, have remained for the most part, separated, namely, Agamben's ontology of law and politics[59] and Agamben's methodology[60]. Another argument advanced in this thesis is, therefore, that there is no theory of law, nor, more generally, ontology in Agamben, if this is considered as something separated from a method, a *praxis* of study. Agamben's work provides for the radical indistinguishability of theory and method, ontology and methodology. This is demonstrated through an engagement with both dimensions – theory and method, being and praxis – as they meet at the crossroads with law.

This will also allow me to make some more substantial remarks about law as an object of critique. In this respect, it should be noted that while much has been written on

[57] It is telling, in this respect, that in the 'Proposal' for an edited collection of essays on the 'Biopolitics of Legal Education', it is argued that "while the academic discourse on the biopolitics of education is well-established generally, *legal* scholars are yet to inquire into it and explore the potential of its multiple declensions effectively" and more specifically, "that there is a clear lack of consistent and adequate biopolitical investigations within legal pedagogy discourse" (Giddens & Siliquini-Cinelli, 2021). And it is all the more telling that "[i]f one were to look for similar works outside the legal domain, one could mention Tyson E. Lewis, *On Study: Giorgio Agamben and Educational Potentiality* (Routledge, 2013), and Igor Jasinski, *Giorgio Agamben: Education Without Ends* (Springer, 2018)" (Ibid:4), that is to say, works that engage, from a non-legal perspective, with Agamben's notion of study.

[58] The most systematic works on the topic are Lewis (2013) and Jasinski (2018). Further contributions include Masschelein and Simons (2015), Vlieghe (2012), Meskin & Shapiro (2014).

[59] The literature, in this respect, is simply immense and include, among others, Zartaloudis (2010), De Caroli (2007, 2013, 2017), Frost (2010), Mc Loughlin (2009a, 2009b, 2014, 2017), Humphreys (2006), Fusco (2018) Parsley (2010) Schütz (2000), Whyte (2009, 2013), Siliquini-Cinelli (2018), Simoncini (2008), Abbott (2014), Moran & Salzani (2015).

[60] The most systematic contribution is, in my opinion, Watkin (2013). Other relevant contributions include Crosato (2019), Attell (2015), Mills (2008), Kishik (2012).

Agamben's take on law, most of the secondary literature tends to focus on the exceptional or sovereign element of juridicity as if this would be separable from issues of legality. One of the arguments advanced in this thesis instead is that the exception can be used as a methodological concept to make sovereignty and legality indifferent, in the sense that both, in their own terms, reproduce the signature of exceptionality which, in fact, signifies a generic communicability of law in both normal and exceptional circumstances. Similarly, the institutionalist perspective on law can, in both its conventional and critical forms, be problematised as reproducing a structure of exceptionality, the exceptionality of law's thinkability. This might seem to imply that, when considered as a methodological tool, Agamben's critique of exceptionality provides a quite de-politicised account of law[61]. On the contrary I would suggest that it provides a reflection on the conditions of possibility of both politicised and depoliticised uses of law, that is to say, on (de)politicisation as the (political) praxis of theory. In this sense, this approach remains thoroughly political. Its source of inspiration is Benjamin's critique and in this respect the thesis advances a series of considerations on the possibility of interpreting *Gewalt* itself as a methodological tool to reflect on law's thinkability in terms of instrumentality. While it is often observed in the secondary literature that Benjamin in the Kritik does not advocate for the destruction of the law, it could be equally suggested that his work is characterised by a 'legal scepticism' that aims if not at the destruction certainly at the critical study of law *tout court*, and not only some of its most violent manifestations.

Similarly, this thesis provides a contribution to the existing literature on Foucault's take on law oriented not so much towards an Agambenian interpretation of Foucault's biopolitics (which in any case is still underdeveloped in the secondary literature) but rather towards a critical reflection on the fact that legal theorists have concerned themselves with this problem. While theory is split into two schools — one which claims that biopolitics represents for Foucault the decentralisation of power and therefore the demise of law and sovereignty ('expulsion thesis') and the other which suggests that law itself becomes somehow biopolitical and therefore remains central for a proper understanding of power — my take is that it is this very theoretical oscillation which is worth problematising as a manifestation of the biopolitical nature of (legal) theorising itself. From this perspective, theory can be investigated not so much in relation to what it says about the law but rather in relation to its own biopolitical structure.

[61] Mills, 2008:137.

Finally, given the methodological premises of this work, a smaller contribution is represented by the way in which the thesis itself is organised. Considering that the thesis' focus is a formulation of a theory of study through the concrete exposure of a praxis of study, and considering that this praxis consists in a form of a wandering (without ends) around the ruins of tradition, thus producing a constellation of paradigms of a signature of legal intelligibility, the very organisation of the material gathered here is what *de facto* resulted from this *experimentum*[62]. For this reason, it is not shaped following the standard format of a thesis. That is because the thesis itself, in its form, becomes a paradigm of what it means to study, in the sense that it exhibits its own made-form as that which defines the content of a theory of study. If study is without ends, then the very form of this study can represent, to a certain extent, the attempt to resist the paradigm of instrumentality that rules over research and that makes theoretically possible the separation of the object from its exposition and therefore its organisation into a standardised form. The form of this thesis is the form of its life, that is to say, of that which took to write it. Rather than in chapters the thesis is organised into (clusters of) texts (separated by thresholds) that follow one another in a quite linear fashion and yet intersect thematically in multiple ways, which would also imply that a different line of organisation of the same texts would be entirely possible.

[62] This is a word Agamben uses to refer to his own philosophy, namely, an *experimentum linguae*, the attempt to make a certain experience of language possible (1993).

Threshold (or On Benjamin)

It has been often suggested that Agamben's 'encounter' with Benjamin has had a decisive influence on his philosophy as a whole[1] and, relatedly, on his philosophical problematisation of law. Specifically, Benjamin's 'Critique of Violence' is said to supply "the basic structure of the Homo Sacer project"[2] and, in fact, the very concept of 'sacred life' represents the attempt to develop Benjamin's suggestion, in the critique, to investigate 'the dogma of the sacredness of life' in, precisely, its connections with law and politics[3]. Moran and Salzani have gone as far as to argue that "the theses and the language of Benjamin's essay become something like the grid through which Agamben approaches the political"[4].

Following this suggestion, it could therefore be argued that what has been termed Benjamin's 'legal scepticism' concerning 'the connivance of the legal form and violence'[5] will ground Agamben's methodology of problematisation of 'the relation between law and life' as, precisely, a problem of articulation of form and force of law. Crucially, while the former problematises the relation between law and violence through the category of *ambiguity*, the latter problematise the relation between form and force of law through the categories of *indistinction* and *exception*. The *exception* is, in fact, the very form of the *ambiguous* relation between law and violence – as well as between form and force of law or more generally, inside and outside of law – which makes the two (plus four) *indistinguishable*. The notion of ambiguity, which very rarely is thematised as such in the literature on Benjamin[6], grounds specifically his critique of law's function of universalisation, which Benjamin links to what he calls the mythic character of the law, the idea that law can establish itself as a fate[7].

Moreover, the notion of ambiguity is here considered in relation to another theme which is extremely relevant for a proper understanding of Benjamin's influence on Agamben's methodology of study, namely, the means-ends logic that grounds the very thinkability of law, including the possibility of theorising it. To be ambiguous is, in

[1] Moran & Salzani, 2015:27.
[2] Kotsko, 2008:119-129.
[3] De la Durantaye 2009:354
[4] 2015:16.
[5] Cercel, 2021:42.
[6] In particular see Ross, 2015.
[7] On this see also Birnbaum (2015) Fenves (2019) and Menke (2010).

general, the relation between legal means and natural ends, as well as that between natural means and legal ends, with both representing different ways of re-formulating the problem of the ambiguous relation between law and violence. From this point of view, Benjamin's take on law is biopolitical, as suggested for example by Santner, in that here law produces a "threshold where life becomes a matter of politics and politics comes to inform the very matter and materiality of life"[8]. This for Benjamin is possible precisely because law ambiguously establishes itself as a fate, thus constituting both nature and the life of man as such as its operational limits[9]. More precisely, Benjamin suggests that the ultimate end of law is the self-preservation of law itself so that the monopoly of violence consists in the *fiction* of subjection of nature as such to a potential (legal) scrutiny[10]. Along the same lines, the principle of equality comes to represent the principle of the sanctity of life, which is to say, the establishment of life as such as a zero-degree of judgement, as always cursed by judgement[11]. This opens the world to a process of juridification or, with Fenves, of 'legal encroachment'[12].

Crucially the idea of an ambiguity of the instrumental logic of means and ends represents in Benjamin's oeuvre not only a fundamental theoretical tool for the critique of law: it is also the foundation of his critique of the so-called 'bourgeois conception of language', language as a means to communicate through signifiers with no relation with the signified. In this respect, as observed by Hamacher, the critique of violence has to be inscribed within Benjamin's broader reflection on language, in the sense that his idea of a 'divine violence' that would break the ambiguous connection between law and violence can only be properly grasped if considered from the perspective of a theory of a purely non-instrumental (and, for this reason, non-violent) communicability of language[13].

In what follows, these three fundamental aspects of Benjamin's critique, namely *ambiguity*, *instrumentality*, and *language*, are explored in order to lie a foundation for the analysis of Agamben's theory of exceptionality as a method to study law's communicability or, in other words, a theory of study as a means without ends.

At first, the notion of ambiguity and fate will be problematised from different perspectives, including: the uncertainty of the threat represented by the law, which is

---

[8] Santner, 2006:12.
[9] On this see also Moran, 2015.
[10] For a similar argument, Gentili, 2019:264.
[11] Menke, 2010:12.
[12] 2019.
[13] 1992.

inviolable precisely because it can be eluded, the ambiguity of the principle of equality and the ambiguity of the notion of legal person. To this purpose, Benjamin's observations will be integrated with Simone Weil's critique of human personality and human rights, and particularly with her remarks about the fictional nature of legal equality which is ruled by a logic of force and privilege and constitutes life as always separable from its form and, therefore, destroyable in spite of the indestructibility of its persona. Benjamin's critique of the notion of sanctity of life will be then developed along the same lines, stressing in particular that this is the principle that constitutes life as such as guilt and therefore exposed to the possibility of judgement.

These considerations will be then developed trying to situate them in the context of a modern positivist theory of the legal order. Particularly some of the conceptual tools used by MacCormick to develop his institutional theory of law – including the notions of 'civil society', 'defeasible universality' and 'coherence' – will be critically assessed in order to stress how they reproduce some of the problems of law's ambiguity highlighted by Benjamin in his critique. Specifically MacCormick's theory will be re-interpreted as an ontology of order where order itself is defined in terms of decidability. Decidability becomes, in other words, one of the supreme values that maintain the coherence of legal order in spite of its many inconsistencies (exceptions).

The problem of ambiguity will be then further discussed in relation to the (ambiguous) logic of instrumentality which, according to Benjamin, grounds law's thinkability, and therefore also the very possibility to theorise the law. The idea that the coherence of the legal order represents the end of law will then be considered from the perspective of Benjamin's critique of law's self-preserving logic (coherence of law as law's self-preservation). Relatedly, Benjamin's critique of Kant's formula of humanity as, precisely, a representation of the ambiguous logic of means and ends, will be discussed considering some of the relevant critical literature on the categorical imperative[14], in order to draw some analogies between Kant's autonomous subject and the legal person of positivism. In both instances life is constituted through an injunction to be rational and therefore through a fundamental exposure to the possibility of judgement.

Then the problem of the ambiguous relation between means and ends will be considered in terms of the biopolitical power of law to articulate together legal means and natural ends as potentially violent. This power to juridify the world by constituting it as

[14] Particularly Nancy (2003), Brophy (2016) and McLoughlin (2009a).

an excess of legal form (ontology of masterability) will be discussed from the perspective of the relevant literature on Foucault's biopolitics of law. The critique of juridification will be therefore reframed as, more broadly, a critique of governability, the idea of the world and life as governable through an articulation of legal and non-legal means, law and norm.

Ultimately, the problem of the ambiguous logic of means and ends will be situated within the broader context of Benjamin's theory of language and particularly of the self-referential communicability of language itself as the manifestation of an absolutely non-violent realm of human existence. Some key concepts, including that of 'conversation' and 'force of the word' will be introduced here in order to be developed from the perspective of Agamben's methodology at a later stage. In relation to this, Hamacher's reinterpretation of Benjamin's theory of language as a theory of 'afformativity' (as opposed to performativity) will provide the first steps towards a formulation of the concept of study, as a form of exposure of the instrumental logic that seems foundational for both law and language.

Benjamin's Ambiguity

Benjamin's Critique of Violence has been interpreted as a critique of the 'ambiguity' [*Zweideutigkeit*] of law.[15] To be ambiguous is, first of all, the relation that law establishes with violence and, consequently, the law itself which is criticised precisely insofar as, in its 'mythic' configuration, it lacks clarity. That the law is mythic means, first of all, that through the monopoly of violence law, like myth, establishes itself as a *fate*, a destiny: the law founds itself as 'an order imposed by faith' which has to be 'preserved' because it "promote[s] the interest of mankind in the person of each individual"[16]. As a result, the law displays what might be defined quasi-ontological features: in Benjamin's own words, the power of law "resides in the fact that there is only one fate and that what *exists*, and in particular what threatens, belongs inviolably to its order" [italic mine][17]. The threatening force of the law is thought by Benjamin not as the capacity to act as a 'deterrent' – as certain liberal theories of law would have it – but

[15] Ross, 2015:39-56.
[16] Benjamin, 2004:241.
[17] Ibid:242.

rather as the capacity to produce uncertainty with respect to its outcome: uncertainty about *whether* it will actually be applied[18] (and, as I will argue below, about *how* it will be applied). This ambiguity then makes the law powerful, in the sense that it defines its threatening *potentiality*: it makes of it, with Ross "a menacing presence precisely in its status as a *potential* threat of detection and punishment" [19]. It is precisely the possibility of a threat, and not its actualisation, which makes the law threatening. More generally, for Benjamin, both law and myth, "reign in a threatening fashion because the boundaries they police are uncertain"[20].

Ross suggests that for Benjamin this potentiality is exemplified by two fundamental legal principles, namely, the principle that the ignorance of the law does not limit its applicability[21] and the principle of 'equality before the law'. The formalisation of law incorporates and reproduces the problem of violence at the epistemic level so that, it can be suggested, the ambiguity of law concerns, more generally, the way in which it operates as form which, paradoxically, strives for clarity[22]. This more generally has to do with the ambiguity of the logic of universalisation which characterises the legal form. The principle '*ignorantia legis non excusat*', in fact, is justified by the fact that the law is written, but this in turn requires the universalisation of the ability to know, that is to say, treating every subject as a subject who is able to know what is written or, with the language of legal positivism, as a 'reasonable person'[23]. In other words – despite all the complexity and nuances, in today's forms of judgement, behind any pronouncement on the reasonableness of legal mistakes[24] – it can be suggested that the principle '*ignorantia legis non excusat*' points toward a more general power of universalisation which is reflected in the other principle mentioned by Benjamin, namely, 'equality before the law'. Equality before the law stands for the 'demonically ambiguous' power of law to dispense equal rights to *de facto* unequal people. This is a foundational aspect of law, in the literal sense that, for Benjamin, in the act of peace which founds the law the power of the 'victor'

---

[18] The law, in other words, can be 'eluded' (Ibid). Ross speaks of 'uncertainty' about whether and when the law will be applied (2015:42).
[19] Ibid:42.
[20] Ibid.
[21] Benjamin, 2004:249.
[22] 'The struggle over written law' is for Benjamin, "a rebellion against the spirit of mythical statutes" (Benjamin, 2004:249).
[23] Kahan, 1997.
[24] Segev, 2006:42-43.

is stronger precisely when the 'defeated' is treated as equal (as-if-not defeated)[25]. In general, the principle of equality constitutes a sort of existential limit that nobody can cross even if – or perhaps, precisely because – *de facto* it is constantly crossed, the principle of a law that 'may not be infringed'. To clarify this point Benjamin quotes Anatole France satirical comment about the 'majestic equality of law', which "forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread"[26].

More concretely, Benjamin's point is that legal equality presupposes force and, therefore, it will produce "at the most equally great violence"[27] or, following another translation, 'equally great *powers*'[28]. In a similar vein, Simone Weil, another great influence in Agamben's reflections on law[29], has developed a critique of rights as constitutively 'dependent on force'[30]. Rights are the expression of the privileges of a certain social group and, more generally, of a paradigm of sociality as commerce, of a 'commercial society'[31]. Due to their 'commercial flavour', rights "are always asserted in a tone of contention[,] and when this tone is adopted, it must rely upon *force* in the background, or else it will be laughed at" [italic mine][32]. This, by itself, makes the claim to equal rights problematic insofar as, according to Weil, "an equal share of privilege for everybody – an equal share in things whose essence is privilege (…) is (…) absurd because privilege is, by definition, inequality"[33]. More concretely, rights constitute the individual as a '*persona*', that is to say, as "the sum of the parts one plays" in a given social context[34], which means that "the social differences from which 'persons' are abstracted are presupposed in that abstraction" and that "the moral or legal person is thus conceptually wedded to the social hierarchy from which it abstracts its egalitarian

---

[25] "[T]he adversary is not simply annihilated (…) he is accorded rights even when the victor's superiority in power is completed" (2004:249).
[26] The passage is from the novel 'The Red Lily'.
[27] 2004:249.
[28] 1995:25. The difference derives from the ambiguity of the term '*gewalt*', which means both violence and power.
[29] He himself has recently recognised this indebtedness (2017b) and yet Simone Weil appears very sporadically among Agamben's interlocutors and very little has been written on the influence of her thought on his work (Ricciardi, 2009; Marovich, 2017).
[30] 2005:81.
[31] Andrew, 1986:70.
[32] Weil, 2001:81.
[33] And with a tone of dismay she further adds: "In an unstable society the privileged have a bad conscience. Some of them hide it behind a defiant air and say to the masses: 'It is quite appropriate that I should possess privileges which you are denied'. Others benevolently profess: 'I claim for all of you an equal share in the privileges I enjoy'. The first attitude is odious. The second is silly, and also too easy" (Ibid:84-85).
[34] Andrew, 1986:62.

person"[35]. There is, ultimately, an "ambiguity of rights and persons with respect to equality and inequality" which, it could be argued, derives from the very ambiguity of *persons* as "refer[ring] both to individuals' actual status or social role, as well as to the legal and moral abstraction from their standing in a social hierarchy"[36]. Individuals, as persons, are therefore captured by a collectivity which has a "tendency to circumscribe the person" which, in turn, has a "tendency to immolate himself in the collective"[37]. Crucially both the person ('the part of soul which says I') and the collectivity ('the part of soul which says We'[38]) are, for Weil, fictions[39] that represent the abstract impossibility of violence and, for this very reason, make it concretely possible as a presupposition of the juridical form. In Weil's own words:

> "[t]here is something sacred in every man, but it is not his person. Nor yet is it the human personality. It is this man; no more and no less. I see a passer-by in the street. He has long arms, blue eyes, and a mind whose thoughts I do not know, but perhaps they are commonplace. It is neither his person, nor the human personality in him, which is sacred to me. It is he. The whole of him. The arms, the eyes, the thoughts, everything. Not without infinite scruple would I touch anything of this. If it were the human personality in him that was sacred to me, I could easily put out his eyes. As a blind man he would be exactly as much a human personality as before. I should not have touched the person in him at all. I should have destroyed nothing but his eyes. It is impossible to define what is meant by respect for human personality"[40] [italic mine].

The legal person institutionalises a pure, indestructible form of life which, at the same time, presupposes, as its condition of possibility, its material destruction, and it does so precisely by 'immolating life' into a collective system of organised forces.

The human condition of 'being immolated in the collective' (as an abstract sphere of sociality) is represented by Benjamin as the condition of man before a mythic law,

---

[35] Ibid:64.
[36] Ibid.
[37] Weil, 2001:78.
[38] Ibid:74.
[39] "[A] collectivity is not someone, except by a fiction; it has only an abstract existence and can only be spoken to fictitiously" (Ibid:74).
[40] Ibid:70-71.

which constitutes life, as a whole, as a fate of guilt[41]: "[t]he laws of fate – misfortune and guilt – are elevated by law to measures of the *person*"[42] [italic mine]. Birnbaum has therefore argued that for Benjamin the 'order of law' "presupposes a causal connection between crime and punishment, conceived according to a commensurability, an equivalence established between the degree of punishment and that of guilt"[43]. Crucially, the relation between punishment and guilt, from the perspective of the 'order of law', is such that the guilt precedes punishment, in the sense that it makes it possible. With Birnbaum, "the juridical constitution of guilt is an integral moment of the rule of law, and (…) this constitution logically precedes any act"[44]. To be part to a legal order means, from this perspective, to be exposed to the possibility of being guilty or, with the language of legal positivism, to be 'innocent until proven guilty'. Thus, when Benjamin argues, in 'Fate and Character' that "[t]he judge can perceive fate wherever he pleases; with every judgement he must blindly dictate fate"[45], he can be re-interpreted as suggesting that what every judgement dictates is, first of all, the possibility of judgement, the existence of an order of guilt in which judgement is possible.

It is along these lines that one can read Benjamin's critique of the 'legal interpretation of the fifth commandment: 'Thou shalt not kill'. For Benjamin, in fact, the correct interpretation of the commandment is that "the injunction becomes inapplicable, incommensurable, once the deed is accomplished" and that, in other words, "[n]o judgment of the deed can be derived from the commandment"[46]. The commandment is not a 'criterion of judgement'[47] and those who think otherwise must presuppose as, a general and abstract principle, what Benjamin calls the 'theorem of the sanctity of life'. The sanctity of life, which stands for an alleged natural or bare (formless) life as such, is precisely what grounds possibility of judgement and, crucially, Benjamin seems to represent it as the power to separate 'one existence from existence itself'[48] and thus as a principle of universalisation. It is, from this perspective, specular to Weil's categorisation

[41] "[F]ate shows itself, therefore, in the view of life, as condemned, as having essentially first been condemned and then become guilty (…) Fate is the guilt context of the living" (2004:204).
[42] Ibid:203.
[43] 2015:94.
[44] Ibid.
[45] 2004:204.
[46] Ibid:250.
[47] It is, rather "a guideline for the actions of persons or communities who have to wrestle with it in solitude and, in exceptional cases, to take on themselves the responsibility of ignoring it" (ibid:250).
[48] "We [the thinkers of the sanctity of life] however, profess that higher even than the happiness and justice of existence stands existence itself" (ibid:251).

of the legal person as a life which is always isolated from its concrete instances. The sanctity of life stands for the principle that natural violence, the violence against life as such, prior to any determination, must be avoided, or better, judged[49]. To be natural, from this perspective, is judgement itself. Along similar lines, Moran suggested that the "identification of the human with mere life is identification of the human with a guilt context that requires submission to it"[50]. Mere or natural life is the life subjugated by fate as, precisely, 'the guilt context of the living', 'the marked bearer of guilt'. In this sense, as noted by Moran, the invocation of mere life is a 'normative invocation'[51], the attempt to essentialise life by providing it with a (allegedly natural) fate. In other words, the institution of a fate of life is also the attempt to account for the *nature* of life and, in this sense, the institution of a legal order presupposes (the institution of) a life bound to that fate.

In Benjamin's words fate "concern[s] the natural man – or, better, the nature of man, the very being that makes its appearance in signs" and, from this perspective, the task of the judge can be assimilated to that of a 'clairvoyant' who decipher those signs in order to "plac[e] it [the mere life of man] in the context of guilt"[52]. A judgement, from this perspective, "is never [concerned] with man, but only [with] the [bare] life in him that it strikes – the part involved in natural guilt and misfortune by virtue of semblance"[53]. It is, in other words, concerned with a (legal) person (guilt is for law 'the measure of the person'[54]) which in turn presupposes a bare life, itself understood as a life subdued to an order. The legal person is therefore the device through which the mere life of man is connected to its fate of guilt. From this perspective, the ambiguity of law is the ambiguity of nature which, in fact, as noted by Moran, is granted, as myth, a power that 'could never be entirely clarified by thought'[55].

---

[49] Law, as suggested by Birnbaum, represents the exclusion of this alleged natural violence (and, therefore, the production of the sanctity of life): law "excludes, *de facto* and violently, all other possible ways of articulating the 'before' and 'after' of the unjust act [and t]ends to suppress all free and uncertain means of articulation, which mediate the relations among humans [on the ground that] this incertitude, this instability cannot be tolerated, for it entails the risk of *natural* violence" (2015:94-95).

[50] Moran, 2015:77.

[51] Ibid.

[52] Benjamin, 2004:204.

[53] Ibid.

[54] Ibid:203.

[55] 2015:75.

MacCormick's Ambiguity

Benjamin's and Weil's critiques of law are, first of all, a critique of the (legal) possibility to produce what Agamben calls a life separated from its form[56]. Positive theories of law rest, in general, on the (re)formulation of this possibility and, by doing so, they also (re)produce, in their own terms, the problem of law's ambiguity.

Neil MacCormick's influent work will be taken here as an example. To him, any legal order is to be considered as the expression of a 'general possibility of orderliness'[57] which exists before and in spite of any actual explicit formulation of its rules[58], which means that the existence of a legal order presupposes a "quintessentially human (…) capacity for interactive coordination in [a] ought-based way"[59]. Man's fate – what follows from this essential capacity for coordination – is to form a 'civil society', namely, "the context of voluntary associations and of *economic* activity among free *persons*", a "state of affairs in which persons can interact reciprocally with each other as at least *formally* equal beings, however *different* individuals may be in character, beliefs, origins, and *resources*" [italic mine]. *Civil* society is, in other words, society when considered from the perspective of the legal order, namely the context in which equal – and yet different – persons share and exchange what makes them equal – and yet different – namely their rights or, in Weil's terms, their privileges, their force(s). Civility is, in this sense, an ambiguous space[60] in which the boundaries between a formless society and the form of law become blurred.

Ultimately, the formless 'ought-based way' which constitutes man's essential capacity for coordination is revealed to be the form of decision-making itself, namely the form of a rule of the following kind: 'Whenever *OF* (Operative Fact), then *NC* (Normative Consequence)"[61]. This form represents, at the same time, the explicit formulation of the implicit rule which governs man's capacity, his 'possibility of orderliness', and the syllogistic or deductive form which, according to MacCormick *grounds* (without

[56] This can be inferred from his de-legalised conception of a form-of-life, namely "a life that cannot be separated from its form" (2000:3).
[57] 2007:18.
[58] Ibid:16.
[59] Ibid:42.
[60] MacCormick argues that the prefix civil refers more generally to the fact that state and society are "non identical [and yet] overlapping contexts of human existence", and that civility is the bearer of an 'intimate connection' between the two (Ibid:72).
[61] Ibid:25.

exhausting it though) legal argumentation and judgement[62]. In the technical sphere of legal argumentation, the form of syllogism stands generally for law's capacity for abstraction, i.e. 'universalizability', to be understood as the power to attach a juridical consequence (universal) to a certain human behaviour (particular) and, at the same time, the power to integrate a (particular) juridical consequence into the order of law as a coherent whole (universal)[63]. From this perspective, the formless possibility of orderliness is always-already abandoned to a fate of formalisation: with MacCormick, "order can become formalised"[64], otherwise – I would add – it would not be order at all. The presupposition of a formless possibility of orderliness legitimates formalisation by means of 'rule formulation' and 'rule administration'[65], which means also that it requires someone who would administer universalizability, to whom MacCormick metaphorically refers as a 'marshall or manager'[66]. The formless of order already contains the 'ought-form' of law, the formulation and administration of a coherent order of legal rules. That a lack of form already contains an ought-form means that the former is instrumentalised so as to ground a practice of administration of order, the maintenance of universalizability. But crucially this also means that the ambiguity of a formless order is fundamental to the purpose of universalisation. It is the intrinsic ambiguity which resides into a 'general possibility of orderliness' that makes possible, actually necessary, some kind of clarifying intervention, through legislation and judiciary enforcement or, more generally, rule formulation and administration.

This is further reflected in the conceptualisation of legal rules. As noted by MacCormick, the rules of legal order are fundamentally different from the rules of a game: whereas the latter are 'absolute' and certain, in the sense that from a certain cause will inevitably follow a certain normative effect, the rules of law are, for the most part, either of 'strict' or of 'discretionary' application, which means that, with different degrees, both forms of rules provide discretion to make exceptions[67] in spite of their validity. That a rule is strict or discretionary, in the sense MacCormick has in mind, means that the rule contains the principle that would override it[68]. The strength of legal rules is derived precisely by what would appear as its weakness, namely, by the fact that they can

---

[62] On this see in general MacCormick's books on legal reasoning (1978 & 2005).
[63] MacCormick, 2005:46-48.
[64] 2007:32.
[65] Ibid:34.
[66] Ibid:32.
[67] Ibid:27.
[68] Ibid.

be overridden, because this imply that they make, within themselves, room for exceptions to the rule. In other words, to formalise order – to actualise the possibility of orderliness – means to produce, at the same time, rules *and* exceptions to those rules. Rule formulation and administration make (formed) order and legitimise themselves by producing a '*defeasible* universality'[69], a universality that has to be, endlessly, formulated and administered. Exceptions themselves are thus rules, in the sense that, in order to ground a decision on a given case – no matter how unlikely it is that a similar case will occur again – the exception must retain a 'universal quality'[70]. That is because a decision does not decide the case only: it is always also a decision on the order of law, on the capacity of law to keep on formulating and administering rules[71]. Universalizability the stands for the survival of an order of formulation and administration of rules. Benjamin's considerations about law as an "order imposed by fate [which] promote[s] the interest of mankind in the person of each individual"[72] can be re-interpreted in the sense that the interest of mankind is law's interest in maintaining the possibility to decide, to treat every individual as a rule-individual, the object of a decision.

The general argument is that there is a *gap* between (the formal order of) law and (the bare or formless order of) reality and this produces the necessity to fill that gap by means of a decision. Legal rules ground "decisions as to the *applicability* of universals (predicate terms) to particular instances"[73], they ground the 'existence of and necessity for decisions'[74]. This gap makes the decision necessary and the law ambiguous. The ambiguity of legal rules, in contrast to the purity of game rules, derives from the fact that legal rules are 'open hypotheticals', that "deploy universals or concepts in stating what are the operative facts relative to given normative consequences" on a hypothetical basis, which means that they remain "open-ended [and] set conditions that are ordinarily necessary and presumptively sufficient, not necessary and sufficient absolutely"[75]. Law is ambiguous not only because 'it can be eluded' but also because it eludes itself. This, however, makes the legal order omni-present: thanks to 'defeasible universality' the legal

[69] 2007:94.
[70] 2005:91.
[71] Every case for MacCormick has to be treated as a 'rule-case'[71], one which universalises the decision on the case (Ibid:81).
[72] 2004:241.
[73] 2005:71.
[74] Ibid.
[75] Ibid:76.

order as such re-emerges *from* the decision[76]. The defeasibility of the universality of the rule through the decision produces the universalisation of the decision, its capacity to re-constitute the legal order as the ground of further decisions. Since the order emerges from the decision, and conduct is ordered by ordering the decision on conduct, all that which eludes the law (or is allowed to elude it) is, so to speak, non-existent, in the sense that its existence does not affect the order of the law which, in other words, remains (defeasibly) universal even if that which eludes it would seem to contradict its universality.

Ambiguity for MacCormick is internalised, in the sense that it concerns law's relation with itself, rather that its relation with life. And yet, it could be argued that this self-relation makes the relation between law and life ambiguous too. In general, the legal order must provide a reasonable order of *conduct*[77] by incorporating a system of *coherent* values[78]. These values have to be *coherent* in the sense that "in their totality they can be conceived as expressing a satisfactory form of life"[79]. This form of life is the life of a civil society, a fictional singularity in a fictional collectivity. As a result, the coherence embedded in the legal order and *a posteriori* in society, has to be firmly distinguished from *consistency* and, in fact, a coherent system is one which does not disintegrate despite, precisely, its own inconsistencies[80]. In very broad terms, a coherent legal order – which is admittedly one in which rules have to remain, to a certain extent, 'vague' – functions as a fate in the sense that it creates "the illusion of timeless continuity"[81] in spite of its own internal ruptures. Value-coherence is precisely what makes room for exceptions from within the scopes of application of rules and it is in this context that MacCormick speaks of inconsistencies[82]. However, insofar as each decision presupposes a civil society[83], it is, I think, possible to stretch the notion of inconsistency and argue that inconsistencies which do not impinge on coherence, are also inconsistencies in actual conduct of affairs. That the law is eluded (or allowed to be eluded) or, in general, that the law withdraws (leaving behind casualties of all kinds) has no direct impact on its

---

[76] Ibid:109.
[77] Ibid:189.
[78] A set of legal rules is coherent when they share the same 'value-cluster' (Ibid:191).
[79] Ibid:193.
[80] Ibid:190.
[81] Ibid:246.
[82] In MacCormick's framework this argument is, ultimately, advanced to ground 'judicial discretion' from within a syllogistic mode of legal reasoning (which is therefore called 'quasi-syllogistic'). Inconsistencies are, in this sense, situations where a judge makes an exception to the rule or also situations where a judge takes a bad or wrong decision, one which might eventually be overturned.
[83] And "[a] legal order can be conceived as an ideal order in the sense of a possible ordering of human affairs which is taken to set a pattern at least for aspiration in the actual conduct of affairs" (Ibid:202).

coherence. The legal order remains coherent even when life as it is 'conducted' appears 'inconsistent' with its premises. The law is a fate because inconsistencies do not affect it, because it thrives on its own ambiguity (which is also the ambiguity that it projects onto society, by calling it civil): defeasible universality cannot be defeated.

The internal ambiguity of law reflects its external ambiguity. The legal order, as such, is an ambiguous concept which encompasses, at the same time, an abstract life and the life presupposed by that abstraction, a mere life, which, in so far as it is always-already projected onto an abstraction which re-defines its temporality (with Benjamin, a fate), is a sacred life, a life that can be judged. The legal order is traversed by a gap which constitutes its life as always both civil and social, 'an ideal pattern of conduct' and a plurality of inconsistent (and yet potentially coherent) conducts. Society becomes the premise from which to extract a coherent form of organisation, a 'form of life', the explicit expression of coherence. When legal positivists argue that "the reality of the legal system is a regulative idea"[84] they can be re-interpreted as suggesting also that the reality presupposed by the legal system is always-already exposed to a fate of regulation: it is real in so far as it contains a possibility for orderliness. What is implicitly at stake here is an ontology of organisation, the idea that the world *is* a masterable place, which in turn, presupposes a mere life of chaos[85]. Ultimately civility is, for MacCormick "the opposite of the *state* of actual or potential war of all against all that Thomas Hobbes typified as being the '*state* of nature' which humans would have to endure where the *state* had broken down"[86] [italic mine]. The state of nature, the state of man's natural or mere life, is the presupposition of the process through which a potentiality for orderliness is given a (state) form.

---

[84] MacCormick quoting Bengoetxea (Ibid:230).

[85] 2007:73.

[86] Ibid:72-73.

The Ambiguity of Instrumentality

An underestimated aspect of Benjamin's critique of law concerns what might be called its *instrumental logic*[87]. The law is a means to an end and then can be problematised both in relation to the ends that it serves and to the means that it uses to pursue them[88]. Even for positivism, every rule, insofar as it functions as an open-hypothetical, constitutes an open-ended legal means which, for this very reason, admits exceptions every time is made object of a decision. There is, in other words, an ambiguity of law which concerns its essence: it is not clear whether the essence of law is to be a means for unspecified ends or to serve particular ends. This is reflected in the never ending 'war' between positive and natural theories of law[89]. In Benjamin's own words, while positivism "can judge all evolving law only in criticizing its means", naturalism "can judge all existing law only in criticizing its ends"[90]. There is, therefore, a mutual solidarity between positivism and natural theories of law, a sort of circularity of the instrumental argument, which is exemplified by Benjamin in the following terms:

> "just ends can be attained by justified means, justified means used for just ends. Natural law attempts, by the justness of the ends, to 'justify' the means, positive law to 'guarantee' the justness of the ends through the justification of the means"[91].

This circularity produces a functional dialectic between 'legality and 'justice' that sustain each other as precisely means and ends: "if justice is the criterion of ends, legality is that of means"[92]. A reflection on violence is therefore impossible as long as one thinks in terms of either positive or natural theory. What is needed instead is a historico-philosophical analysis which, however, must begin from an assessment of the premises of positivism. In fact, for Benjamin, it is precisely positivism's disdain for ends and, therefore, the prevalence of a reflection on means over ends in the economy of a positive theory, that makes a critique of *Gewalt* possible. 'The positive theory of law' in fact can be assumed as a 'hypothetical basis' for the Critique because it, alone, provides a solid

[87] Ross, for example, argues that for Benjamin, law "operates according to the 'impurity' or 'bastard form', of instrumental means-end logic" (2015:43)
[88] For a general overview of the instrumentalist view of law see Tamanaha (2006) and Green (2009).
[89] For a similar argument see Green (2009).
[90] 2004:237.
[91] Ibid.
[92] Ibid.

criterion for the identification of legal violence, namely, the "distinction (…) between historically acknowledged, so-called sanctioned force and unsanctioned force"[93]. The formalisation of law is a formalisation of violence, the institutionalisation of the "use of violence as a means toward legal ends"[94].

Moreover, Benjamin's famous distinction between 'law-making and law-preserving violence'[95] – the two faces of law's mythic violence – seems to be suggest that, from the perspective of violence (as a means) the legal end *par excellence* is the preservation of law itself: 'law-making violence', the violence which produces the means of law, becomes 'law-preserving violence', violence which aimed at law's preservation. The violence which preserves the law constructs legal ends but it does so for the sake of law's own self-preservation: "law's interest in a monopoly of violence vis-a-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself"[96]. Similarly, for legal positivism not only legal decisions have to be taken in order to maintain legal rules *coherent* with a cluster of values and principles (ends) that the rules embody, but ultimately, it is the 'the coherence of law' as such – the existence of law as a coherent whole – which becomes "a grand-scale legal value"[97] in itself. Coherence is, in this sense, a synonym for self-preservation and, in this sense, a 'critique of violence' is also a critique of legal coherence. Benjamin argument that "law's concern with justice is only apparent, in truth the law is concerned with self-preservation"[98] is, in other words, *coherent* with the positivist argument that "an overarching principle of justice [is] treating like cases alike and different cases differently"[99]: legal coherence is a principle of self-preservation of (the coherence of) law. Law provides for a coherent (and yet rich of inconsistencies and casualties) organisation of violence, founded on a logic of instrumentality. Benjamin's claim that "[a]ll violence as a means is either lawmaking or law-preserving [and i]f it lays claim to neither of these predicates, it forfeits all validity", from this perspective, implies that violent means (in spite of their legal inconsistencies) remain coherent with legal ends as long as they don't threat the existence of law as such. With Benjamin's words, violence

[93] Ibid:237.
[94] Ibid:241.
[95] Ibid.
[96] Ibid:239.
[97] MacCormick, 2005:207.
[98] 2004:232.
[99] MacCormick, 2005:208.

"when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law"[100].

The aim of *Kritik*, therefore, is not to so much a re-evaluation of the ends of law or a limitation of its means: *Kritik* is not meant to make the law coherent. Rather, to be criticised is the very possibility of its organisation and, therefore, its instrumental logic. The formal distinction between 'sanctioned and unsanctioned force', is important for Benjamin only in so far it allows him to ask: "what light is thrown on the nature of violence by the fact that such a criterion or distinction can be applied to it at all[?]"[101]. The answer to this question is that "all violence as a means, even in the most favorable case, is implicated in the problematic nature of law itself" or, in other words, that the *nature* of violence is to be articulated into juridical and non-juridical violence, which also means that the *nature* of law is to articulate the sphere of violence into two spheres: juridical and non-juridical. Kritik concerns the *ambiguity* of the distinction between sanctioned and unsanctioned, juridical and non-juridical, as well of the instrumental logic which makes this distinction possible[102].

Crucially, the *Kritik* has been interpreted as both a rejection and a 'by-product'[103] of one of the main points of reference for (positive) theories of law as a means[104], namely Kant's moral philosophy. In general, Salzani has argued that Kant's moral philosophy reproduces the same instrumental logic that grounds the oscillation between positive and natural theories of law[105]. Specifically, Benjamin problematises Kant's formula of humanity[106] as an expression of the ambiguity of the instrumental logic. In general, the issue is that Kant's ethics of 'ends in themselves' does not abandon the means-end logic but rather reformulates it in paradoxical terms so as to represent the treatment or use of a person, at the same time, as *both* a means and an end. The formulation ('always at the same time') seems to imply not only that treating someone as a means is not morally enough, but also that doing it is *necessary* in order to attain the moral end[107]. Benjamin problematises this aspect of the formula, claiming that "one might, rather, doubt whether

[100] 2004:239.
[101] Ibid:237-238.
[102] A similar argument is made by Salzani (2010:438).
[103] Salzani, 2010.
[104] Kelsen's theory in particular (Green, 2009).
[105] 2010:440.
[106] "So act that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means". For an overview of the debate concerning the interpretation of this ambiguous formula, see Kerstein (2019).
[107] Ibid:5.

this famous demand does not contain too little – that is, whether it is permissible to use, or allow to be used, oneself or another in any respect as a means"[108]. Moreover, claiming that a person should be treated at the same time as both a means and an end is 'inadequate' to the scope of the *Critique* because that is exactly the universalistic logic of positive law, which claims "to acknowledge and promote the interest of mankind in the person of each individual"[109]. Kant's ethics and positive law – but the same applies to natural law[110] – are similarly ambiguous due to their being rooted in a logic of instrumentality.

Kant's ethics is, generally speaking, juridified[111], as reflected in the well-known first formulation of the categorical imperative[112] whose function, according to McLoughin, is to provide "a response to problem of normative regulation of concrete life" [113] through a principle of universalisation. In Kant's ethics "all rational behaviour follows rules or maxims, and the rational subject is suspended between the generality of rules and the particularity of the situations to which they respond"[114]. The particularity of a situation triggers a general rule, so that between the situation and the rule there is a *gap* ('the gap between general and particular' [115]) that has to be filled by means of a *judgement*, which means that the 'problem of normative regulation of concrete life' is always-already a 'problem of normative *application*' [116] of general rules to particular situations, and thus that the ethical subject has to act like a judge. Ethics reproduces a juridified mode of thinking, insofar for Kant, law too "brings with it the concept of the unconditional and objective and hence universally valid necessity"[117].

The moral-judging subject has then to interpret the rule in order to apply it to the concrete situation. This procedure of interpretation produces the universalisation of experience, its projection onto a 'universally valid necessity', the 'Categorical Imperative' as a 'pure form of universality' to which all determinate maxims –

---

[108] Benjamin, 2004:252.

[109] Ibid:241.

[110] For it only contains the criterion for cases of the use of violence and not for violence itself as a principle (Salzani, 2010:440).

[111] It has been suggested that it is precisely since Kant that critical philosophy (and therefore ethics) can be said to "[have] always-already become (…) juridical" (Zartaloudis, 2005:387). Zartaloudis here draws from Nancy's account of Kant's philosophy, as developed in an essay titled '*Lapsus Judicii*' (2003:152-171).

[112] 'Act only in accordance with that maxim through which you can at the same time will that it become a universal law'.

[113] McLoughin, 2009:247.

[114] Ibid.

[115] Ibid.

[116] Ibid:249.

[117] Ibid.

hypothetical imperatives whose "binding quality depends on an empirically determined end"[118] – have to conform. McLoughin thus suggests that 'determinate moral maxims' – each one provided with 'determinate ends' – have to *conform* with the Categorical Imperative that, in this sense, represents the end of all ends, an end in itself. An interpretation is required because the Categorical Imperative is, in terms of its content, *indeterminate* or, one could say, *ambiguous*. This ambiguity derives from the fact that the 'universally valid necessity' of the Categorical Imperative seems to be nothing but the necessity of *conformity* as such: in other (Kant's) words, "conformity alone is what the imperative properly represents as necessary"[119].

Conformity is the end in itself so that, as Nancy suggests, "the imperative does not prescribe that we act *in accordance with* the law (…) it prescribes *acting legally*, in the *legislative* sense[, i]t prescribes that the maxim of action be the founding act of a law, of the law[, it] prescribes *the act of legislation* (hence it prescribes 'universally')"[120]. To prescribe the 'legislative act' means basically a self-obligation to the 'universality of the law', 'the universality of legality', 'of the being-law of the law'[121]. The moral subject is subject to a law which "prescribes [nothing but] the act of legislating according to the form of the law, that is, according to its universal form"[122]. With respect to the judgemental nature of Kant's ethics, McLoughin further suggests that "due to the formality of the Categorical Imperative, what exactly is demanded in each case of judgment can never be known with absolute certainty"[123] and that, therefore, "[t]he modern moral subject find[s himself] beholden to a law, and unable to determine definitively whether [his] actions are in conformity with its demands"[124]. As a result, the moral subject is always-already an 'outlaw', 'abandoned to the entire rigor of the law'[125], which is to say, exposed to a form of law that defines his freedom as a freedom to interpret the law in order to apply it.

---

[118] Ibid.
[119] Ibid:250.
[120] 2003:138.
[121] Ibid:141.
[122] Ibid:146.
[123] 2009:254.
[124] Ibid:256.
[125] This comes from Nancy (2003:140), who further argues that:
"'*Act in such a way*…' only makes sense if it is addressed not only to one who is *able* to refrain from acting in such a way, but first and foremost to one who, radically, in his or her very disposition, does *not* act in such a way. The law prohibits the one to whom it is addressed from obeying it from the outset, without stumbling" (2003:140).

Universality, it might be argued, represents the end of all particular ends, the conformity of all ends, their 'coherence'. In other words, the form of law, or better the *respect*[126] for the form of law, is achieved when the moral subject becomes able to interpret his own and other people's ends in accordance with their ultimate end, reason as the universal law. Respect for the law is "recognition that the moral law is a supremely authoritative standard that binds us" in consideration of the fact that its "[b]asic moral requirements retain their *reason-giving force* under any circumstance, they have universal validity"[127] [italic mine]. This implies that rational action is, always, *instrumental* action, action *willed* as a means to an end. To be rational means, first of all, to set maxims in the *conditional form* "'I will *A* in *C* in order to realize or produce *E*' where '*A*' is some act type [a means], '*C*' is some type of circumstance, and '*E*' is some type of end to be realized or achieved by A in C"[128]. If, given a concrete situation, a maxim expressed in this form can be made universal, in the sense that it can be said that it should 'govern *any* rational will'[129], then, it is a hypothetical imperative. The categorical imperative, from this perspective, is a principle of organisation of the 'form of means-end reasoning'[130]. The notion of 'end in itself' does not neutralise the means-end logic: it provides a principle for its coherent organisation as reflected, for example, in the attempt by Kant and his interpreters to determine what duties (positive and negative) can be derived from the categorical imperative[131]. Equally, it is suggested that the universal law formula "summarize[s] a *decision procedure* for moral reasoning" [italic mine] which organises maxims hierarchically in accordance with their moral force[132].

Along these lines, it has been in fact suggested that to treat others as ends in themselves means to treat them as *persons*, that is to say, as 'subjects of morally practical reason', which ultimately means 'having the capacity to set ends and being autonomous'[133]. A *person* is thus someone who acts instrumentally – i.e. whose actions are means to an end – and, additionally, is able to do so autonomously, that is to say, in conformity with a (self-)legislation of "moral laws that are valid for all rational

[126] For an overview of the concept of 'respect' in Kant, see Dillon (2018) and Johnson & Cureton (2021).
[127] Johnson & Cureton, 2021:13-14.
[128] Ibid:17.
[129] Ibid.
[130] Ibid.
[131] See for example Yudanin (2015).
[132] Johnson & Cureton, 2021:17-18.
[133] Dillon, 2018:24.

beings"[134]. A consequence of this is that nobody, properly speaking, is a rational being and that one is a person only to the extent that can become both the object and the subject of a decision on the validity (rationality) of his actions[135]. To be a person does not mean to be rational: it is an injunction to be rational. Along these lines, Brophy has suggested that Kant's self-legislative individual is constituted by a 'commanding force' which separates him from actuality, and that, therefore, in Kant's philosophical framework "command overtakes substance"[136]. One can only be autonomous 'in a commanding manner' by "yeld[ing] to unalterable but content free rules"[137], so that the 'moral duty' is "cause and/or expression of freedom" or, more technically, "good *will* forms a *command* (i.e. 'categorical imperative') by means of the legitimising *potency* of the autonomous processes of reason"[138]. Agamben, in this respect, has suggested that Kant's ethics is the expression of 'an ontology of command', in which the three fundamental modalities of being – 'possibility, contingency and necessity' – and, therefore, of its three modal verbal-forms – 'being-able-to, a willing-to, a having-to' –, collapse onto each other, producing the paradoxical formula '*man muss wollen können*', "we must be able to will", whose actual meaning is "I command myself to obey"[139].

If *being* rational means that one *has-to-be* rational, then everyone is, with Nancy, an 'out-law': everyone is exposed to an injunction to be rational whose validity is "in no way conditional on (…) whether a person acts morally or has a morally good character"[140]: to be an 'out-law' means to be separated from one's own pure form of personhood by a gap that must be filled by a decision. One, then, treats others as persons not *because* they are persons but *as if* they were persons and, in this way, he himself is acting *as if* he were a person. This has to do, again, with the fact the notion of person, and more generally that of universal reason, grounds judgement rather than justice or knowledge (justice and knowledge as judgement)[141]. One can only *judge* whether he is a

[134] Ibid:24.
[135] For a similar argument see Fusco (2018).
[136] 2019:196.
[137] Ibid:198.
[138] Ibid: 202.
[139] 2019:109.
[140] Dillon, 2018:26.
[141] Nancy says something similar when he discusses Kant's notion of the 'tribunal of reason' in the following terms:
"Knowing ourselves becomes a matter of judging ourselves; judging ourselves presupposes that we have at our disposal our own 'eternal and unchangeable laws' (…). Since it has to judge *itself,* reason is itself a *case* in the sense of a default from, or a lack of, right; [T]o this extent, and to the extent that reason ought to draw right itself alone, its jurisdiction can only be 'absolute' in the paradoxically accidental institution

person or not and, from this perspective, to treat oneself and others as ends in themselves mean to treat everyone as a means for a (moral) judgement. Therefore, when it is suggested that the respect for persons – legal and Kantian alike – is a matter of respect for their dignity[142], what perhaps is really meant is that to be respected is the *judgment* on the universality of the moral imperatives[143].

It is interesting, in this respect, to further reflect on the fact that the 'humanity formula', as invoked by Benjamin, blurs the distinction between the notion person and humanity: 'act in such a way that you treat *humanity*, whether in your own person or in the person of any other, never merely as a means, but always at the same time as an end'. This concretely means that "it is not human beings *per se* but the 'humanity' in human beings that we must treat as an end in itself"[144]. The person functions here as a representative of humanity as a whole and, only in this sense, it is possible to treat it as an end in itself. It is, in other words, universalisation, i.e. the institution of the person as a representative of humanity (or as a means to an end), that grounds Kant's ethics through what ultimately can be presented as a rupture, to be performed from within the individual itself: the rupture between life and its form, between a singularity and its person. Only in this sense the individual can act, at the same time, as both a means and an end and, therefore, as an end in itself. To treat someone in accordance with the categorical imperative means to treat him as more than a mere man: it means to treat him as a person, that is to say, as the *representative* of humanity. The person constitutes, in this sense, an excess of representation which exceeds the mere medium of such representation, the individual. The person is an ambiguous zone in between singularity and humanity, means and end.

Similarly, being a legal person is "*additional* to being a human being, albeit everyone who is human has a right to this additional recognition" [italic mine][145]. Fusco speaks, for example, of the 'non-pertinence' of the legal person with the thingness of the body and yet notices that the singular existence acts like a 'hidden support'[146]. The mere

---

of its tribunal (…). Rather than having an essence, therefore—which would involve knowing itself—reason has an accident, which involves having to judge itself. Reason stumbles over its own case— the case of the judge. (…) [T]he law thus invoked doesn't make jurisdiction as such obsolete. It doesn't *found* the tribunal but leaves it the—infinite— task of *justifying itself*" (2003:162-163).

[142] McLoughin, 2009:255.

[143] Similarly, for legal purposes, to be a person means to have a 'right to *recognition as a* person *before* the law' (Article 6 of the Universal Declaration of Human Rights).

[144] Johnson & Cureton, 2021:23.

[145] MacCormick, 2007:77.

[146] Fusco, 2018:83-85.

life of man acts therefore as the repository of a (legal) passive capacity "to be the beneficiary of a legal provision"[147]. It is not fully clear what particular form of (mere) life – what form of 'natural person' – is needed in order to sustain this 'minimum element of legal personateness'[148] but, in any case, it should be noted that the two coincide so that a zero-degree of nature (to be individuated) corresponds to a zero-degree of law. However, such zero-degree of law is not sufficient to act legally: this passive capacity has to be integrated by an active capacity "to perform juristic acts (…), that is, to carry out legal transactions" and, thus, "to act for the interest of the person endowed with purely passive capacity" [149]. This 'capacity to act with full legal effect' is, at the same time, a passive 'capacity-for-liability', namely the capacity to be subject to 'imputation of wrongful intent' or, to put it simply, the capacity to be judged. To be able to act means "to either being judged a wrongdoer or being deemed one who does no wrong in respect of some given act or omission"[150] and this capacity constitutes the sphere of the legal order as "a rational ordering of rational beings"[151]. Rational beings are beings provided with the additional recognition of a force, or better, with 'a kind of reward' – Weil would call it privilege – "that is *enforceable* by due process of law"[152] [italic mine].

Like Kant's rationality, legal rationality is the possibility to submit to judgement all individual ends and, from this perspective, it renders individual interests indistinguishable from the interests of state law[153] like Kant's rationality renders individual interests indistinguishable from the end of the (moral) law. The analogy is not purely formal but also substantial insofar, on one side, Kant himself argued that the state acts in the name of the whole people and, vice-versa, the founding narrative of the state as "inherit[ing] (from 'the whole people') a duty towards the autonomous processes of reason" to be exercised beyond individual interests[154], that is to say, in the interest of humanity as such. In both realms (ethics and law) procedure (means) and values (ends) are made indistinguishable through a complicated reformulation of the logic of

---

[147] MacCormick, 2007:86.
[148] Ibid:88. In succession law, for example, the child in utero is beneficiary of legal provisions, which will produce their effects only after the birth (Ibid:79).
[149] Ibid:88.
[150] Ibid:93.
[151] Ibid:92.
[152] Ibid.
[153] Brophy, 2019:203.
[154] Ibid:202-203.

instrumentality which posits, as the ultimate end, judgement itself as the means to evaluate the coherence of all individual means and ends.

Juridical Means, Natural Ends

It is well known that Benjamin develops his critique of law focusing on the particular problem of the 'sanctioning' of the *monopolisation of violence*. If considered in its monopolising relation with violence, law sanctions itself through a 'law founding violence' and a practice that preserves the law through time, the 'law preserving violence', thus forming a 'continuum of violence'[155]. This 'formally sanctioned' aspect of law provides for the internalisation of violence as something that exceeds law, an excess which the sanctioned law must constantly try to organise. In order to exists law must include violence and, therefore, administer it in a stable manner. Law-founding violence is 'historically sanctioned violence', that is to say, a violence for which "a general historical acknowledgment of its ends" can be provided, a violence which leaves historical proof of "a deliberate submission to its ends"[156]. In its originary manifestation, the force of law is the force of a formal recognition of certain ends as legitimate(d)[157].

The force which the form of law captures is the force to produce legitimate ends, but also the force of law to establish itself as an end. This is reflected in Benjamin's conception of the 'mythic violence of law', which is to say, basically, the idea that 'law is crowned by fate'. This concept refers, on one side ('crowned…') to the formal acknowledgement of legal violence – law founding violence – and, on the other, to production of an *end*, a *telos* ('…by fate') which is achieved precisely through the administration of this formal acknowledgement – law preserving violence. The law by 'sanctioning' its monopoly over violence, produces and internalises an 'excess of form' which is thought by Benjamin as a 'fate' of inclusion, namely, the idea that nothing violent can exist outside the law: in his own words, the 'power of law' "resides in the fact that there is only one fate and that what exists, and in particular what *threatens*, belongs inviolably to its order"[158] [italic mine]. That is why the legal order is said to represent a

[155] Zartaloudis, 2015:174.
[156] Benjamin, 2004:238.
[157] Ibid:237.
[158] Benjamin, 2004:242.

'continuum of violence'. Zartaloudis speaks of this continuum as "a masterless plane of normativity in the name of its self-imposed necessity of mastering", a 'legal order' in the broadest sense of the word, which "places all events and all human actions as subject to the law's suspicion"[159]. To this purpose, legal means are created in order to evaluate whether legal ends shall be erected in place of natural (which is to say, potentially violent) ends. In this respect, the debate between positivist and natural schools of legal theory, with the former claiming that what makes the law special is its use as a means and the latter focusing instead on the study of the ends that law should legitimately pursue, can be resolved if one considers, as Benjamin does, that the supreme end of law is actually its own self-preservation as a means, that is to say, as a form to be held in relation with whatever *threatens* its existence as a form.

In this respect, law is able to produce new (legal) ends out of natural ends on the presupposition of a general sanctioning of all violence as belonging to the law. It is this foundational act of sanctioning that law has to preserve: this makes possible for the law, as a means, to subject potentially all (natural) ends to its own suspicion[160]. The law is the source of articulation of legal and natural ends or, in other words, a threshold of decision on the distinction between law and nature. A violence which, as a means, serves ends that are not legal is a kind of violence that exists outside the law. Such violence however is not allowed to exist and must be internalised through the production of legal ends that replace pre-existing natural ends. It is worth quoting Benjamin's argument at length:

> "[s]ince the acknowledgment of legal violence is most tangibly evident in a deliberate submission to its ends, a hypothetical distinction between kinds of violence must be based on the presence or absence of a general historical acknowledgment of its ends. Ends that lack such acknowledgment may be called natural ends; the other type may be called legal ends. The differing function of violence, depending on whether it serves natural or legal ends, can be most clearly traced against a background of specific legal conditions. (…) Characteristic of these, so far as the individual as legal subject is concerned, is the tendency to deny the natural ends of such individuals in all those cases in which such ends could, in

[159] Zartaloudis, 2015:171. The law's suspicion concerns precisely the possibility that something violent could exist outside the law.

[160] A similar claim is made by Fenves too. In his own words, for Benjamin "[w]hoever transgresses a "natural" (read: *mythic*) boundary alters a nexus of relations. Such 'unnatural' (read: *mythic*) alterations solicit fate, which makes every relation, including so-called natural relationships, ambiguous" (2019:216).

a given situation, be usefully pursued by violence. This means: this legal system tries to erect, in all areas where individual ends could be usefully pursued by violence, legal ends that can be realized only by legal power"[161].

Benjamin thinks the link between violence and law as constitutive of the very possibility of distinguishing (by articulating them together) legal means and ends, which are then further split into (and articulated as) natural and juridical ends. The result of this is that there is no such a thing as non-sanctioned violence, in the sense that all violence needs to be sanctioned in order for the law, as a form, to exist. The monopolisation of violence is realised through a form (of law) which presupposes that every human action *can* be framed as a means to either natural or juridical ends. At stake here is then a certain account of *potentiality*, or better, *power*, namely, "the organisation of potentiality"[162]. Such organisation of potentiality produces the inscription of life, i.e. human praxis, into a meta-normative framework which, on one side, treats actions as means to an ends and, on the other, is allowed to establish whether those ends are either juridical or natural, violent or not. At its core, such meta-normativity says that life is potentially violent, that is to say, potentially subjected to an infinite process of articulation of (juridical) means and (juridical or natural) ends[163]. The form of law contains an excess of normativity, a meta-normativity whose only content is that all human action has ends and that these ends can be subjected to legal scrutiny. The performance of the law, from this perspective is not only the sanctioning of a power to scrutinise all human action but, more radically, the power to think all action as a means to an end, a power of instrumentalization.

The thesis here is that, on one side, there is no violence outside the law and, for this very reason, nothing is really abandoned or left unquestioned by the law. Everything is potentially subjected to its scrutiny because the just ends of the system coincides with the power to scrutinise all ends, in order to establish whether they are natural or legal. Nature, in other words, is a by-product of the monopolisation of violence: all law is violent, in the sense that "all the natural ends of individuals must collide with legal ends if pursued with a greater or lesser degree of violence"[164] but at the same time all that which is natural is merely not violent unless proven otherwise. The monopoly of violence

[161] 2004:238.
[162] Agamben, 1995:71.
[163] This is a process of juridification or, with Fenves, of 'legal encroachment' (2019).
[164] Benjamin, 2004:238.

is the *fiction* of subjection of nature as such to legal scrutiny[165]; a zone in which the relation between law and nature is made ambiguous. Zartaloudis speaks, in this respect, of the *fictio* of a 'juridical world' which presupposes a 'juridified world'[166], that is to say, a world that is abandoned to the possibility of 'juridification'. The *fictio* then is perhaps a *meta-fictio*, a *fictio* of two worlds, according to which the juridical world, with its national and supra-national institutions, is to be found in the real world as, precisely, a space to be juridified[167]. The law from this perspective establishes, *fictionally*, a capture of that which exists while at the same time, also fictionally, leaving it outside, thus also creating the conditions to justify its own eventual failures when it comes to enforcement – a failure that can also be strategically performed by the system itself. This latter is the most evident aspect of modern law's *exceptionalism*, what Zartaloudis, via Agamben, defines "the production of bare life as a juridico-political act", or in other words the fictional (and yet very real for those who experience it) production of 'human waste', such as, for example, the 'collateral casualties' of war or of the economic crisis, or of any other (organised as) exceptional situation[168].

The scrutiny on legal ends presupposes a scrutiny on natural ends, a scrutiny of what *exists* 'naturally' before the law, but this existence is always-already understood as what conditions the *existence* of the law itself[169] and, therefore, as a possibility of judgement. The law presupposes what Fenves has defined a 'legal encroachment', to be understood as the expansive production of an ambiguous threshold in which nature and fiction become indistinct, in the sense that they are neither perfectly disjointed nor perfectly coincident, i.e. nature as myth[170]. Moreover, in Fenves' reading of Benjamin's *Kritik*, the concrete operations of the law presuppose a legal ideology of 'pietization' which makes the relation between law and morality ambiguous too[171]. Nature and morality are, in this sense, ambiguously absorbed into a sphere of law that encroaches. Along these lines, it could be further suggested, the legal principle of someone 'being innocent until proven otherwise' points rather towards a form of 'natural guilt', the

[165] Within this scheme, nature is, in potency, a means to an end which, always in potency, can be either legal or non-legal, that is to say, threatening or non-threatening for the law itself.
[166] 2015:171.
[167] Ibid.
[168] 2008:153.
[169] Similarly, Fusco suggests that the pseudo-juridical category of the 'state of exception' "finds its (onto)logical presupposition, and its only raison d'être, in the presence of determinate exceptional facts constituting a threat for the state" (2021:17).
[170] 2019:215-216.
[171] Ibid:217.

"being-in-potentiality of a transcendental Law of the law that defines 'innocence'" as the possibility of a "foundational judgement passed on every past, present and future action" [172], whose preservation constitutes the hidden end of all legal means. Natural/moral ends are, from this perspective, not simply excluded but juridically-excluded, that is to say, excluded in order to be included into the very possibility of order: excluded *in* order; organised into a 'legal plenitude' that coincides with all possible reality[173].

More generally, it might be argued, the dialectic of means and ends proposed by Benjamin suggests that *Gewalt* refers to an excess of signification, a meta-normativity, that doesn't establish anything in particular except that law *can* only be thought in its association with something that exceeds it, precisely as ends stand with respect to means. This excess of signification is framed by Benjamin as a fate, law as a fate, and is characterised specifically as the 'mythic' violence of law. In a sense this mythic violence is already implicit in the formal structure of positive law which provides it with a power of abstraction, namely, the power to frame the life of human beings through a form that is meant to be separated from the life to which it refers. From this perspective, the closure of the gap between form of law and forms of life constitutes the fate of both law and human beings, a destiny that the system must constantly try to fulfil but without ever reaching final completion. That there is a posited gap between law (form) and life is what grounds law's fate as a form gap-lessness, an excess of signification used to fill the gap. This structure (*potentiality* as power) opens legal thought to the only possibility of a never-ending use (*actualisation*) whose fate (*ends*) is to fill the gap, rendering law and life indistinguishable while maintaining their potential separation instrumental (as a *means*) to that purpose. The gap is instrumentalised, it becomes the space of a decision on whether violence serves legal or natural ends, a decision on the distinction between law and nature which (insofar as it is a decision) must presuppose their indistinguishability. With Benjamin, the "legal system tries to erect, in all areas where individual ends could be usefully pursued by violence, legal ends that can only be realized by legal power"[174].

Interestingly, one of the examples provided by Benjamin in this regard is the growing body of legislation concerning 'the limits of educational authority to punish'[175].

---

[172] 2008:161.
[173] Zartaloudis, 2015:175.
[174] 2004:238. Benjamin's focus is, specifically, on the European legal system.
[175] Ibid.

This is one of the fields on which Foucault concentrated his detailed analysis of the emergence, since the 17th century, of a 'disciplinary society', a kind of social normativity interested in controlling, singularly, the bodies of its subjects and which later evolved[176] into more systematic forms of 'management of the population'[177]. Within the new – biopolitical – paradigm of government a set of mechanisms and procedures are set in place to secure power through intervention on the basic biological features of the human species[178]. This implies a fundamental change in the normative structure of society, which is reflected in the development of new forms of administrative powers (disciplinary and security) that decentralise sovereignty, making it, at the same time, far more pervasive with respect to life. From a theoretical standpoint this is further reflected into what many theorists have described as a re-organisation of the very concept of normativity, which now is split into two dimensions, namely rule and norm, legalisation and normalisation[179]. With the development of the new paradigm of normalisation life as such is represented as administrable – with Foucault, 'fosterable or disallowable to the point of death'[180] – but this does not represent the demise of the juridical. Rather, sovereignty is transformed into a multi-headed form of power in which discipline of the body, control over huge populations and their legal organization are entangled and, to a certain extent, become impossible to separate. What is realised is, in other words, the stratification of the relation between law and life (legal means and natural ends) and the blurring of the limits meant to separate them.

In accordance with Ewald's reading of Foucault's work this process leads to the creation of a hyper-legislated society[181] and, more generally, to a phenomenon of what could be termed of exponential juridification. The fundamental characteristic of juridification is that the relation between law and nature is organised through a dialectic between rule and norm, legalisation and normalisation, which displays itself not only in the hyper-production of legislation, but also in the internalisation, by judges, of a power to normalise and the internalisation into normalising procedures beyond the law of a

---

[176] One of the main points of Foucault's analysis is that modern biopolitical government of populations would have not been possible without the creation of disciplinary institution first. It is precisely in the passage from disciplinary institution to the institution of the State as a machine for the management of populations, that the modern function of law as a threshold of articulation of juridical means and natural ends was consolidated.
[177] Muller, 2011.
[178] Foucault, 2004.
[179] See for example Ewald (1990).
[180] 1979:138.
[181] Ewald, 1990.

power to judge[182]. This non-legal power is held in relation with legal power and it is out of their relation that something like a 'universal reign of the normative'[183] can emerge. The concept of juridification, in this respect, represents the creation of "a new form of law, a mixture of legality and nature, prescription and constitution"[184] such that life, as norm, is constituted as a sphere somehow suspended in between *factum* and *ius*. The result is, in Benjamin's terms, the institution of a new threshold of indistinguishability between law-founding violence and law-preserving violence, through which the law is able to re-invent its ends while *preserving* its originary structure[185].

Violence, i.e. Gewalt, can in other words be reinterpreted (also) as the *power* to produce a sphere in which nature and law as, respectively, norm and rule, become *indistinguishable* and, in this sense, *ambiguously* related. Both the law-founding and the law-preserving moments of violence rest on a power of *normalisation* – i.e. the realisation and preservation of *normal* conditions of living – such that, it could be further argued, life, as normal (normalised life), is captured by a logic of instrumentality, of means and ends, which makes of it both the foundation and the end the of law. In fact, on one (Benjamin's) side, life – once operationalised as the foundation of law, i.e. as a zero-degree of law – is turned into a life-exposed-to-judgement but, on the other (Foucault's), life as such is also constituted as the *end* of law because biopolitical norms, as it has been observed, are more than just facts, they are *ideal* facts[186]. As noted by Wetters, in fact, the norm "tends to imaginary and idealised projections"[187] and, Kelly, in this respect, has further stressed that "norms are strictly speaking fantastical, never entirely realised", while, at the same time, "normalisation does exist in reality as a kind of heterotopia generated by the norm"[188]. Basically, and this is the main point of Kelly's analysis, for Foucault the norm provides both for a conception of society as it is *lived* by individuals and, at the same time, as a 'model for the future' and, therefore, a "standard against which things can be *judged* as to their deviation" [italic mine][189]. This ultimately means that the norm is a 'natural rule' which allows to guide action rather than just to limit it and, therefore, that the binary distinction between legal and illegal, rather than disappearing,

[182] Foucault's 'judges of normality' (1991:304).
[183] Ibid.
[184] Ibid.
[185] As already mentioned, Fenves, speaking of Benjamin calls this process 'legal encroachment' (2019).
[186] See in particular Kelly (2019) and Wetters (2006).
[187] 2006:37.
[188] Kelly, 2019:8.
[189] Ibid:7-8.

is turned into a field comprising a much richer gradation of (ab)normality and where the two opposites are represented by, respectively, "nonconformity with the optimum" and "falling outside a normal bandwidth"[190].

Crucially this new distinction has an extremely penetrating social function, in the sense that it organises and defines not only human actions but the very *being* of the subject it regulates[191]. That is because it has both a biological dimension – such that, for example, Wetters speaks of 'bionormativism'[192] – and a moral one – such that Kelly suggests that in Foucault "the normal/abnormal [is] a form of the good/evil distinction"[193]. In other words, like the law for Benjamin, the norm represents a new paradigm of the ambiguity of the relation between nature and morality, which is produced when these are used as the ground and the end of a general order of decidability. Similarly, but from a different perspective, Fusco – reinterpreting Schmitt's notion of sovereignty as a power which always presupposes (and eventually, in exceptional circumstances, redefines) *normal* conditions of life within a given society in a sense which is, at the same time, biological, moral, psychical and economic[194] – draws a parallel between rule and norm, suggesting that 'social normalisation' in Canguilhem (one of Foucault's main source of inspiration) is analogous to 'the establishment of juridical norms'[195]. Legislation, from this perspective, *is* itself a form of normalisation which treats 'a certain socio-historical context' as "the substance of the norm and the social material to be normalised", which also means that this context is constituted as what Fusco, following Schmitt, defines "the ground for the sovereign normalising decision"[196].

The point worth stressing is that normalisation *reproduces*, without abandoning, the old binary logic of the law in a way which is, however, far more penetrating than what the legal/illegal distinction might seem to imply[197] and, in this sense, reminiscent of Benjamin's problematisation of juridification, as a process which invests (ambiguously) the life of man as such, in both its natural and moral ramifications. Specifically, the process of normalisation is dependent on norms that function as ends and that are not so

---

[190] Ibid:17.
[191] Ibid.
[192] 2006:35.
[193] 2019:17.
[194] A normal situation is, in Fusco's reading of Schmitt, a hypothetical *homogeneous* situation "in which each member of the community possesses independence equally and is similar to every other one physically, psychically, morally, and economically" (2017:135).
[195] Ibid:143.
[196] Ibid:143-144.
[197] Kelly, 2019:18.

much meant to produce conformity (which would be impossible given that, due to its ideal nature, "all real individuals deviate from the norm to some extent"[198]) but rather to create the condition for an endless punishability: "[s]ince no one really finds themselves fully in accordance with any norm, this means that everything is punishable"[199]. As a result, then, "the rule continues to exist alongside the norm", with the latter producing, specifically, "abnormality [as] a pretext for punishment"[200] and, therefore, providing the rule "with a new, indefinitely expanding scaffold"[201]. The norm, in other words, represents the *end* of law, to be understood as a general ideal of what – also considering Foucault's studies on so-called modern 'govern-mentality' – could be defined, governability: the ideal of life as such as *governable*. Benjamin's critique of legal instrumentality and, relatedly, of the problem of juridification or, with Fenves, of 'legal encroachment', can therefore be re-interpreted as a biopolitical critique of the institution of life as governable and, therefore, of (legal) decidability as a *means* for the *end* of constituting life as such as the object (and the subject) of a governmental power. What is problematic (in the sense of worth problematising) about this biopolitical process is that, again with Kelly's words, 'the combination of rule and norm' makes possible 'the indefinite extension of sovereign power' and that, at the same time, subjects are 'consigned to abnormality' and, therefore, to an endless possibility of punishment[202].

Along these lines, a Foucauldian's critique of law has extensively discussed the problematic articulation of rule and norm in the context of disciplinary institutions. In general, it is observed, the law re-defines its limits by regulating the 'normalising use of discipline'[203] and, by doing that it expands itself, permeating most, if not all, social institutions[204]. With respect to the modern normalisation of discipline Foucault would argue that, since disciplinary institutions are always "located within a juridical framework" it follows that a "communication between the power of discipline and the power of law"[205] is always held in place, to the point that "sovereignty and discipline, legislation, the right of sovereignty and disciplinary mechanism are in fact the two things

[198] Ibid:18.
[199] Ibid.
[200] Ibid:17-18.
[201] Ibid:21.
[202] Ibid.
[203] Ewald, 1990:141.
[204] Hunt and Wickham, for example, argue that prisons, asylums, factories and schools "operate in such a way as to 'naturalise' the legal power to punish at the same time as they 'legalise' the technical power to discipline" (1994:46).
[205] Foucault, 1991:303.

that constitute the general mechanism of power"[206]. The dialectic between juridical means and natural ends becomes more and more complex and, in a way, natural ends are juridified precisely by being held in relation with legal means. This is reflected not only in the "proliferation of legislation"[207] in the form of acts, codes and regulations, which would institute authority beyond the law, but also through judicial intervention. For example, Golder and Fitzpatrick argue that the law-norm nexus is re-enforced by using law as restrain upon discipline but also by using discipline as a restrain upon law[208]. The egalitarian juridical framework is, in this sense, turned into "the mask of real power"[209], a transcendental source of mythic violence which facilitates the operationalisation of power beyond the limits set by existing legal means. At the same time, as already stressed, techniques of administration of natural ends are coded as if they were legal, that is to say, they acquire legalistic characteristics through the establishment of quasi-judicial institutions[210].

Benjamin's argument about law's mythic violence, law 'crowned by fate', implies that law institutes a zero-degree of legal signification, a horizon of legality which includes both legality and non-legality, understood as the withdrawal of law and the related production of a field of normalisation. Such potentiality of law, in which the law says nothing but the fact that it is held in relation with life (even if this, eventually, is one of withdrawal or self-invisibilisation[211]), is what makes the proliferation of normative powers possible and grounds a general paradigm of *mere governability*, "a command that prescribes nothing other than the mere presupposition of governability"[212].

Interestingly enough, this process of expansion is understood by Benjamin as, at the same time, a process of decay of the legal system. The history of a legal system, he

---

[206] Ibid. 1976:39.
[207] Ewald, 1990:139.
[208] They offer a judiciary example to support the claim. The case, in particular, concerns a Court decision in which the legal representation for prisoners charged with disciplinary offences was limited during hearings before the Governor. Here, according to the authors, we witness a *withdrawal of the law*, "the withdrawing of its legal claim to supervise", which produces the naturalisation of the disciplinary power of the Governor to judge (2007:64).
[209] Hunt & Wickham, 1994:48.
[210] Foucault, 1991:304.
[211] For a similar argument, but with farther reaching conclusions, see Philippopoulos-Mihalopoulos' analysis of legal atmosphere as "the withdrawal of the lawscape from the very bodies of its emergence" (2015:108) and particularly the notion of 'engineered withdrawal' as "suppression of the legal elements of a lawscape and the preponderance of the material, spatial, corporeal affects of desire" when used as a tool for political or economic strategies that guarantee and anticipate specific affective responses" (Ibid:109).
[212] Zartaloudis, 2008:155.

claims, is indeed the history of decay of the violence that has posited it. The juridification of life through, for example, a growing body of legislation or even through the production of non-legal acts and procedures that appropriate the force of law is, from the perspective of Benjamin's analysis, an outcome of the weakening of the originary nexus between law and violence. Law has, from this perspective, to actualise its potentiality in order to survive as law and yet, this survival, as a juridification, is what weakens the law itself. Foucault's claims about the demise of sovereignty in modernity could certainly be read along these lines. It is, in fact, precisely such demise which coincides with the production of 'extra-juridical' forces, that is to say, the juridification of forces that operate beyond the sphere of law.

Language without ends

For Benjamin, violence is not all which there is: a non-violent realm of existence exists too, namely, communication insofar as language is thought in pure, non-instrumental terms. Benjamin's theory of language as a *medium without ends* then authorises a juxtaposition of violence and instrumentality in the Critique. Such theory is very concisely sketched by Benjamin in an essay titled 'On Language as Such and on the Language of Man'[213].

The essay begins by suggesting that the 'human mental/spiritual life' [*Geisteslebens*] finds its concrete expression in a series of languages, including for example, the language of music, sculpture, justice, technology, etc. The language of justice, it is further suggested, does not stand for the linguistic form of, for example, German or English law: it rather stands for the tendency, within those languages, to communicate a mental or spiritual content[214]. The 'mental or spiritual entity' and the 'linguistic entity' appear, at the beginning of the essay, as distinguished[215] and yet related. Language communicates the *communicability* of things, their 'ability to be communicated'[216], the being in language of the thing. This is true not only for things such as justice, art and sculpture but for, literally, anything[217]. A mental being does not

[213] 2004:62-74.
[214] Ibid:62.
[215] Ibid:63.
[216] Ibid.
[217] Benjamin's list of examples includes lamps, mountains and foxes too (Ibid).

communicate itself, but its own being in language and therefore a linguistic being is the being-in-language of a mental being or, vice versa, "[t]hat which in a mental entity is communicable is its language"[218]. A mental being is not, from the perspective of language, a content but rather a communicability, which also means that to claim that "language communicates the linguistic being of things", means that "language communicates itself"[219].

Most importantly, language does so 'without mediation', 'immediately', in the sense that "all language communicates itself *in* itself", rather than something (as an end) through itself (as a means)[220]. Benjamin here is opposing what he calls the 'the bourgeois view of naming language' which holds that "means of communication is the word, its object factual, and its addressee a human being"[221] and that "man communicate his mental being by the names that he gives thing", that is to say, using names as, again, means to an end. For Benjamin, the opposite is true, namely, that "[t]he name is that (…) *in* which language itself communicates itself absolutely" and relatedly (but this holds true for man alone) that "*language as such* is the mental being of man"[222]. Therefore, it is not correct to claim that man communicates himself by means of language: he rather communicates himself immediately – without mediation – *in* language. Equally, it is not correct to claim that language has a content[223]: rather, language communicates a *communicability*. To be questioned here is, in general, the logic of instrumentality as the foundation of the linguistic experience.

Benjamin tries therefore to describe a particular linguistic experience, the experience of the name as a medium *in* which mental and linguistic being are co-originary, in the sense that "language is [experienced as] the mental being of things" and "mental being is situated *within* the communicabile"[224]. This experience questions the supposed conflict between "what is expressed and expressible and what is inexpressible and unexpressed", with the former being represented by linguistic being and the latter by the 'last mental entity'[225]. Interestingly, for Benjamin, this conflict makes the relation

[218] Ibid:63.
[219] Ibid:63.
[220] That is why, quite radically, Benjamin argues that "nothing is communicated *through* language" (Ibid).
[221] Ibid:65.
[222] Ibid.
[223] "There is no such thing as a content of language" (ibid:66).
[224] Ibid.
[225] Ibid.

between mental and linguistic being 'ambiguous' whereas, on the contrary, the thesis of the "equation of mental and linguistic being (…) make[s] the relation between mind and language thoroughly *unambiguous* so that (…) the most *expressed* is at the same time the purely mental"[226] [italic mine]. This unambiguous relation is reflected in the account of creation developed in the Bible, and specifically in the first chapter of the *Genesis*, which Benjamin re-interprets as a paradigmatic attempt, in the *history* of human thought, at reflecting on the nature of language. According to this interpretation, creation has a (linguistic) rhythm: 'Let there be' (*fiat*) – 'He made' (created) – 'He named'[227]: it begins with the 'creative omnipotence of language' – the *word* '*fiat*' – and it ends with the incorporation of the created into language – knowledge in the *name*. The *name* stands therefore for the knowability of the things, which is to say, the knowability of language as a creative force of the *word*, which is why Benjamin argues that "[a]ll human language is only the reflection of the word in name"[228]. The word stands therefore for a 'creative force' ('*Schöpferische*') which is experienced by man in the name and therefore, knowledge is simply the experience of this force[229].

Things become knowable *in* their name, so that the name represents the knowability of a thing, and therefore its communicability, its being *in* the name and, *in* it, becoming communicable[230]. However, this originary 'experience of the name' – the experience of the creative force of the word – is somehow forgotten and replaced with another experience, namely, the experience of good and evil, which crucially represents, in Benjamin's reading, the paradigm of another experience of language. This is the experience of a loss, of the forgetfulness of the creative force of the word, as well as the attempt to grasp it, to actualise it again, which is why, at the end of the essay, Benjamin claims that "the residue of the creative word of God (…) is preserved (…) above man as the judgment suspended over him"[231]. Historically, this is reflected in the constitutive experience of the 'human word' as a word that "must communicate something (other than itself)", the word *as a means to an end*, the word, 'as something externally

---

[226] Ibid:66-67.
[227] Ibid:68.
[228] Ibid.
[229] Ibid.
[230] Hamacher has therefore suggested that for Benjamin the name God and the attribute 'divine' refer to 'the mediacy of the linguistic process', 'the unconditional nature of mediacy and impartability' (1991:1141).
[231] Benjamin, 2004:74.

communicating', the experience of a "[n]ame [that] steps outside itself"[232]. This word is ambiguous – it is a 'prattle' – because, crucially, the knowledge it produces "knows only one purification and elevation, to which the prattling man, the sinner, was therefore submitted: *judgment*"[233] [italic mine]. Within this new conception, justice represents something 'unnameable and nameless', a rupture within the name itself which demands judgement. The law constitutes a temporality in which judgement is endless because its function is to make judgement – the re-unification of what has been separated – possible by presupposing – endlessly – a rupture[234].

To the namelessness of justice corresponds – together with the guilt life of man – the muteness and the melancholy of nature in general, which is reflected in its incapacity to speak – in its 'lament', to be considered as "the most undifferentiated, impotent expression of language"[235] – and, relatedly, in the endless (human) attempt to find, for it, the right name. This brings about a process of 'overnaming' of nature (and one could argue, of justice too), an 'excess of the name', which represents "the deepest linguistic reason for all melancholy and (from the point of view of the thing) for all deliberate muteness"[236]. The more nature is named the more it becomes mute and sad. This is somehow related to the problem of abstraction, the fact that the experience of language becomes the experience of a process of abstraction. The 'Fall' (into the realm of judgement) represents, for Benjamin, "the origin of abstraction as a faculty of the spirit of language"[237] and thus also of 'the bourgeois view of language' which, in fact, grounded on the idea that "the word has an accidental relation to its object, that it is a sign for things (or knowledge of them) agreed by some convention"[238]. Both the modern experience of law and the bourgeois conception of language, with their respective abstractions, partake to this experience of the loss of experience, through a process of 'overnaming', the production of an excess within the name itself, through which the name 'steps outside itself' and tries to grasp the muteness of nature and the guilt of human life.

---

[232] Ibid:71.
[233] Ibid.
[234] Similarly, Benjamin argues, "[t]he Tree of Knowledge stood in the garden of God not in order to dispense information on good and evil, but as an emblem of judgment over the questioner" and this fact represents "[t]he immense irony [which] marks the mythic origin of law" (ibid:72).
[235] Ibid:73.
[236] Ibid.
[237] Again, in his own words, "the abstract elements of language (…) are rooted in the word of judgment" (Ibid:72).
[238] Ibid:69.

Violence (in both law and language), it might be argued, resides in this act of overnaming, in the sense that it stands for the instrumentalization – which in Benjamin's word is also a parody and decay – of the creative force of the word of God (the creative force of language), the attempt to master it for a purpose: in other words, the instrumentalization of communicability, its use as an empty, abstract form containing an excess of denomination, a force, i.e. its use as a means to an end. In this sense, violence ('*Gewalt*') represents the decay of the creative force of the name ('*Schöpferische*').

It is with this in mind that one could re-interpret, in the essay on violence, Benjamin's paradigmatic reading of the 'sanctioning of deception', through the crime of fraud, as the instrumentalization of a non-instrumental realm of existence, namely, *conversation* ('*Unterredung*')[239]. Benjamin's claim, in fact is that "a totally nonviolent resolution of conflicts can never lead to a legal contract"[240]. 'Conversation' then represents a form of unsanctioned medium in which, in fact, communication, in order to occur, must first become 'inaccessible to violence' and, more generally, non-instrumental. The kind of conversation Benjamin has in mind here is the presupposition of every conversation, that which makes conversation possible, namely 'language as understanding'[241]. Hamacer has spoken in this respect of the idea of a pure mediacy of language, language as a 'preinstrumental technique'[242]. At the level of pure understanding the conversation represents the experience of the very possibility of being in language, of a communicability without ends, and which cannot be "measured against an 'objective state of affairs"[243]. In general, Hamacer suggests that the mediacy of language represents the *deposition*, in every speech and by every speaker, of the 'truth' and 'law' that have been *posited*[244]. Conversation, the experience of communicability, in fact, as with every experience, is historically situated and insofar we live in a world in which the law has always-already been posited, it becomes possible in the form of a deposition of what has been posited.

---

[239] A philosophico-historical understanding of law, suggests that, while deception is not perceived, within a new born legal system, as a threat to the system itself, it slowly becomes so, as a consequence of the decay of its mythical force. At a certain point, the system begins to lose the vitality that originates from its 'victorious power' (2004:245) and thus starts to recognise deception (or rather the possible reactions of the deceived party) as violent, that is to say, as a threat to its own power.

[240] Ibid:243. Here Benjamin's argument recalls Weil critique of the 'bargaining spirit' which is implicit the notion of right that, when placed "at the centre of social conflicts (…) inhibit[s] any possible impulse of charity on both sides" (2005:83).

[241] Ibid:245.

[242] 1991:1142-1143.

[243] 1991:1144.

[244] Ibid.

Hamacher describes the experience of language exemplified by the conversation with the attribute 'afformative', in order to distinguish it from that experience of law which, in accordance with a long tradition of reflection on the nature of both law and language, can be termed 'performative'. For Hamacer to be performative is, more precisely, law's use of violence as 'a means for stipulated ends'[245]. To this purpose, violence cannot simply be used to posit legality, but also to preserve it as an end. This results in law's oscillation between positing and preserving *violence*: 'law-positing' violence is always-already a means to the end of its preservation, 'law-preserving violence', insofar as the former "cannot by itself bring about a state of law, of legality, or the legitimacy of actions"[246]. Legality includes and preserves violence as 'something other than itself', thus producing a form of overnaming, a form which contains an excess of form, i.e. a force. Legality is a "suppression of violence that posits" violence, which endures precisely "by confining, obstructing, and isolating itself"[247]. The legal performance consists in "an absolute, preconventional performative act, one which posits conventions and legal conditions in the first place": in other words, a legal order, itself to be understood as 'a continuum of violence', a form which is preserved by an excess of form, through which "law can re-assert itself in an evolutionary continuum of its mythic status"[248] which, however, evolves by falling, decaying[249]. The legal order is a name provided with a force of denomination which exceeds it, a form of overnaming, which re-defines endlessly the form of guilt of human life and the form of muteness of nature, its two constitutive limits.

From this perspective, the mediacy of language, as exemplified by the pure understanding required in any conversation, is 'afformative', rather than performative insofar as it is "untainted by the interests of preserving or mandating certain ways of life", that is to say, "untainted by positive forms of law"[250] that, in turn, represent the corruption of the pure mediacy of language because they treat each 'individual situation' as a means

[245] Ibid:1136.
[246] Ibid:1134.
[247] Ibid.
[248] Zartaloudis, 2015:175.
[249] Legality's duration is a history of decay, it is "the realm of compromised, enslaved means, the realm of a violence which, by its consideration for self-preservation, security, and duration renders itself impotent and decays" (Hamacer, 1991:1136). The biblical fall, from this perspective, represents history as "the decay of positing violence, the *fall* of positing" [italic mine] (Ibid). This fall is performative in the sense that it constitutes a form – an institution – served by violence as a means to an end: a form provided with a self-organising force, a name which has stepped outside itself.
[250] Hamacher, 1991:1133.

to universalization. The fall, in Benjamin's philosophy, consists in a process of abstraction and the form of positive law – which rests on a 'logic of performative subsumption' which "sacrific[es] the respective situation to statutory laws, conventions, or codes"[251] – represents an instantiation of this process. For this reason, the afformativity of language can only find its pure expression in the singularity of its manifestation. The exposure of the speaker, in the speech, to the mediacy of language, is what produces its *singularity* as what is really universal and, in this sense, just. Just and universal is the singularity of the speaker and the very fact of a non-subsumability of such singularity under general laws[252], its un-representability. Afformativity is language's offering of itself "as the form of mediacy between speakers, as their mediacy in a third entity, in a talk, an *Unterredung,* an *inter* of their languages, without which they would not be language"[253].

As already mentioned though, a reflection on this kind of experience occurs from within a history of legality, a history of oscillations between law-positing and law-preserving violence, means and ends. What is universal is the exposure to this oscillation as that which conceals, re-presenting it as a presupposition (as a mental being concealed by language), communicability. The experience of afformativity has to take place in the medium of this history as a form of deposition of that history. In this sense the speaker's fate is not only posited but also a fate of positing and yet "whoever posit does not posit – that is, posits neither truth nor law – without exposing himself and his positing to the possibility of deposition in the mediacy of language"[254]. While the only possible task today, either in theory or in practice, seems to be the appropriation of this excess of form in order to re-orient it towards new ends, the solution advanced by Benjamin's is rather focused on the return to the medium *in* which this articulation can occur.

Methodologically speaking, the experience of afformativity is provided by the exposure of the way in which the communicability of the mental-linguistic being 'law' has consolidated into a (legal) tradition. This exposition, which might be called *study*, is a form of exposure of the instrumental logic that seems foundational for both law and language. The study of law constitutes, as it has been already suggested elsewhere[255], a

[251] Ibid:1144
[252] The fact that singularity "is not already cognized or even cognizable according to rules", that it "demands universal recognition only in the absence of such rules" (ibid:1145).
[253] Ibid:1144.
[254] Ibid.
[255] Zartaloudis, 2015.

possible concretisation of what Benjamin has termed 'divine violence', in order to oppose it to the mythic violence of the law, and it is telling, I think, that in spite of their differences both are identified as forms of violence. It is equally telling that Benjamin's critique of the logic of means and ends produces a theory of pure means (without ends), which is to say, paradoxically, "means towards nothing (…) no longer any kind of means in a comprehensible sense"[256]. Divine violence takes place within the realm of mythic violence, and its violence is that consists in the exposition of violence: pure mediality can become intelligible only as a form of deposition of the logic of instrumentality. 'Divine or pure violence', it has been suggested, is "the cessation of any violence which could be employed for the implementation *(Durchsetzung),* or even for the positing *(Setzung)*, of ends" but this cessation begins with the exposure of the use of violence as a means to an end. Along these lines, Hamacher has also suggested that the use of violence in the expression 'divine violence' "marks the trace of the mythical in Benjamin's own language"[257] and, I would add, qualifies the historical dimension of his philosophical methodology.

In a similar fashion, the study of law has been characterised by Zartaloudis as "an extreme act of self-negation: a *willing* that paradoxically abdicates its own *willing*"[258] [italic mine]. The studier intends the abdication of the intention which historically defines her own *persona* as, for example, in the form of a self-legislating subject. The experience of afformativity, the task of the studier, represents in fact a form of 'abstention from action' which "cannot be oriented by any cognitive or temporal form of representation or, therefore, by any figure of subjectivity and its constitution"[259]. It is an exposition of the very process through which a subjectivity is constituted, of how conversation is instrumentalised, articulated into a dialogue between legal persons, a dialogue backed by force, suspended in the temporal dimension of legal order, which binds singularities, as means, to the end of its own self-preservation. In this sense, the experience of study is the de-position of any "claim to universal or uniform identity"[260] which, however, is possible only from within a history in which claims to universal or uniform identity have been posited. This experience makes of the law an object to be studied, that is to say, de-operationalised: not a means to an end but a means without ends. The experience of a

[256] Hamacher, 1991:1152.
[257] Ibid.
[258] Zartaloudis, 2015:180.
[259] Hamacher, 1991:1144.
[260] Zartaloudis, 2015:181.

means without ends is, therefore, the experience of "a reality that can be studied rather than rendered sacred [muted] or equally be accused [guilt]"[261]. But this is also the experience of a reality that has been *realised* (rendered) as, precisely, sacred and accused. When Zartaloudis suggests that to study means to be in a state of real necessity (not a fictional one) in which "the subject of the right to revolutionary violence (…) is not the person but the situation itself"[262], he is likely to imply that study is a praxis which exposes itself as pure-mediacy – and thus exemplifies the pure-mediacy of language. But when law is made object of study this might also imply that study is the exposure of the concealment of the situation, its articulation into a tradition of means and ends.

[261] Ibid:180.
[262] Ibid:181.

Threshold (or Law's Sphere of Reference)

The problem of law's ambiguity, of a law 'crowned by fate', which produces life *as* abandoned to the possibility of judgement becomes, with Agamben, the so-called problem of the relation between law and life or, with Zartaloudis, of 'the institutional integration of life'. The relation between law and life has, according to Agamben, the form of the exception, that is to say, of an inclusive exclusion, just like, in Benjamin, law can constitute itself as the opposite of violence only by incorporating violence[1]. For Agamben, the critique of this relation is possible only through what Benjamin in his critique has termed a 'historico-philosophical inquiry'. Agamben's work, from this point of view, can be interpreted at the attempt to create a methodology that would fit this definition.

The theory of exceptionality is thus formulated as a theory of the signatures, that is to say, particular methodological tools that render the tradition intelligible in accordance to what Watkin as defined a common-proper dialectic, a "conceptual structure dominated (…) by an economy made up of an element which seems to found the phenomenon and a series of subsequent elements which appear to actualise this founding element or simply which are allowed to occur because of a held-in-common foundation"[2]. In this context, the held-in-common foundation (the signature) is represented by the exception as a structure of thinking which is historically actualised into a series of paradigms, i.e. examples of exceptionality, that the student can find in the process of reading the tradition that has somehow constituted her. The law-student can therefore confront her own tradition in order to investigate where and how exceptionality can be seen at work. Methodological contributions of authors like Watkin, Crosato[3] and Abbott[4] are fundamental in this respect because they allow to interpret the 'problem of the relation between law and life' as, first of all, a methodological problem, that is to say, the problem of laying down the rules and principles that would make a historico-philosophical investigation of western legal thinking possible.

[1] For a similar argument see also Menke,2010.
[2] Watkin, 2013:xi.
[3] 2019.
[4] 2014.

In this respect, my approach is to read Agamben's work on the exception as the attempt to turn Benjamin's problem of violence (*Gewalt*) into a tool of communicability, that is to say, of a generic potentiality to speak, write and study which does not express anything in particular (communication), or better, makes of whatever is said the paradigm of a potentiality of saying as such. Zartaloudis has spoken in this respect of Agamben's philosophy as providing "an *experience* of reading and thinking as such, rather than the extraction of prescriptive arguments and conclusions"[5] and, similarly, Lagaay describe this experience as the suspension of "familiar categories and strategies of argumentation"[6] in order to enter a dimension of 'thought beyond meaningful propositions'[7]. Schiffers has therefore spoken of the experience of a thought which "turns towards itself, that is, becomes self-referential"[8] and Lewis, situating this experience in the context of tradition has suggested that the signature makes 'the transmission of transmissibility' possible[9]. It is, again, Zartaloudis who has suggested that, when situated in the context of the legal tradition, Agamben's work could inform a critique of the conditions of transmissibility of legal theory and, specifically, of "the structure implied in asking and answering the problematic question 'what is law?"[10].

As Watkin notices, the held-in-common signature or foundation of law's transmissibility becomes, in Zartaloudis's work, a "self-founding fiction of 'the mythologeme or fiction of (bipartite) presence'"[11]. This is the fiction of two powers, or two laws, which Zartaloudis describes with the formula 'Power of power' or 'Law of law', such that law and power are always represented as constituted transcendentally from an outside of law and power, a Law or Power. While in his work on Agamben, Zartaloudis focuses mainly on historical fragments ('paradigms') that exemplify how in the western tradition politico-ideological representations of Law and Power have been used to legitimate a *praxis* of government, my position is that his general approach can inform a more general inquiry into the limits of modern legal theorising and thinking as founded on the signatory bipartite fiction of *form* and *force* of law. Force and form of law are mutually grounded on an 'inclusive-exclusion' and this structure can be used to represent the theorisability of law through a series of paradigmatic examples.

---

[5] 2008:xiii.
[6] 2009:327.
[7] Agamben, 1999:42.
[8] 2009:326.
[9] 2013.
[10] 2008:1.
[11] 2013:6.

To this purpose, in what follows, I will try to re-elaborate Agamben's take on law, focusing on a series of paradigms of the signature of legal exceptionality, including the notions of 'legal order', 'potentiality of law', 'sovereignty', 'legality', '*auctoritas*', 'normality', 'state of exception', '*sacertas*', '*sanctitas*', and so forth, in order to suggest that they all represent methodological concepts useful to represent the theoretical thinkability of law as an articulation of (law's) form and force and, therefore, to inform an investigation into the modern tradition of legal theorising. The literature addressing Agamben's take on these concepts is vast and the texts I have selected[12] are the ones that better allowed me to re-interpret, through a direct engagement with the original sources, 'the problem of the relation between law and life' as a methodological problem, a problem of study.

At first, I will try to conceptualise methodologically the notion of juridical order as an order of law's thinkability, by focusing on Agamben's take on both the ancient roman law formula of *lex talionis* and the modern theory of the illicit developed by Kelsen. Moving from Lindhal's unorthodox reading of Kelsen, I will conceptualise the juridical order as a space in which being and having-to-be become indistinguishable, with violence representing in general the very idea of a 'tangential point' – a zone of indistinction and articulation – between the two. The juridical order produces an ontology of world's masterability as well as the 'enunciative function' of its subjects as one of deciding how being and having-to-be are articulated.

Then, by re-interpreting in biopolitical terms Agamben's treatment of the notion of *auctoritas* I will suggest that the enunciative function of the legal subject can be represented as one of articulating law into form and force, with force representing the exception of life as such and, therefore, its constitution as a zero-degree of law (a force-of-~~law~~) held in relation with what, within this methodological scheme, appears as an empty 'form in force without significance'. From this point of view, it is the very notion of form which represents a forceful void of signification from which life is always-already banned, that is to say, excluded in order to be included as its ground, as the exteriority that gives force to it. This allows to represent the potentiality of law as one of articulation of law and life, form and force, that in this sense are, at the same time, separated and indistinguishable (*forиa*, hybridisation of the Italian 'forma' and 'forza').

[12] Including, among many others, Zartaloudis (2008), Schütz (2008), Whyte (2009), Clemens (2008, 2016), Bignall (2016) DeCaroli (2007, 2008, 2013), Frost (2010), Fusco (2017, 2021), Cercel (2021).

The form of law, it will be suggested, stands for the representation of that which is unrepresentable, namely, singular existence which, in this sense, is constituted as an excess of (legal) signification and therefore, as the ground of a biopolitical logic of decidability. The state, as the modern representation of the form of law, represents therefore a general principle of 'dislocating localisation', that is to say, a general power to politicise and depoliticise life as such where the 'as such' represents, precisely, the possibility of (de)politicisation. From this point of view, the form of law is a means to an end, namely, to decide on the governability of life so that life, understood as the force of that which is governable, is constituted as the end of law.

From this perspective, my main suggestion will be that there is nothing particularly exceptional in idea of exception (inclusive-exclusion of life) and that, therefore, sovereignty and legality can be both interpreted as manifestation of the exceptional structure of law. In this respect, conventional and unconventional epistemologies of law (including, for example, the distinction between *quaestio facti* and *quaestio iuris*, lawscape and atmosphere, consistence and coherence) reproduce the logic of exception that is made intelligible, at best, by the paradigm of the state of exception. The sphere of reference of law, from this perspective, is defined by the signature of exceptionality which makes intelligible both the relation between sovereignty and legality and that between legality and life. Sovereignty, legality and life concur to the definition of a general govern-mentality of the world, the representation of the world as a space that can be governed through the instrumentalization of the indistinction between law and life, its use as a means to take decisions on their relation. This is, generally speaking, the (sovereign) enunciative function which informs the operations of legal theory and the student is the one who exhibit, in every act of legal communication, this general rule of communicability.

Then, in order to stress how this signature traverses history I will briefly focus on the exceptional relation between *sacertas* (of life) and *sanctitas* (of law) in Rome. *Sacratio*, the constitution of life as sacred represents, at the same time, its constitution as the referent of a decision and therefore the constitution of law as inviolable (*sanctus*), that is to say both valid and efficacious. *Sacertas* and *sanctitas* are then said to be paradigms of the thinkability of law's sphere of reference as constituted both referentially (in relation to life) and self-referentially (in relation to itself).

Ultimately, I will develop an analysis of three different theories of law, namely, Kelsen's *Grundnorm*, Schmitt's decisionism, and Ehrlich's living law, suggesting that

they are three different and yet coherent representations of the enunciative function of the 'jurist'. In order to do that, I will first introduce Agamben's analogy between law and language which suggests that both constitute themselves self-referentiality through a desemanticisation of life. Kelsen's work, from this perspective, becomes paradigmatic of a sort of originary desemanticisation of life which produces both a form of law as pure applicability – the idea the law's application cannot be impossible – and a formless life as the zero-degree of applicability (force-of-~~law~~). Schmitt, similarly, focuses on the judicial decision as the desemanticisation of the content of the form of law, which actualises its pure applicability by providing a representation of life as the normal medium of law's validity and therefore as pure decidability – the idea that judicial decisions are always possible. The sovereign decision is, from this perspective, just a radicalisation of this principle, which makes decidability possible through a suspension of the actual form of law in order to re-constitute the frame of life in which the pure applicability of the form of law will become possible again at a later stage. Finally, Ehrlich's theory of the living law will be considered as another form of desemanticisation of life for legal purposes. Despite their differences these three theories provide paradigms of the signature of exceptionality as defining the enunciative function of the 'jurist'.

The Ought of Intelligibility

The relation between law and life – or with Zartaloudis, the 'institutional integration of life' – can be problematised (i.e. studied) from many different angles, including that it seems to be always-already compromised by violence. From the perspective of law, as argued by Benjamin, the mere existence of violence outside the law constitutes a threat (the main threat) to the existence of law as such, which is why law must, at the same time, declare all violence illegal – that is to say, outside the law – and, at the same time, found itself on the monopoly of violence – that is to say, its inclusion[13]: the existence of law rests on the inclusive-exclusion of violence or, with Agamben, on the exception (from *ex-capere*, 'taken-outside'[14]) of violence.

[13] For a similar argument see also Menke (2010).
[14] Agamben 2017:19.

Following Benjamin's suggestion, according to which this constitutive relation between law and violence cannot be exposed by either natural or positivist theories of law, but only by a 'philosophico-historical view'[15], Agamben's own inquiry into the form of law develops as a *philosophical* search for historical expressions (*paradigms*) of this exceptional relation. For example, the Roman *lex talionis* (i.e. *si membro rupsit, talio esto*) indicates not so much that a transgressive fact – *membro rupsit* – is punished – *talio esto* – but rather that "the juridical order (…) constitutes itself through the repetition of the same act without any sanction, that is, as an exceptional case"[16]. Agamben suggests that *talionis* is likely to derive from *talis*, and thus could be interpreted as 'amounting to the *same* thing'[17], which means that the '*talio esto*' does not originally refer to the punishment of a certain violent act ('*membro rupsit*') but rather to "its inclusion in the juridical order, violence as a primordial juridical fact"[18]. The repetition of same act produces, at the same time, the inclusion and the exclusion of violence and, thus, the constitution of a juridical order, an order of laws, which organises life in a stable manner.

It is important, in this respect, to stress again that Agamben interprets the *lex talionis* as a *paradigm* of the constitution of the order of law: this means that the formula *exemplifies* the self-constitution of the juridical order as a whole[19]. From a methodological standpoint this 'whole' is trans-historical, not in the sense that transcends history, but in the sense that traverses it, defining the limits of the possibility to think the legal order through a chain of acts of transmission, i.e. paradigms, that together provide a representation of what it means to think the legal order. As suggested by Watkin, the function of exemplification is, specifically, "to give historical phenomena their intelligibility/communicability", their 'possibility of existence'[20]. Similarly, Crosato has suggested that each paradigm suspends the historicity of a certain event or institution, so as to become a 'model of intelligibility'[21]. This intelligibility, or possibility of existence is situated in the present of the subject who studies these selected 'historical fragments'[22] as paradigms. The student makes the *experience* of intelligibility *in the present*, which is

[15] 2004:238.
[16] 2017:25
[17] And not 'the thing itself' as provided by the English translation (2017:25), which would work as direct translation of 'la cosa stessa', whereas the expression used by Agamben here is 'la stessa cosa' (2018b:37).
[18] Ibid:26.
[19] With his own words: '…the juridical order *constitutes itself*' (2017:26).
[20] Watkin, 2013:35.
[21] 2019:266.
[22] Watkin, 2013:34.

why Crosato maintains that the paradigm provides an 'ontology of the present' that informs at the same the present of the researcher and the past of the object of research, constituting them together into an ontological framework[23]. The function of a paradigm is to explain what it means for a phenomenon of the past to *exist* in the present[24] and, therefore, to be contemporaneous with it[25] which is why Agamben speaks of a 'past that has remained present'[26]. Both past and present exist together in a new form which, could have not existed alone nor in the past nor in the present[27] and, therefore, together they produce what Watkin has called a 'co-intelligibility'[28].

In this respect, the juridical order is more than just the order of its rules. Order itself represents the operation of ordering through which the law becomes intelligible. This operation is performed by the student and, at the same time, is exposed as the form in which the order allows all its subjects (the student being only one) to think the law. The paradigmatic re-definition of the legal order implies, with Agamben, also the definition of "the very status of the knowing subject"[29]. In other words, the paradigms are gathered and ordered by the student but they are said to represent the intelligibility of the legal order, of the way in which the legal order has allowed itself to be thought and communicated into a tradition by its subjects at large. The juridical order is the order of law's thinkability, the way in which a series of examples that bring the past and the present together make the possibility of thinking law appear ordered or articulated in accordance with a particular logic which, at the same time, is both produced *a posteriori* and considered as the *a priori* condition[30] of law's thinkability.

It is possible to speak, in this respect, of a *historical a priori* as, precisely, 'the moment of arising' of a certain tradition – 'the historical beginning of things' – which crucially Agamben, following Foucault, distinguishes from the 'origin' – 'an immobile form that precedes the external world of accident and succession'[31]. The use of paradigms exposes a process of origination which is activated by the student but, at the same time, makes the tradition experienceable as a certain whole or, with Watkin, as a 'discursive

[23] Crosato, 2019:294.
[24] Watkin, 2013:32.
[25] Agamben, 2009a:95.
[26] Ibid:102.
[27] For a similar argument Watkin, 2013:216.
[28] Ibid:220.
[29] Ibid:89.
[30] Agamben, 2009a:94.
[31] Ibid:83.

formation'. The *historical a priori* therefore is not necessary – 'a meta-historical beginning' – but rather a quasi-necessary[32] contingency that structures the possibility to have access to tradition as a 'discursive formation' organised around a series of paradigms that are expression of a certain logic. This logic is called *signature*, that is to say, "a *transmission* device bearing upon the functional articulation of signs"[33], which, like with Foucault's notion of 'statements' provides, in the present, the implicit or unconscious element that makes a certain language *efficacious* in the sense that it allows it to *exist* as a signifying language, independently from its actual content[34]. This is why, even if it is the product of a certain method, it is possible to speak, with Crosato, of an 'onto-logical framework', that is to say, a framework which defines the general co-implication of language and being: the signature "operates in signs, phrases and sentences, at the level of their simple *existence* as a bearer of efficacy, which each time allow us to decide whether the act of language is efficacious, if the sentence is correct, or whether an aim is realised"[35].

This has two consequences: on one side the signature, like Foucault's statements, produces an 'enunciative function', a 'sanctioned mode of intelligibility' that pre-determines the intention to signify of the subjects it includes[36] and therefore describes a totalising – existential – experience which produces, in general, processes of subjectification, or better, allows to experience what subjects say as a product of that process. On the other, the signature describes, more generally, the way in which language as such exists: language can exist only as a signature, that is to say, as a force that binds subjects to their word creating contexts of sociality in which it is not simply meaning (signification) that is shared but, more generally, a communicability. In each sign, according to Watkin, signifier and signified are articulated together by a signature that make the passage between the two possible providing a code – a force – for deciphering that passage[37]. A subject is thus constituted in and through the appropriation, more or less conscious, of this force or code.

Every language, and law in particular – which is always both "*ius dicere* (saying what is in conformity of the word) and *vim dicere* (saying the efficacious word)", and in

[32] Watkin, 2013:xiii.
[33] Clemens, 2016:129.
[34] Agamben, 2009a:63.
[35] Ibid.
[36] Watkin, 2013:12.
[37] Ibid:19.

fact is defined by Agamben as a "the sphere of signatures par excellence"[38] – is characterised by this mechanism. And yet, there is no necessary code or force that defines the intelligibility or communicability of language like an immutable origin or destiny of human communication. Agamben, as suggested by Watkin acts like a curator who selects from a tradition turned into an 'archive of the signature' paradigmatic examples[39] in order to illuminate particular problematic aspects of intelligibility. Individual paradigms exemplify this particular force of the signature, and the signature, in turn, represents a principle of *analogical* distribution of paradigms or, with Watkin, "the founding commonality of an array of paradigms"[40]. For a certain historical fragment to be a paradigm, it has to be analogous to other paradigms in terms of their ability to reproduce the commonality of the signature.

The paradigmatic study of law, therefore considers the legal tradition as a realm in which the very possibility to communicate legal content is somehow limited or constrained by certain rules of intelligibility, by a certain signature. In Benjamin's work, for example, law's logic of instrumentality constitutes a fundamental rule of intelligibility that makes possible the organisation of legal content into, for example, theories of positive law and theories of natural law. In Agamben, the logic of *exceptionality* replaces or better includes the logic of instrumentality and becomes the fundamental signature that informs and pre-determines the potentiality of legal signification. Both instrumentality and exceptionality, crucially, are manifestation of the problem of violence, if this is generally understood as an excess of signification that relates together means to ends (as an excess of means) and inside to outside (as an excess of inside). The problem of violence thus, is to be investigated as problem of constitution of the legal order in the form of an articulation, i.e. an ordering, of two spheres related by an excess.

Along these lines then Agamben has recently interpreted one of the most influential attempts, in modernity, to think the form of law (and the law as a means), namely Kelsen's pure theory of law– and specifically his idea of the illicit as the fundamental condition of the law[41] – as another paradigm of the ex-ceptional link between juridical order and violence:

---

[38] 2009a:75-76.
[39] 2013:20.
[40] Watkin, 2013:xv.
[41] Agamben, 2018a:21.

"[a]nd since the sanction generally has the form of a coercive act, one can say—even if Kelsen does not seem disposed to draw this conclusion—that the law consists essentially in the production of a permitted violence, which is to say, in a justification of violence"[42].

There is a signature, a commonality, which brings together an ancient legal formula – the *lex talionis* – and a modern theory of law: if considered together they provide the experience of the intelligibility of the juridical order as that which constitutes-itself through a *justification* of violence, that is to say, through an inclusive-exclusion. The 'production of a *permitted* violence' in both ancient and modern times becomes, *in the present*, the experience of a legal signature, an onto-logy of law, to be understood as the way in which law *has become* communicable in terms of a self-constitutive inclusive-exclusion, as the inclusion of an exteriority which grounds itself as the inside of an outside.

Benjamin's critique of Kant's logic of instrumentality is, from this perspective, reflected in Agamben's critique of Kelsen's (neo-Kantian) theory of law as the (juridical) expression of an 'ontology of command', in which 'being' ('*Sein*') is made intelligible as a 'having-to-be' ('*Sollen*'). For Agamben, in fact, the peculiarity of the sanction, if considered from Kelsen's perspective, is not only that it creates the illicit, but that "by determining its own condition, above all affirms and produces itself as what must be"[43]. It should be noticed that Kelsen's intention, as a legal theorist, was actually to firmly separate how things are in the world from how they have-to-be in the world of law but, from the perspective of the signatory force that this separation reproduces, the legal order of the tradition is made communicable as the space in which the two spheres contaminate each other, to the point of indistinguishability. Lindahl, for example, has developed a pseudo-Kelsenian reflection on what he calls a 'phenomenologically inspired account of legal intentionality'[44] which allows to interpret the legal order as the 'primordial' understanding of the world in terms of command: the words as a space in which things have-to-be, rather than being[45]. His reflection develops from Kelsen's *Grundnorm*-hypothesis, the idea that the law is a manifestation of an *ought-form* of thought, according

[42] Ibid:22.
[43] 2018a:22.
[44] 2013:119.
[45] Ibid:120-121.

to which the rules of the system exist only insofar as they have-to-be-valid[46]. Lindahl's unorthodox reading suggests, specifically, that "that 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"[47]. For Lindahl not only the behaviours of legal agents but potentially every social behaviour is, to put it simply, legally ordered by an 'ought form' which makes possible for the behaving subject 'to understand something as something in law'[48]. 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'[49]: they define the limits of what someone can do, his own 'sense of possibility'[50]. The subject, in other words, is constituted through the enunciative function that the law, as a signature of exceptionality, grant to him.

Whereas for Kelsen the ought-form represents the *a priori* of the legal order only for those who are directly concerned with its *interpretation*[51], for Lindahl the ought-form defines the *understanding* of reality of those who must behave in accordance with the law. In any case, this a priori of the legal order which for Kelsen represents 'an immediate given of our consciousness'[52], is problematised by Agamben in consideration of the violent relation that it establishes between that which is and that which must be. Violence, in his analysis, is represented precisely as 'the tangent point between two ontologies':

> "[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

[46] In Kelsen's own words, "an 'order' is a system of norms whose unity is constituted by the fact that they all have the same ground of validity [and that] the ground of validity of a normative order is a basic norm (…) from which the validity of all norms which belong to the order are derived" (2005:).

[47] Lindhal, 2013:17.

[48] Specifically as a 'legal *something* (or *someone*)', in a 'legal *somewhere*', at a 'legal *somewhen*'.

[49] Ibid:132-133.

[50] Ibid.

[51] Mainly judges who, in given circumstances, *must* apply the law.

[52] This is Agamben (2017:748) commenting on Kelsen's argument that "[N]obody can deny that the statement: 'something is'—that is, the statement by which an existent fact is described—is fundamentally different from the statement: 'something ought to be'—which is the statement by which a norm is described. Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa" (Kelsen 1978:5–6).

pure theory of law in the manner of a fugue, in which separation refers to a tangent and this latter again to a separation"[53] [italic mine].

Violence therefore refers to a '*tangential point*' in which having-to-being and being are articulated and constituted as 'presupposing one another'[54], which means that being is constituted as the outside of having-to-being and vice-versa. Violence, methodologically speaking, is the operation itself that originates a tradition in which being and having-to-be are *articulated* together in the form of an exception. The separation between *Sollen* and *Sein* – which Kelsen calls an 'immediate given of our consciousness' –rather than just a separation is the constitution of a tangential point between the two, that makes their articulation possible as a fundamental task of legal transmission, its signatory *force*. The legal order becomes intelligible as the sphere in which being and having-to-be *have to be* articulated. From the perspective of study this 'immediate given' can be investigated as not so much immediate after all: namely, as a 'moment of arising' given (to us) mediately, that is to say, through the medium of a tradition which extends far beyond Kelsen's formulation so as to include, for example, also the *lex talionis*: together these two moments produce a 'co-intelligibility' that can be used to investigate the limits, for both thought and action of the subjects that, at the same time, are investigated as products of that tradition. The politico-juridical tradition, broadly understood, is a tradition of violence in the sense that it can be studied as the sphere of thinkability of an exceptional articulation. The legal order (as thought by tradition) is the sphere in which being and having-being are articulated together in such a way that they appear as always co-implicated in each other and in which its subjects are given the task of re-thinking the form of this articulation. Specifically, the task of legal thought becomes *deciding* on the form of their relation.

The line which separates law and life, being and having-to-be is, within the tradition of legal thought, what Benjamin would call an *ambiguous* zone or, with Agamben, a zone of indistinction and the task of thought is to make this indistinction the object of a decision on their relation. The politico-juridical tradition, in this sense, has 'decisions' as its horizon of possibility and, from this perspective, it produces the institutionalisation of the world as a masterable space to be governed[55]. In order for the

[53] Agamben, 2017:749.
[54] Ibid.
[55] Zartaloudis, 2008:142.

world to be masterable, its 'being' must be conceived in the form of a 'having-to-be' and, in turn, the 'having-to-be' of the world must be conceived as what the world *is*.

The Organisation of Potentiality

The legal (in)distinction that the notion of exceptionality presupposes between having-to-be and being – the inside and the outside – can also be made communicable, from a more legally grounded perspective, as the (in)distinction between a form of law and a force-of-~~law~~, an indeterminate exteriority of law whose force is to produce what are thought as 'legal' effects.

The tradition is full of examples of this exteriority, including, for example, governmental decrees replacing formal legislative acts, military orders that suspend the juridical status of selected individuals or, more generally all acts adopted during a state of exception which suspended the normal application of the law[56]. A particularly instructive paradigm of this force though is, according to Agamben, *auctoritas*, a concept that, in Roman law, is opposed to *potestas* (legal validity) and represents: a) the power of *pater familias* – which emanates immediately from his physical person – to confer force of law on the act of a subject who cannot do so independently[57]; and b) the power of the senators, *patres*, "to ratify the decisions of the popular *comitia* and make them fully valid"[58]. In both instances, it is possible to speak in general of "a power that grants legitimacy" [59], together with or in spite of legal validity (*potestas*). Crucially this power gave to senators the faculty, when the Republic was endangered, to produce, through an act called *iustitium*, the suspension of the juridical order which, Agamben further notices, gives potentially to every citizen a power to act by any means beyond the limits set by the law.

What is relevant about all this is that, as Agamben notices, the power of *auctoritas* has been traditionally conceived as something that "inheres immediately in the living person"[60]. Actually, at the most abstract level, *auctoritas* becomes "a figure of law's

[56] Frost speaks, in general, of a situation where "acts that do not have the value of law can acquire the 'force-of-law' that is separated from the norm's application" (2010:560).
[57] 2017:231-232.
[58] Ibid:233.
[59] Ibid:234.
[60] Ibid:238.

immanence to life" and represents "[l]aw's claim that it coincides at an eminent point with life"[61] as such. To this purpose, Agamben goes as far as to suggest that, with modernity – while being used by Weber to formulate a theory of charismatic power and, later, by Schmitt and other to define the characteristics that a Führer had to *embody* – "the theory of *auctoritas* converged at least in part with the tradition of juridical thought that saw law as ultimately identical with—or immediately articulated to—life"[62]. The 'power the grant legitimacy' in and through tradition becomes the power of life itself and, in fact, Agamben suggests that the dialectic between *auctoritas* and *potestas* can be made communicable, in general, as 'the implication in a reciprocal grounding' of law and life: *auctoritas* represents ultimately a 'living law' – a law which "springs from life" – and, therefore, constitutes a paradigm of biopolitics[63].

Bio-politics, in this respect, should be understood as another name for the signature of exceptionality, defining the intelligibility of several discursive formations in both ancient and modern history in terms of 'an implication in a reciprocal grounding' (that is to say, an inclusive-exclusion) of life as such (*zoē*) and political, qualified, life (*bios*). In general terms, 'Life' – as biopolitical *ex-ceptio* – is not a particular meaning but a "mode of operation (…) which allows things to be said in political [and juridical too] theories"[64], thus producing an enunciative function (the theorist) which presupposes, in whatever is said, the indeterminate commonality of a law that passes judgement on the fact of existence which, in turn, functions as the ground of said judgement[65].

Within the signature of exceptionality as bio-politics, the force-of-~~law~~, the exteriority of law, is therefore, life itself, understood as an absolutely indeterminate normativity that animates the *form* of law and gives *force* to it. But this is possible because the idea of a force-of-~~law~~ that animates law presupposes the idea of an indeterminate form of law – a commonality or potentiality of signification – that has no content other than its being in relation with an exteriority: the form of law as the inclusive separation of law and life. Life (or being), as force-of-~~law~~ is included in law through the very same gesture that produces its exclusion. It is, with Nancy, abandoned, that is to say, included through its *ban* from the form of law. Whyte, interpreting Agamben through Nancy's notion of

---

[61] Ibid:246-247.
[62] Agamben mentions, for example, Savigny ("[l]aw is nothing but life considered from a particular point of view") and Rudolph Smend ("the norm receives the grounds of its validity, the quality of its validity, and the content of its validity from life) (Ibid:239).
[63] Ibid:239-240.
[64] Watkin, 2013:189.
[65] Ibid:195.

a*ban*donment, speaks in this respect of a "law that exists only in potentiality and, through its own suspension, captures all of life in its ban"[66]. This potentiality of the law is described by Whyte as law's remaining 'in *force* as a pure *form*' to which men are exposed (or, precisely, *abandoned*[67]). Men, within the horizon of law's potentiality are, with Whyte, '*held* in a ban'[68] and, therefore, both included and excluded or better, included by means of a ban. Actual forms of abandonment (historical instances of what can be interpreted as 'banishment' by and from the law) are therefore exemplary of what can generally understood as an abandonment (or exposition) *to* the potentiality of law as such: in Nancy's terms, the 'coming under the entirety of the law' or, with Whyte, "compulsion to appear before the law as such"[69].

The form of law represents, in this context, the idea of a law that 'remains in *force* without significance', that is to say, as a 'pure *form*'. But this idea presupposes, at the same time, a void of signification in which all life can become legally meaningful. In other words, it constitutes life itself as a force-of-~~law~~, namely, as always-already related to law as a zero degree of legal signification. Zartaloudis speaks, for example, of a 'zero degree of power' which founds a 'zero degree relation'[70] between the world of law ('having-to-be') and an alleged 'real' world or life ('being') on which, at least in modernity, the *form* or *fictio* of law can be said to ground its *force*. Life, or the world, are in this sense constituted as a fictional product of the legal fiction that grounds the very separation between law and life, juridical and real world, which means that the real world is always-already juridified through its exclusion from law[71], i.e. constituted as a force-of-~~law~~. In this manner, the two worlds (and therefore the form and the force of law) *collapse* into each other, producing an indistinguishability of form and force – *forиa* – (of law) and, more generally, the modern problem of 'juridification' of the life[72]. With Zartaloudis' own words:

[66] Whyte, 2009:313.
[67] Nancy refers to this 'pure form in force' as to the 'limitless severity of law' (Nancy, 1993:44).
[68] 2009:312.
[69] Ibid.
[70] 2015:172.
[71] Ibid:171.
[72] Ibid:171.

"[the law] must capture above all the relation between the two worlds and collapse it in an ever spectacular *relation*, whereby fact and right, exception and norm, can only be located in a zone of indistinction"[73].

The state of exception, as a particular historical instance of suspension of the law, produces "a situation that cannot be defined either as a situation of fact or as a situation of right, but instead institutes a paradoxical threshold of indistinction between the two"[74]. This situation though, belongs to the very intelligibility of law, as a signature, in the sense that the formal *fictio* of the separation between law and life always-already presupposes another fictional sphere of reference, a *fictio* of *fictio* (Zartaloudis's *fictio* of two worlds) in which right and nature, law and life, being and having-to-be are (or better, must be) indistinguishable. From this perspective, the state of exception is the exposure of a dynamic intrinsic in the form law, its bipolar articulation into a fiction of separation and a fiction of indistinction. Behind the first fiction of separation there is another fiction, indistinction of law and life: a "juridically empty space (…) in which law is in force in the *figure* – that is, etymologically, in the *fiction* – of its own dissolution" [75].

It is not a chance if both Agamben's and Benjamin's analyses begin with the recognition of positive law as the only possible ground of critique[76]. For both, the critique of law moves from an understanding of law as the form of a relation with an excess of form, to be individuated either in violence or in life, or both (in their indistinguishability). Life and violence (or power) are synonyms to the extent that life is a product of a separation between life itself and its form, a form of law which, through this separation, produces a force-of-~~law~~ as, precisely, the power of law to maintain itself in relation with an exteriority, i.e. life. Both *Gewalt* and *exception* then refer to an 'excess of form', the sphere of reference in which law and life (as violence) are related and the latter is internalised by the former through its exclusion. It is telling, in this respect, that Agamben refers to 'the state of exception' not as formless but rather as to an 'archetypal form'. The

[73] Ibid.
[74] Agamben, 2017:19.
[75] Ibid:35.
[76] Benjamin claims so explicitly, while *de facto* 'Homo Sacer' provides, at first, a reflection on the form of law (the issue of force will instead become the object of 'The State of Exception'). But in general, Agamben's interest in the positive dimension of law can be derived not only from his remarks about Kelsen but also from his detailed analysis of Schmitt, whose thought, it has been suggested, share with Kelsen the same premises – namely "the neo-Kantian sources supporting an understanding of the law as (…) a matter of form" (Cercel, 2021:40).

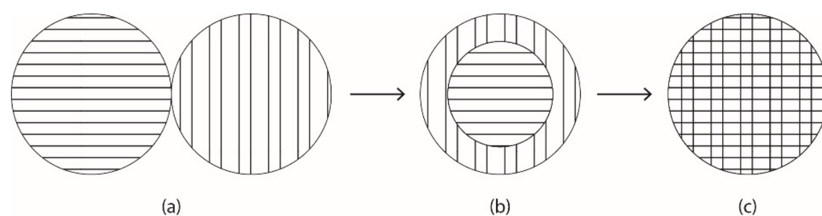
legal distinction between force and form presupposes then an archetypal form, which is also an archetypal force, namely, the force to articulate or articulability as a form. The legal distinction between force and form presupposes the indistinguishability of force and form, a *forиa* as the very power to institute as a zero degree or relation between the two. The communicability of law has in this power its 'moment of arising', its signature, which contemplate, at the same time, both separation and indistinction, as implicit in the formula 'inclusive-exclusion'.

It is also not a chance if Agamben uses the example of the state to reflect on the paradox of exceptionality, namely that by including what it excludes produces what he calls an impossible representation of unrepresentability. In order to make this point Agamben draws an analogy from set theory and particularly from the distinction between *membership* or *presentation* (an element being member of a set) and *inclusion* or *re-presentation* (a subset being included in a set)[77]. While *membership* provides for a 'primitive notion' on which set theory as such rests (only if we say that a term is a member of a set we can have a *primitive* understanding of what a term and a set are), *inclusion* is realised at a more formal level of abstraction (it concerns a term not as a mere member but as a subset comprised of elements that are at the same time also elements of the set). If an individual can be considered a *member* of a society and a class of, for example, electors can be *included* in the State, legal exceptionality is produced through the inclusion (re-presentation) of the individual membership (presentation) into the state: in other words, every time a singularity is "*represented* as such, which is to say, insofar as it is unrepresentable"[78] or, with the language of set theory, as "the paradoxical inclusion of membership itself"[79]. For Agamben the exception represents the form of hyper-inclusion of that which cannot be included, the representation of an unrepresentable as a zero-degree of representation and, following the example provided, it is achieved as soon the communal existence of singularities is thought through the inclusive lens of the State. In general, the exception represents the collapse of the distinction between membership and inclusion (being and having-to-be, singularities and legal persons, society and state, and so forth). At this point representation becomes a form hyper-representation, an exception which includes that which cannot be included, which is why Agamben argues "[t]he exception expresses precisely this impossibility of a system's making inclusion

[77] Agamben, 2017:24-25.
[78] Ibid:24.
[79] Ibid:24

coincide with membership, its reducing all its parts to unity"[80]. At the same time though the exception is the attempt to represent this impossibility as if it were possible. But this produces an excess of representation, the constitution of life itself as normative. The legal order is, from this perspective, the space where that which is not law (the anomic, nature, society, life, etc.) can be represented as if it were law. The declaration of a state of exception then is the exposure, "in the form of its suspension [of] the presupposition of the juridical reference" that is to say, the representation of the world as "zone of indistinction between nature and right"[81]; a signature of the world as a zero-degree of both right and nature (or life, violence, world, etc.) to be articulated[82].

Interestingly, Agamben depicts figuratively[83] the history of exception as the articulation, in three phases, of two sets, representing the state of nature and the state of right:



The first image (a) represents the separation between state of nature and state of right, the second (b) the temporary inclusion of nature into right (or the opposite) and the third (c) their definitive indistinguishability. Contrary to what Agamben seems to imply when he argues that only the first and the second are representations of the exception, it can be suggested that the three figures together provide for the dynamics of exceptionality as a general principle of 'dislocating localisation', a "*permanent* structure of juridico-political de-localization and dis-location"[84] (and the hyphen indicates precisely that both localisation/location and delocalisation/dislocation are at stake in the exception). Watkin

---

[80] Ibid:25.
[81] Ibid:21.
[82] From the perspective of set theory, the state of nature is another re-presentation (inclusion) of membership as, for example, in Hobbes's fiction of the state of nature as a state of war, but also in Locke's fiction of the world as a New World, which is to say, as a space to be conquered: to claim that the world is America – "[i]n the beginning, all world was America" (ibid:34) – or that it is a state of war means to represent it as always-already included into a state of law. The fictional separation of the two rests on the project of their fictional indifferentiation.
[83] The version provided here is an almost exact copy of the original figure which can be found in 'Homo Sacer: Sovereign Power and Bare Life' (2017:35).
[84] Ibid:35.

similarly argues that juridical power, even when it produces localisation "operates via the modality of indifference", "the unlocalizable distinction between inside and outside" and, therefore it will always reach the point where the zone of indistinction will be visibilised as such[85] (fig.3). The three figures represent, from this point of view, a dynamic representation of *the experienciability of the legal tradition* as a space of articulation in becoming which always presupposes the indistinction of that which is articulated[86].

The legal order contains both the possibility of separation and the possibility of indistinction, in the sense that both moments make it intelligible and communicable as a legal order. There is, in other words, a zero-degree of legal order, a "*dislocating localization* that exceeds it and in which virtually every form of life and every norm can be captured"[87] that defines the limits of intelligibility of the legal order. The fact that this dislocating localisation has, according to Agamben, become today visible as such in the form, for example, of refugee camps, detention centres for immigrants or hospital wards[88] means that the signature of law has now become experienceable as such, in all its intensity. The power of law, the organisation of potentiality into form and force presupposes always a *forиa* as 'a virtual dislocating localisation in excess': the power to seemingly include and exclude without limits, by constituting life (or the world, or being) in general as the exteriority of an empty form that animates it from the outside, a force, and which, for this reason, is always-already included into it.

In other words, the power of law is to be thinkable as a fate (in Benjamin's sense) or, with Nancy, as a 'legal universe', "an absolute, solemn *order*, which prescribes nothing but abandonment"[89] (to the law). Agamben, quoting Mairet, refers to the potentiality that bounds us to think law – but also society and the world more in general – in terms of a 'legal universe' as to 'an ideology of potentiality' according to which "potentiality already exists before it is exercised, and (…) obedience precedes the institutions that make it possible"[90]. An ideology of potentiality is a signature in the sense

---

[85] For a similar argument see Watkin, 2014:199.

[86] In a similar fashion, Clemens has spoken of 'sovereignty's becoming' as one long, uninterrupted sequence: it *emerges* with the Ancient Greek polis and *reproduces* itself in different forms during different historical periods, including Roman Empire ('installation'), Medieval Feudalism ('consolidation'), early modernity ('determination'), modern nihilism ('exhaustion'), contemporary camp life ('abandonment and exposure') (2008:54).

[87] Agamben, 2000:43.

[88] Zartaloudis, 2008:172.

[89] 1993:43.

[90] Agamben, 2017:43.

that it is power, an 'organisation of potentiality'[91], that pre-determines the potentiality for signification of the sign 'law' in accordance with an exceptional logic of articulation of force and form. The power of law is the logic of its organisation into form and force, having-to-be and being, law and life.

Co-Implication

It can be argued that the exception, as a signature of law, is not, after all, so exceptional. In fact, Agamben observes that it defines the 'very structure' of law as "constitutively articulated on the possibility of distinguishing *factum* and *ius* by instituting between them a threshold of indifference, by means of which the fact is included in the law"[92]. Basically, Agamben adds "the relation of exception (…) simply expresses the originary formal structure of the juridical relation"[93]. The *sovereign* state of exception as a particular fragment of the history of the west is just one paradigm of the communicability of law as such, one which, with Watkin, exemplifies "the maximum point of tension between violence and law"[94], between a maximum of form (of law) and a maximum of force(-of-~~law~~). But this tension is already internalised in every juridical operation.

For example, the technical indistinguishability in legal discourse between *quaestio factum* and *quaestio iuris* – such that, as suggested by Ubertis, within a judgement there is never a situation of absolute separation between 'facts as such' and 'law as such'[95] – is the internal (to law as an episteme) expression of a general indistinguishability between life (being) and law (having-to-be) that characterises the thinkability of the legal order in general. A judgement must presuppose the impossible isolation of *quaestio facti* and *quaestio iuris*, in the sense that every judgement represents the suspension of the power of a rule to apply to an individual case (*quaestio facti*) which grounds an investigation on the conditions of law's validity (*quaestio iuris*)[96]; and yet this

[91] 1995:71.
[92] 2017:998.
[93] 2017:20.
[94] 2013:213.
[95] 2020:69.
[96] Agamben similarly argues that "[t]he validity of a juridical rule does not coincide with its application to the individual case (...) [o]n the contrary, the rule must, precisely insofar as it is general, be valid independent of the individual case (2017:21).

operation implies that the fact is always-already included in a theoretical context which presupposes its 'juridicity'[97]. In similar terms, in an actual state of exception, the law is suspended but this suspension is always functional to maintain the possibility of its reference. This implies that the suspension of law's reference does not represent a total withdrawal of law which leads to the emerge of a chaotic situation which pre-exists the rule and is totally unrelated to it. On the contrary, the chaotic situation is embedded in the rule as that from which the rule distances from: chaos is always-already included into a broader context of juridical intelligibility.

Philippopoulos-Mihalopoulos, speaks, in similar terms (but from a spatially informed perspective) of the way in which a *lawscape*, the tautological co-implication of law and space, can always withdraw into what he calls an atmosphere, that is to say, a space which consists in nothing *but* the invisibilisation of law, 'the dissimulation of the lawscape as non-lawscape'[98]. Among its many possible forms this atmospheric invisibilisation of the law can become visible as a chaotic situation (including, for example, forms of social unrest[99], but also man-made natural disasters such as global warming[100]) in which what Philoppopoulos-Mihalopoulos calls 'law as *logos*' seems to disappear[101]. Atmospheres are, in other words, "the partition of ontological continuum into epistemological ruptures (…) the creation of the illusionary exterior"[102] which functions as 'an *excess* holding bodies together'[103]. Among these bodies, for Philoppopoulos-Mihalopoulos, there is the body of law(s) too, which is held together precisely by the fiction of its exteriority, an excess of law as the illusionary sphere of law's dissolution. But this, it could be further argued, is the spatially informed re-formulation of a problem which concerns what Agamben calls the 'originary formal structure of the juridical relation'[104], namely the problem of exceptionality. With his own words:

> "[t]he exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception,

[97] Ubertis, 2020:69.
[98] 2015:107.
[99] Ibid:108.
[100] Ibid:125.
[101] Ibid:109
[102] Ibid:194.
[103] Ibid:122.
[104] 2017:20.

> first constitutes itself as a rule. The particular '*force*' of law consists in this capacity of law to maintain itself in relation to an exteriority. We shall give the name relation of exception to the extreme *form* of relation by which something is included solely through its exclusion"[105][italic mine].

The exception is a principle of communicability of the law and of its many possible configurations, both conventional and unconventional, legal and sovereign, juridical and political, and so forth.

Along these lines, but with a focus on the formal aspect of exceptionality, Croce and Salvatore have suggested that the exception – before being a paradigm of sovereignty in the form of a state of exception – is a legal and logical concept which defines the relation between a legal rule and the possibility of applying it in a decision[106]. For example, exceptionalism as a mode of intelligibility, is embedded in the so-called principle of 'defeasible universality' which, in legal positivism, grounds the coherence of the whole system on the possibility to produce exceptions (inconsistencies) to the rule that, at the same time, are considered as integrations of the rule, i.e. the inclusion into the rule of the values that the system represents. Coherence, from the perspective of the excepted rule, is already a legal atmosphere, an excess that holds rules together. In different but related terms, illegality itself can be thought as a legal exception, the suspension of legality which however forms a system with it: illegality as the atmosphere of legality. At a purely conceptual level, the exclusion of an individual case from the rule, i.e. the production of an exception, never creates a fundamental dichotomy between the two but rather constitutes both as the elements of an inclusive-exclusion, such that, with Agamben, "the rule applies to the exception in no longer applying, in withdrawing from it"[107]. Every rule is related to an exteriority that functions as an excess of rule. Similarly, Watkin argues that every (juridical) rule is, as such, "founded on its exception", on its own self-suspension[108].

What is maintained, overall, is the possibility to use the rule as a means to decide and, therefore, to use this excess of law as precisely that: an excess *of* law, which is instrumentalised to legal purposes. To be presupposed, every time an excess of law is thought as such, is the necessity of a decision on how it is in excess, on the form of such

[105] Ibid:55.
[106] 2014:17.
[107] 2017:19.
[108] 2013:198.

exteriority, so that the very idea of an exteriority might be said to refer to the necessity of a decision on how the inside and the outside of law have to be related. For example, the principle of 'defeasible universality', the principle that there are values that exceed the rule, implies that need for decisions is, in itself, a fundamental value of the legal system and, therefore, the ultimate ground of coherence. With Philippopoulos-Mihalopoulos, an atmosphere, the space of law's withdrawal, is always legally determined, and atmospheric meaning, either engineered or contingent, is always-already legal meaning in spite of its anomic façade: in this sense the "atmosphere is not the exception but the rule" and both the material disappearance (force-of-~~law~~) and the immaterial appearance (form of law) work in tandem "to ensure that the law remains relevant" [109]. 'To ensure that the law remains relevant': that seems to be the (sovereign) task of (legal) thought, the limit of the 'enunciative function' produced by the signature of exception. The exception defines the limits of intelligibility of the law both internally and externally and, in both instances, its sovereign function is to make decisions that would maintain the law relevant possible. Following Schmitt's suggestion that 'there is no rule that is applicable to chaos', Agamben argues that "chaos must first be included in the juridical order through the creation of a zone of indistinction between outside and inside, chaos and the normal situation"[110], but this imply that both chaos and the normal situation are always co-implicated in and through the signature of exception.

Sovereignty, it could be suggested, indicates, first of all, the principle that decisions have to be taken – because in each decision is always at stake the (atmospheric) coherence of the order as a whole or, with Benjamin, the survival of the law as such; but it also indicates the first decision which grounds the logic as the moment of arising of its operativity: with Benjamin, the law-founding moment – in which a *fatal* relation between life and law is first established – which is always-already abandoned to a process of necessary preservation of that relation. The fate of law, methodologically speaking, is the signature of its thinkability as something that has always-already grasped its outside. As already mentioned, this signature is *biopolitical* because that outside to be grasped is life as such, bare life or, with Benjamin, the 'sanctity of life' as a zero-degree of law. Along these lines one can re-interpret the Schmittian claim that "sovereignty precedes the law, creating a regular 'frame of life' which the law preserves and codifies but does not

[109] 2013:42-43.
[110] 2017:20.

instantiate"[111]. This kind of sovereignty represents a force which, according to Schmitt, precedes the form of law and yet contains the possibility of juridicity: a pre-legal force-of-~~law~~. Croce and Salvatore speak of Schmitt's exception as a "foundational concept (…) that allows to identify and mark the borders of the legal field" both internally (juristic science) and externally (social reality) [112]. Legality, from this point of view, represents the administration and preservation of the sovereign decision, which is why DeCaroli has argued that "legality is an epiphenomenon of sovereignty"[113]; and yet, insofar sovereignty represents the possibility of juridicity, the opposite is equally true.

Along the same lines Frost argues that 'the deactivation of all legal determinations in the state of exception' "does not mean that there is no law in the exception" and that actually "[t]he exception is full of legality"[114]. That is because, ultimately, the idea of a pure form of law and the idea of force produced by a suspension of the law are the same idea. Fusco's claim that the decision "marks the original moment of *the imposition of a legal order* out of the anomic context of the state of exception"[115] [italic mine] implies that the decision already contains the intent to preserve the pure empty form of a legal order and, in turn, that such form preserves the possibility to decide[116].

Moreover, to be administered and preserved, given that the sovereign decision is a biopolitical decision, namely a decision on the 'regular frame of life', is the relation between law and life as such.

Crucially, given the *institutionalist* dimension of Schmitt's decisionism[117], the sovereign force-of-~~law~~ is always also the force of life itself, a life charged with normativity that has the power to normalise the law[118]. To be sovereign, methodologically speaking, is the thinkability of the threshold between law and life as a relation, that is to say, as articulable. The sovereign exception anticipates judicial exceptions[119] and, more generally, the exceptional government of *life* as *something* which is always in excess with respect to *law* and, for this very reason, produces and asks for law: 'that the law remains relevant'.

---

[111] DeCaroli, 2007:50.
[112] 2014:14.
[113] 2007:49.
[114] 2010:559.
[115] 2017:133.
[116] The articulation of sovereignty and legality is therefore akin to Benjamin's articulation of law-positing and law-preserving violence
[117] For an overview, Croce & Salvatore (2014:30-61).
[118] Fusco, in this respect, has demonstrated that Schmitt's theory of sovereignty is a theory of life's normalisation and that his institutional turn (from sovereign to 'concrete-order-thinking') is still permeated of decisionism and, therefore, 'is not a turn at all' (2017:129).
[119] DeCaroli, 2007:50.

The sovereign exception, the institution of a frame of life, is, from a methodological point of view, the very attribution to life of a principle of excessive normativity that produces law, the institution of life as a force-of-~~law~~.

Sovereignty stands, in general terms, for the institution of a signature that makes life thinkable in the form of a 'govern-mentality' that produces, endlessly, decisions – both legal and non-legal[120] – that maintain the law relevant. A similar argument is developed by Jessen and Eggers, who, re-interpreting Foucault, suggest that while the 'sovereign state' has no proper essence, nevertheless it functions as a 'practico-reflexive prism' or 'principle of intelligibility' which constructs our political understanding of society through the fictional unification ('statification') of different governmental rationales and practices[121]. This process implies, first of all, that life as such is thought in terms of governability (its ability to govern itself and to be governed) and, secondly, that this thinkability will always be filtrated by some kind of juridical or pseudo-juridical coding[122].

In general, the signature of exceptionality implies that legality, sovereignty and life are always co-implicated. Particularly, if legality stands for the form of law, sovereignty and life can both be thought as force(s)-of-~~law~~. It is interesting, in this respect, to observe that in the history of legal thinking it is not only Schmitt's decisionism which, in stark opposition with Kelsen's pure theory of form, has focused on a problematisation of a 'frame of life' beyond the law: Ehrlich's theory of the 'living law', and the institutional approach more in general, focuses on the 'living order of associations' – which, in his case, precedes rather the following the sovereign decision – and thus provides a theory which is specular to Schmitt's in terms of how it is opposed to Kelsen's, which seems therefore to act as a medium between the two. Both Schmitt and Ehrlich are concerned with the possibility to include within the scopes of legal reflection what has been excluded by Kelsen, namely, a reflection on life *before* the law, the existence of what DeCaroli calls a "stable, coherent order within a territory such that the logic of a legal system, once created, will be capable of making statements that are juridical true"[123]. More generally, if it is true, as Croce and Salvatore argue – following Schmitt's suggestion in 'The Three Types' – that jurisprudential thought tend to express itself in

[120] Think of Foucault's biopolitical paradigm of a 'society of judges'.
[121] 2020.
[122] Ibid:66.
[123] 2007:49.

three forms, namely, normativism, decisionism and institutionalism – which means that the three manifestations of 'the legal phenomenon' are rules, decisions and concrete order[124] – it can be further suggested that these three are bound to a dialectic of exceptionality in which, more precisely, what has been excluded by the first approach is further re-included, in different terms, by the second and the third.

All these different perspectives are therefore included within the reach of Agamben's theory of exceptionality. This is, I think, reflected in the (indifferentiating) way in which he questions the boundaries of law's 'sphere of reference'. The inclusion in law of violence as a primordial *juridical* fact is interpreted by Agamben as "the inscription within the body of the *nomos* of the exteriority that animates it and gives it meaning", which is to say, a structure or a form (a form of structuring) that constitutes at the same time both itself and its exteriority: the *sphere* to which law refers. In Agamben's own words:

> "[t]he law has a regulative character and is a "rule" not because it commands and proscribes, but because it must first of all create the sphere of its own reference in real life and make that reference regular"[125].

The paradox of exceptionality, that of the *inclusion* of an *exteriority*, is perhaps better rendered in the original (Italian) version[126], where it cannot be established (decided) whether the object ('*la*') of the verb 'to make regular' ('*normalizzare*') is 'life' ('*vita*') or 'reference' ('*referenza*'). Practically, it is impossible to establish once and for all if the law concerns transgression or compliance, the abnormal case (which constitutes the normality of law, the stuff law normally deals with) or the normal one (the normality of life before or beyond the law: with a Kafkian formula, 'life lived at the foot of the castle'). This ambiguity is reflected in the very possibility to think law as either a 'rule of decision' or a 'rule of conduct' (or both), which suggests that what is really paradoxical and ambiguous about the law is that it is never fully clear whether it ultimately normalises itself – in the sense that it constitutes itself as a system of rules to be applied – or the life which is presupposed by such systematisation. In other words, the ambiguity of law is

---

[124] 2014:33.
[125] Ibid:25.
[126] "Il diritto ha carattere normativo, è "norma" (nel senso proprio di "squadra") non perché comanda e prescrive, ma in quanto deve innanzitutto creare l'ambito della propria referenza nella vita reale, normalizzar*la*" (2018b:37).

also reflected in the ambiguity of legal theorisation, its constant oscillation between these two poles of law's thinkability.

As much as it not clear whether the law is a sanction – which, as already mentioned, in its primitive form is, paradoxically, 'the repetition of the same act without any sanction, that is, as an exceptional case' – or normalised behaviour – the production and representation of a normal behaviour –, *sovereignty* too is characterised by an intrinsic ambiguity which concerns the target of its reference. The sovereign, in fact, is – according to Schmitt's (in)famous formula – both "he who decides on the exception" and "he who definitely decides if [the regular] situation is actually effective"[127], which means, as Agamben suggests, that "the sovereign is, at the same time, outside and inside the juridical order"[128]. From this perspective, the sovereign can 'decide on the exception' because he decides, at the same time, "on the normal structuring of life relations"[129] and a decision which concerns the former is also a decision which concerns the latter, and vice-versa.

There is, in other words, an analogy between different accounts of legality (law as a rule of decision or law as a rule of conduct), as well as between different accounts of legality and Schmitt's account sovereignty. All these accounts can be interpreted as a manifestation of exceptionality. Sovereignty is, in this sense, a name for both the (legal) referentiality to life – the establishment of a relation of reference between law and life – as well as for the possibility of its suspension – self-referentiality. But the same can be argued with respect to legality if this is considered in its two dimensions, rule of conduct – reference between law and life – and rule of decision – self-reference or suspension of reference in and through the judgement. Both sovereignty and legality are representation of life as well as representation of its opposite, exceptional suspension or demanticisation of life. Sovereignty and legality are, in this sense, akin: they are two names that describe the same thing, namely, relationality as such, the possibility of a relation between law and life which, of course, implies also the possibility of suspending their relation. From the perspective of legal theory, such relationality is expressed by the possibility to relate to each other legality and the sovereign themselves, so that the history of legal thinking might also be depicted as an oscillation between a series of polarised positions, including the one which sees the rules made by the sovereign, the one which sees the sovereign

[127] Schmitt, 2005:13.
[128] 2017:17.
[129] Ibid:25.

made by the rules[130], and the one which sees both rules and sovereigns as either making life or being made by it[131]. This implies that, through the signature of exception, sovereignty, legality and life are always co-implicated.

Along these lines, it can also be suggested that it is also possible to read Agamben's theory of exceptionality as an attempt to reflect on (i.e. to study) the *ambiguous* co-originality of inside and outside (form and force) of law, as a signature of biopolitical communicability of the tradition of legal thinking, the tradition of thinking about the law. This allows to re-interpret what, with Benjamin, could be called the messianic dimension[132] of Agamben's ontology in methodological terms, that is to say, as a call for *study*.

The 'power' of law is, with Agamben, 'the capacity of law to maintain *itself* in relation to an *exteriority*'. Similarly, in Benjamin the law becomes a fate by establishing an ambiguous relation with violence, as an excess or exteriority. Benjamin's *Gewalt* of law is, from this perspective, its capacity to produce an *ambiguity* which concerns the distinction between means and ends, thus constituting law itself as the fate of a sacred life, a zero-degree of life which is also a zero-degree of law. Agamben's notion of indistinction of law and life is therefore a re-proposition of Benjamin's notion of ambiguity in his Critique of Violence. While the latter criticises the circularity of argumentation of positive and natural theories of law as a manifestation of the closure of the logic of instrumentality – which makes impossible a confrontation with the problem of the violent constitution of a sacred life – similarly, the logic of exceptionality makes this confrontation possible as the exposure of law as a signature, the endless and circular articulation of law and life, form and force-in-excess-of-form. What remains unquestioned and unquestionable, every time law and life are articulated, is the very power to take a decision on their relation as the (sovereign) function of legal thought. It could actually be argued that the logic of exceptionality, insofar as it is considered a logic of sovereignty, is grounded on the *instrumentalization* of indistinguishability, its use for the purpose of another distinction: the use of indistinction, with Benjamin, as a means to an end.

[130] This is, for example, how Waldron reads Hart in opposition to Bentham and Austin (Shapiro, 2009:1).
[131] As, for example, in the two versions of institutionalism, namely pluralist institutionalism – where social law makes state law – and decisionist institutionalism – where state law makes social law (Croce & Salvatore, 2014:50).
[132] See Khatib (2013) for an extremely powerful reflection on Benjamin's 'messianic without messianism'.

Law is communicable as a power to produce the 'indistinction' (the indistinguishability) between 'having-to-be' and 'being' or, in similar terms, between law and life (as the two worlds *of law*) in order to endlessly re-articulate their separation, that is to say, *in order to* use it as the ground for a decision on their relation. The study of law's communicability is, from this perspective, the exposure and the critique of its *decisionist* element, the fact that not only the legal order is possible in and through "law's potential not to apply"[133], but also that this suspension is always instrumentalised to the purpose of another decision. This is, I think, a crucial aspect of Agamben's thought which tends to be overlooked in most secondary literature, namely, the fact that 'sovereignty' stands, ultimately, for *the instrumentalization of indistinction*, its use as a means to an end. Agamben makes this clear when he claims that (what he calls) "[s]overeign violence opens a zone of indistinction between law and nature, outside and inside, violence and law [and] the sovereign is precisely the one who maintains the possibility of deciding on the two *to the very degree* that he renders them indistinguishable from each other"[134] [italic mine]: sovereignty is the ambiguous "medium in which the passage from the one to the other takes place"[135], the instrumentalization of the figure of the exception.

From a methodological standpoint, sovereignty itself represents an enunciative function, namely, that the necessary task of (political) thought is to take a decision which concerns the 'reciprocal grounding' of law and life. What is to be decided is, first of all, the very fact that there is a reciprocal grounding of law and life, an exceptional co-implication which makes politics thinkable. Sovereignty is a signature of exceptionality which "allows power to happen" by constructing "the determinant space of political thought" [136], as a space in which politics can and has to be thought through a logic of exceptionality. Moreover, this potential co-implication has to be given an actual form, an actual articulation. Once established, the 'reciprocal grounding' of law and life has to be, so to speak, administered, governed, re-articulated. Sovereignty eventually stands for the necessary nature of this administration, for the fact that it cannot be otherwise and, therefore, for the necessity of each decision that follows from the first, foundational decision. Methodologically speaking though this necessity is an enunciative function and,

[133] Whyte, 2009:315.
[134] 2017:55.
[135] Ibid.
[136] 2013:199.

therefore, it does not concern (only) actual sovereigns but, more generally, every subject who wants to be allowed to speak and think politically.

When, therefore, Agamben interprets what Benjamin calls 'divine violence' as the ability to "show the connection between (…) violence and law [as] the single real content of law"[137] this also implies that the performance of Agamben's own critique, as a form of study, consists in rendering – with a gesture that partially resembles that of the sovereign – law and violence indifferentiated. This gesture resembles that of the sovereign because, in a way, the student creates the sovereign, in the sense that she produces a posteriori the signature that makes law intelligible in the terms that have been described so far (sovereign, exceptional, biopolitical, etc.). That is why, for example, Agamben – in a way which resembles Benjamin's use of notions such as pure *means* and divine *violence* in opposition to instrumentality and mythic violence – chooses to describe his own theory as a theory of 'destituent *power*'.

Destituent power is still *power*, because it is the exposure or study of the functioning of power, as an articulating apparatus, which, nevertheless, can only be performed by methodologically crafting the apparatus of power, therefore exhibiting it. Destituent-power is, in Agamben's own words, *anarchy* as the 'exposition of the anarchy internal to power', that is to say, "deposition of the anomie that the juridical order has captured within itself in the state of exception"[138], and "inoperative disarticulation of *zoe* and *bios*"[139], so that ultimately "destitution coincides without remainder with constitution" and "position has no other consistency than in deposition"[140]. Destituent-power cannot be either constituent or constituted power, insofar as their relation can easily be interpreted as another product of the apparatus, another paradigm of exceptional co-implication of form of law and force-of-~~law~~[141]: destituent-power can only be the

[137] 2017:55.
[138] Ibid:1276.
[139] Ibid:608.
[140] Ibid:1276.
[141] Christodoulidis, in this respect, speaks of the paradox of the 'co-originality of law and politics' which consists in the recognition that "the event of the exercise of constituent power, the registering itself of the constituent, must necessarily occur within a framework of recognition, where it can be 'individuated' as an event and ascribed to an actor" (2007:189). From this perspective, meta-analysis of constitutionalism and truly emancipatory movements alike are always confronted with the problem that "constituent power is not free-floating, but appears to come always already implicated with constitutional form, the instituting already coupled with the instituted" (ibid:191). In similar terms, Frost has argued that "[T]he force-of-law (without law) can be claimed by both the State and non-State groups not just to justify their actions, but to give them the force-of-law, to make their actions legal" (2010:560). Every attempt at defining the essence of constituent power, even when such power is considered as irreducible to

exhibition of their organisation. If power is ‘organisation of potentiality’, that is to say potentiality actualised in the form of an articulation (possibility of articulation) then destituent power is “the experience of a potential that (…) exposes itself in its non-relation to the act”[142] and becomes inoperative, impotential. The two spheres of law, life as force-of-~~law~~ and law as form, can be studied in their non-relation, that is to say, at the point of their *contact*, which Colli has defined a ‘void of representation’: the void of representation is not a thing, an irrepresentable or incommunicable being or life, but the very exhibition of communicability as articulated into a re-presentation. Colli, in fact, further describes (represents) this void as a ‘representability’, a potentiality for representation and, in order to distinguish it from actual representations, he also uses the term ‘expression’[143]. In this respect, it could suggested that when Agamben (who considers Colli, together with Melandri and Carchia, the most important Italian philosopher of 20th century[144]) argues that the “exception (…) *expresses* the originary formal structure of the juridical relation”[145] what he actually means by this is that the exception, from a methodological point of view, represents the voiding of all politico-juridical representations, in the sense that it accounts not so much for their content but for their own representability, their exceptional power to represent.

Destituent-power, like any power, produces indifferentiation, because it exhibits indistinction (the production of a void of representation) as power’s fundamental operation, and yet it renders it really undecidable, inoperative, in the sense that indifferentiation, at this point, is not used to ground decision (representation), its function is not to make the law relevant: its end is *not* a re-articulation of law and life (a new representation) and, in this sense, it has no end: it is a *dis-articulation* as the exposure and study of articulation.

constituted power (this being, for example, the position of scholars such as Christodoulidis, Hardt and Negri) is nevertheless still an attempt to grasp the exteriority of a form of law.

[142] Agamben, 2017:1277.

[143] 2016:19.

[144] 2017b:128.

[145] 2017:20.

Sacer-Sanctus

Law's sphere of reference is ambiguous because in order for the law to refer to 'real life' (reference), the law has to constitute its own sphere of reference first (self-reference). The sphere of reference represents therefore a *threshold*, through which law passes into life and life passes into law, i.e. the sphere of the relation between law and life. As a threshold, the sphere of reference, can be thought, with Agamben, as a sphere of 'indistinction' in which, what is made indistinct is the relation between law and violence (that is the paradigm of *lex talionis*) and, through that, the relation between law and life more in general. To become ambiguous is the very distinction between life and violence and that is what makes possible for life to become a force-of-~~law~~, the exteriority *of* a form of law. Agamben speaks of this constitutive relation between law and violence as a 'political curse' which "marks out the *locus* in which, at a later stage, penal law will be established"[146]. This curse functions as an act of *sacralisation* which establishes a threshold of inclusion/exclusion into/from a *political* territory. The curse establishes a regular frame of life and is, in this sense, analogous to the modern sovereign decision on the originary inclusion of the *living* in the sphere of law" [italic mine] which, in fact, it is said, anticipates and makes possible the decision on 'the licit and the illicit'[147]. It has been observed by Fusco that the sovereign decision, at least for Schmitt, is a 'biological decision', and that the famous distinction friend/enemy presupposes an evaluation of what is to be considered "the normal way of life of the community, assuming peculiar 'biological' essence"[148]. If the sovereign decision can be interpreted as a modern manifestation of an ancient *political* curse[149], then equally the ancient political curse can be reinterpreted as a biopolitical performance which produces both a socio-legal context and a, presupposed, natural (de-politicised) one, a *zoe* separated from *bios*. Biological life, from this point of view, refers to a life which is biological only insofar is not social, "biological norm *prior* to all legal and social norms" [150].

The formula *talio esto* then presupposes a (cursed) form of life on which the formula can be activated, the constitution of an entry point into a juridically organised context. Within Agamben's scheme of interpretation the formula can thus be interpreted

[146] 2017:329.
[147] Ibid:25.
[148] 2017:135.
[149] For a similar argument, see DeCaroli (2007:53).
[150] Fusco, 2017:135.

as a legal act that immediately follows from a foundational act of sacralisation: it is the medium between a sovereign curse and a juridical curse which grounds the development of a system of penal law. The signature of exception suggests that law becomes at first possible by means of a sovereign *curse*, an act of sacralisation whose most paradigmatic form is provided, in Roman law, not so much by the *lex talionis* but by a series of penalties "aimed at pronouncing a man *sacer*", and, therefore, known as '*leges sacratae*'[151]. The paradigmatic formula which characterises all these penalties, i.e. '*sacer esto*', is taken by Agamben to indicate the constitutive form of the implication of life in a politico-juridical order, "the originary form of the inclusion of bare life in the juridical order, (…) the originary 'political' relation, which is to say, bare life insofar as it operates in an inclusive exclusion as the referent of the sovereign decision"[152]. In order for men to be constituted as the referent of a judicial decision (legal and social norms), as in the case of the *lex talionis*, they had first to be constituted as the referent of a sovereign decision on what it means to be alive (biological norm): the reciprocal grounding of law and life presupposes a decision on what it means to live. More generally, it can be suggested that to be alive means to be subjected to a decision on what it means to be alive.

The foundational pronouncement of the sacredness of those who violate the law ('*qui legem violavit, sacer esto*') functions as the forceful institution of a threshold between the inside and the outside of society *tout court*, between a zero-degree content of life or law and a socio-politico-juridical content, a form of life or law. This pronouncement represents, in general, the institution of politico-juridical power in terms of a threshold between inside – the space of law's inviolability – and outside – a space devoid of law, so that, in general terms, "the production, at any moment in history, of a

---

[151] Bennett provides an exhaustive list in what follows:

> "Two definitions taken from the dictionary of the Augustan writer Verrius Flaccus cite this as the penalty prescribed by regal law for the remover of boundary stones and the parent-beater. Some scholars believe that the same phrase can be distinguished on the archaic cippus of the Forum, and interpret it as having embodied a threat against any violator of that place or stone. Servius has preserved the wording of a law of the XII Tables, which invokes a like penalty on the head of the patron who has wronged a client, while Festus also quotes the Tables as authority for the archaic form of aliter in some law of unstated content: "Si quisquam aliuta faxit, ipsos Jovi sacer esto." (…) To the former list, therefore, we may add the law which Livy reports to have been passed in the first year of the Republic against any individual who should have conspired for monarchy (sacrando cum bonis capite ejus qui regni occupandi consilia inesset), as also the familiar Valerio-Horatian law of 449 B.C., which declared that if any man should have violated the sacrosanctitas of a tribune of the plebs, "ejus caput Jovi sacrum esset, familia ad aedem Cereris Liberi Liberaeque venum iret"" (1930:5-6).

[152] Agamben, 2017:72.

bare life – is to be considered as a "juridico-political phenomenon" [153]. This is analogous to how modern "sovereignty precedes the law, creating a regular 'frame of life' which the law preserves and codifies"[154]. There is, therefore, continuity between *sacralisation*, that is to say exclusion of bare life from the political territory, and *legalisation*, inclusion of life in the social sphere through politico-juridical qualification. To declare someone '*sacer*' meant to exclude him, in the most radical way from the sphere of sociality, which is to say, both religious and profane, so "that it was not (…) lawful for him [*homo sacer*] to be sacrificed, but anyone killing him was held innocent of murder"[155]; and yet, this act of exclusion represents for Agamben the very sovereign foundation of the sphere of sociality itself, a sphere of inclusion, in which politico-juridical relations become possible and are allowed to occur and develop within the two abstract poles of sovereign and bare life. Sovereignty and barenness are the two *outer* extremes of law's sphere of reference, two opposite forces related to a form of law whose communicability rests on the possibility of their exclusion.

Therefore, DeCaroli's claim that sovereignty *precedes* legality, is problematic if it is temporal precedence which is spoken about. From a historico-philosophical perspective, in fact, the articulation of sovereignty, legality and bare life, of force and form, occurs all at once and the task of thought or study is to make the experience of this co-occurrence. Similarly, the two ancient Roman Law formulas, '*talio*' and '*sacer esto*' are co-implicated. The formula '*talio esto*' then represents, in the signatory reconstruction offered by Agamben, something like a paradigmatic first politico-juridical act, the first act of application of the law, *after* the politico-juridical sphere has been established through the formula '*sacer esto*'. '*Talio esto*' is the functional explication of the principle of exceptionality (the 'repetition of the same act' as a form of inclusive exclusion) after this principle has been grounded through an act of sacralisation, the exclusive constitution of a zero-degree of life on which the west has built its politico-juridical project of inclusion, which implies certainly punishment but extends far beyond that.

In general, this is reflected in the evolution of the Roman conceptualisation of the legal sphere. Following Thomas, Agamben describes a movement from a situation where crime and sanction are included within the same norm – so that illegality is conceived not

[153] Ibid.
[154] DeCaroli, 2007:50.
[155] Bennett, 1930:7.

as a violation of the law but rather as a 'legal hypothesis'[156] – to a situation where the relation between law (illegality) and life (behaviour) is suspended and re-organised so as to distinguish between a primary norm, a prescription which formalises the due behaviour – a rule of conduct – and a secondary norm, a punishment or rule of decision, which should follow in case the primary norm is violated[157]. In this new context, "the law denounces the transgression as an infraction of the imperatives that it has pronounced"[158] and, thus 'turns the sanction towards itself'[159], 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"[160]. The expression '*lex sancta*', in fact, indicates that the law is "enclosed (…) by a protective barrier"[161] and that therefore cannot be violated (even when it is violated). The law becomes the horizon of possible, which presupposes the very possibility for man to be 'accused', in the sense of 'caused', 'called in question'[162]. The sanctification of the law, therefore, refers to the crystallisation of law into a form and, more generally, to the concrete, signifying formation of a *valid* legal order in which the law is in force, that is to say, observed as the ground of judgement: an *efficacious* juridical order. The production of a zero-degree of life generates, at the same time, a process of life's qualification, the production of forms of life as forms of law being at the same time, both valid and efficacious, formal and in force. *To the production of a sacred life corresponds the production of the sanctity of law* and, from this point of view, (accusing) law and (accused) life are made indistinguishable.

The law, at this point, acquires 'ontological consistency'[163] and perfects itself to the point of becoming, with the introduction of so-called *leges perfectae*, able to produce the 'juridical inexistence' of what transgresses it[164]. Such laws protect the inviolability –

---

[156] "Although the content of the norm and the sanction were distinct, their symmetry inscribed into the law the act conforming to it and the one contrary to it simultaneously: illegality was formulated initially as a legal hypothesis" (Agamben, 2018a:17).
[157] In accordance with the maxim '[c]*ontra 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)" (ibid).
[158] Ibid:17-18.
[159] Ibid:17.
[160] Ibid:17.
[161] Ibid:18.
[162] In Italian, 'chiamato in *causa*'. Agamben speaks of a process of 'interiorisation of guilt', the constitution of the subject as subjected to scrutiny.
[163] Ibid:19.
[164] Thomas, quoted by Agamben (2018a:22-23).

sanctity – of law by voiding the act forbidden[165] so that a law which is unable to produce the same effect is called '*minus quam perfecta*'. Moreover, a third category of rules at some point is introduced, namely the *lex imperfecta*, a law unable to nullify an act nor to lay a sanction, but only to produce a normatively charged social meaning[166]. McGinn has observed that *lex imperfecta* is paradigmatic of what in modern legal theory has been termed 'the expressive function of law', its ability to "convey a social meaning that reinforces or changes the norms of a community, beyond its role in establishing and enforcing rules"[167]. In general, this is a reflection of how the 'sanctity' of the juridical order – produced through a *sacratio* of life – produces an ambiguous threshold of indistinction between law and sociality, that, at the same time, has to be articulated (the enunciative function) into the two realms of validity and efficacy, or with McGinn, rule and norm.

The institution of a threshold between inside and outside, by means of *sacratio*, which founds the possibility of legality, is followed by a *sanctificatio*, the stable organisation of legality, its eventual delimitation or expansion. For example, in Rome, the boundary stone was considered sacred and therefore whoever would violate it would be considered *sacer*, whether the city walls were considered *sancta* and their violation would be followed by a death punishment. This means that the term *sanctus* works as a "specification of and explication of the category *sacer*"[168]. *Sacer* indicates an extreme limit, such as the limit between nature and society – Benveniste, for example, stresses "the difference between *sacer* as a natural state and *sanctus* as the result of some operation" – or between a pseudo-divine act that founds the law and a human one which merely administers it (*leges sacratae*, as opposed to *sanctae*, are, according to Benveniste, "inflicted by the god themselves" and, thus, "put the law in force"[169]. The distinction between *sacer* and *sanctus* is therefore analogous to the distinction between sovereignty and legality, but at stake in both articulations is the institution of a sphere in which natural life can be administered and, therefore, normatively charged through its introduction into

[165] A *lex perfecta*, specifically, is one which "forbids something to be done and, if this has been done, voids it" [In latin: "…*quae vetat aliquid fieri et, si factum sit, rescindit*"] (McGinn, 2015:28). McGinn suggests that for some Roman commentators even the voiding of the act forbidden was to be considered as penalty and therefore that the distinction between *lex perfecta* and *lex minus quam perfecta* concerned the difference in terms of typology of sanction (2015:30).

[166] He brings, as an example, the law limiting gift-giving among clients during the Saturnalia, even though he also suggests that clear evidence of their effectiveness is lacking at the moment.

[167] Ibid:34.

[168] Agamben, 2018a:16.

[169] Ibid.

the sphere of law. In this sense, the distinction between *sacer* and *sanctus* is also analogous to that between constituent and constituted power, as suggested by the fact that one of the most important *lex sacrata* was the one through which the tribune of the plebs was established.

In philosophical terms *sanctificatio* presupposes *sacratio* which means that the institution of a legal order presupposes the institution of a threshold of articulation of two poles of life's thinkability (either bare or qualified). This makes possible the institution of law as *sancta*, that is to say, articulable into validity and efficacy, form and force, decision and conduct, etc. The self-referentiality of law presupposes an act of sacralisation. *Sacratio*, as much as sovereignty, represents a *signature of necessary articulability* of both law and life, of the latter through the former, and therefore of the institution of life as such the object of a decision. The juridical order contains its own outside (nature, anomie, violence, life, etc.) and constitutes it as the ground of its own *sanctitas*, as the accusation of life as such, law's own becoming a machine of either total inclusion (life empowered by a *lex perfecta*, which exists insofar as it is juridified) or total exclusion (life outside the law, abandoned, de-juridified): a threshold of (in)distinguishability between inside and outside that ground a mechanism of decision on their relation.

Language in between Kelsen and Schmitt

Both Schütz and Zartaloudis have suggested that despite their adversary positions, Kelsen's theory of law (legality) represents an *anticipation* of the theory of the state of exception (sovereignty) developed by Schmitt[170]. In what follows I will try to expand further on the idea of a shared commonality (signature) between these two theories. In this context, Agamben's account of the exceptionality of language, provide a perfect foundation to illustrate the solidarity between Kelsen's legality and Schmitt's sovereignty.

Not only is the case that law has its own signature, its logic of intelligibility. Language as such is a signature and this is embedded in the very differentiation of

[170] Schutz, 2008:123; Zartaloudis, 2010:283. Recently also Fusco (2021) and Cercel (2021) have stressed the existence of crucial similarities between the two projects.

linguistic signs into signifier and signified or, more generally, of language into two spheres, *langue* and *parole*, semiotic and semantic, and so forth. Both signatures, law and language, provide for the intelligibility of law and language in terms of exceptionality. Agamben discusses this both in relation to the state of exception and to legal norm as such as a form of 'desemanticisation'. 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. It 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 (…)"[171].

The indistinguishability between law and life produced in the state of exception is, paradoxically, what results from the suspension of their relation, a suspension which produces a norm 'without reference to reality', a pure form of law. This pure form is analogous to a *langue*, a grammar without reference (denotation) to the real. The whole process of *formation* of both law and language (as social institutions) is a process of 'desemanticization' of concrete praxis, from which the very distinction between law (or language) and life emerges. In what follows I will analyse this suspension in both Kelsen (a) and Schmitt (b) and then I will provide some final remarks on their commonality (c).

(a) Kelsen's theory, which still plays a central role in the tradition of legal thought[172], provides precisely a theory of the law as a form, or with Lindhal, of a legal

[171] Agamben, 2017:197.

[172] As observed by Lindahl, the conceptualisation of the legal order in legal theory is still bound to the possibility to think such order in a Kelsenian manner, so that even what he calls 'Kelsen's detractors' (including, for example, Hart, Dworkin and Raz) can enter the conversation around the subject only if they have "already accepted the terms in which he poses the problem" (2013:18). Similarly, Zartaloudis claims

order ‘independent from any consideration of legal limits’, which is to say, “valid everywhere, at all times, for all forms of behaviour and for all human beings”[173]. It is a theory of ‘the law *qua* order’, namely, of ‘an order of legal norms’ that are validated or authorised as a whole by a *Grundnorm*, a power-conferring norm which says that the whole *ought-to-be* valid. The *Grundnorm* is an ought-form which says that “there is an obligation to obey the law in general, the law as such”[174]. It is a ‘principle of ordered action’, a ‘conceptual truth’ and, as such, it is entirely “independent of all social facts” or any other context, to the point that, Green argues, it “would exist even if there were no human beings”[175]. It is, so to speak, anarchic, because it has no normative ground other than its own presupposed validity[176].

The *force* of law is its capacity to constitute itself as a *form* through a process of exceptional desemanticisation of life (both naturally and socially understood[177]). The sphere of reference of (a pure theory of) law does not even include human legal or illegal behaviours (respectively, ‘the act in conformity with the precept’ and ‘the prohibited act’[178]), because, as Agamben suggests, for Kelsen ‘the essence of the law’ is the sanction, and neither the one nor the other is really ‘in question in the norm’[179]. There is, in other words, no ‘immanent, extra-juridical quality of the action’ to which corresponds a sanction; on the contrary, the (juridical) quality of the action depends entirely on the fact that “the legal order makes it the condition of a coercive act as a sanction”[180]. Human actions and the (subjective) meaning attached to them are, in Kelsen’s words, behaviours ‘qua condition’ related by a norm to a coercive act ‘qua consequence’[181], that is to say, they are the vanishing presupposition of law. In Kelsen’s words, “validity is the specific existence of law”[182], which means that law’s formal essence is the desemanticisation of life (understood naturally and socially), namely its representation as mere sanctionability.

that Kelsen’s hypothesis, the *Grundnorm*, “may be the most significant attempt at reaching an *entry point to an inquiry into the limit of law*” [italic mine] and thus represents something like “the ultimate shifter of the law, its very condition of possibility” (2010:283).

[173] Lindahl, 2013:14.

[174] Guastini, 2016:404.

[175] Green, 2016:48-50.

[176] Marmor, 2016:7.

[177] “The Pure Theory of Law does not look to mental processes [social or psychological] or physical [natural] events of any kind in seeking to cognize norms, in seeking to comprehend something legally” (Kelsen, 2002:11).

[178] Agamben, 2018a:21.

[179] Ibid.

[180] Ibid.

[181] Kelsen, 2015:52

[182] 2002:24.

The suspension of its relation with life is what gives law its power, namely, to establish whether a thing exist or not legally[183], which is to say, what is the form of its sanctionability.

Deductive reasoning in legal decision-making can be used as a paradigm of desemanticisation[184]. Deduction in rule application ('R+F=C', namely 'Rule plus facts yields conclusion') implies that rules apply to facts that can be included into the rule as 'operative facts', namely, facts that are "stated universalistically, that is in a form translatable with the formula 'if ever facts of character F occur'"[185]. The 'F' of the logic of rule application, in other words, does not refer to facts or facticity as such, but rather to facticity turned into 'F', namely, to 'an individual instantiation of the universal category 'F'[186]. This means that 'F' (but the same holds for 'C' too) is always already included in 'R' or better, that 'R+F=C' is the real 'Rule' and not 'R' alone. In other words, in the formula of rule application, 'if F, then C', 'F' doesn't stand for the mere fact ('f') to which the rule still applies, but rather to the universalisable 'character F' of 'f'. Mere facticity is thus included in law through its removal (universalisation). This means, to put it simply, that the *quaestio facti* is always already a *quaestio iuris*.

The logic of the rule application is, therefore, always-already a logic of exceptionality, a logic of inclusive exclusion which desemanticisises 'f', suspending its operativity in order to constitute it as 'F'. It includes 'F' in R by presupposing (excluding) 'f'. In Agamben's own words: "[t]o refer to something, a rule must both presuppose and yet still establish a relation with what is outside relation (the nonrelational)"[187]. 'F' is the sanctionability of 'f' and 'R' stands overall for the fact that life (all possible manifestations of 'f') – is sanctionable. Validity, the fact that law ought to be applied, stands equally for sanctionability so that life ('f') and law ('R') represent each other in and through the *Grundorm* as, respectively, mere or impure sanctionability (life) and pure

---

[183] An invalid act is one which "legally speaking (…) does not exist" (2015:63).

[184] MacCormick considers deductive reasoning the irreducible core of legal reasoning, to the point that, he argues "the elements of legal reasoning that are non-deductive (…) come before and after the deductive part, but always in the end focus on it, and are intelligible by virtue of their relation to it" (2003:ix). As a result he affirms that deduction in law is the expression of formal validity (2003:23). Validity as understood by Kelsen does not necessarily coincides with the structure of logical inference and yet the relation (of validity) between a norm (N1) which is authorised and the norm (N0) which authorises it (Guastini, 2016:403), provides for what can loosely be understood as a deductive argument of the kind 'if N0 then N1'. On Kelsen's own account of legal interpretation see Kelsen (1990).

[185] MacCormick, 2003:x.

[186] Ibid.

[187] 2017:20.

or qualified sanctionability – what Kelsen calls 'the applicability of the legal order'[188] (law). Life, from this perspective, is charged normatively as sanctionable and therefore it becomes normatively relevant as a norm prior to legal rule (as force-of-~~law)~~ insofar as it can be used to define the form of law's applicability.

Sanctionability, in other words, has to be articulated. This requires a self-referential assessment of validity, namely whether there the norm (R+F=C) that appears applicable is created according to the constitution[189] and, therefore, what is its position 'within the framework of the legal order'[190] in relation to other ones, including for example the ones that establish the organ competent to apply it. The 'efficacy' of the norm, its ability to 'prescribe' an how-of-sanctionability is temporary suspended and Kelsen, in this respect, claims that the 'dynamics of the law' "proceeds from the general (abstract) to the individual (concrete)"[191], from *quaestio iuris* to *quaestio facti*, or from *application* of a norm (the one which authorises the decision) and the *creation* of a norm (the decision itself as a creative act which authorises an executive order). It is only theory though (a pure theory) that can articulate these two moments that *de facto* (but this '*factum*' is still theory's fact) are indistinguishable[192]. The decision will always contain, inseparately, law's validity and efficacy, the latter being, for Kelsen, the product of 'the issuance of the order *in concreto*' and of the 'execution of the coercive act' authorised by that order.

The creative moment of the decision, the how-of-sanctionabilty, is, from Kelsen's perspective, impure because – while its purity is given by the fact that it is possible only from within the frame of a higher norm – the way in which this frame is conceptualised within the decision is not pre-determined by the norm and remains discretionary, indeterminate, ambiguous[193]. The creative moment concerns how the judge wants to normatively represent the mere sanctionability of life, how, by introducing it into a framework of pure applicability, he wants to make it efficacious. Life's actual sanctioning, the efficacy of the sanction, rests on an impure act of 'reading' (interpretation) which is accidental (instrumental) but not cause of the validity of the norm

[188] 2005:247.
[189] Ibid:238.
[190] Ibid.
[191] Ibid:237.
[192] The "application of law is at the same time creation of law" (ibid:234).
[193] Kelsen, 1990:128.

itself[194]. And yet, this impurity (Kelsen calls it ‘ambiguity’) stems precisely from the validity of the norm, from its being a pure frame of sanctionability: *since* the decision on validity is limited to an ascertainment on whether the norm “establishes or does not establish the alleged legal obligation”, *it follows* that the decision on *how* the norm does so (efficacy) is left to the *indeterminate* evaluation of the judge[195]. As a result, at the same time, the law constitutes itself as a gapless sanctionability – because “a legal order is always applicable”[196] – and produces a gap to be filled – a “difference between the positive law and desired law”[197]. The *Grundnorm* constitutes a gap between a gapless form of law and a force-of-~~law~~ and produces the injunction to articulate them together: an injuction to charge life normatively in order to apply the law. Logically, applicability is always possible and, for this reason, it has to made possible in and through a decision on life’s sanctionability.

Paradoxically then the form of law’s purity is what produces impurity, life as a force-of-~~law~~. The form of law, the fact that ‘law is always applicable’ is what grounds the ambiguous sanctionability of life, life as such as sanctionable. This ambiguity is reproduced, beyond the judgment, into the ambiguous relation between the validity of the legal order as a whole and its efficacy as a standard of behaviour in society. Here, again efficacy is placed in an accidental (instrumental) but not causal relation with validity, in the sense a legal order is valid not because it is effective but only for as long as it is effective[198]. Efficacy is, therefore, lived life as a force-of-~~law~~, which is to say, a pre-condition or, with Kelsen, ‘minor premise’, of the form of law which, however, must be *necessarily* articulated with it in order to sustain validity because, as Marmor suggests, even for Kelsen a legal order which is not “actually (generally) followed by the relevant population” is not valid either[199]. The *Grundnorm* represents therefore the *contact* of law and life as the threshold through which they constitute each other representatively, that is to say, representing each other as separated and articulable into validity and efficacy. It represents the fiction[200] of indistinguishability of form and force[201] (*forиa*) of a form

[194] In Kelsen’s own words “[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’” (ibid:131).
[195] Ibid.134.
[196] Kelsen, 2005:247.
[197] 1990:133.
[198] 2005:212.
[199] Marmor, 2016:5. Cercel has similarly stressed that for Kelsen “in order to be valid the law has to be effective” (2021:39).
[200] A ‘hypothetical foundation’ (Kelsen, 2002:58).
[201] Guastini speaks of ‘the identification of validity and binding force’ (2016:403).

whose force is that it constitutes itself as a system (ambiguously) separated from life which, through this separation, is charged as a force-of-~~law~~. The *Grundnorm* binds together all norms making them pure against the background of a presupposed impurity (social, psychological, natural life, etc.) which however remains relevant for the law. It is then a *forиa* also in the sense that it makes possible the thinkability of law as an articulation of form and force, validity and efficacy, law and life.

Kelsen's theory is, therefore, analogous to a practice of *sacralisation*, whose fundamental task is not simply the individuation of a pure sphere but rather making possible the articulation of a pure sphere and an impure sphere, the articulation of purity and impurity. The main function of the pure theory is the foundation of a sphere of law's thinkability in which 'application is always possible' on the presupposition of life as a zero-degree of sanctionability, which therefore becomes an administrable force-of-~~law~~, an excess of legal signification. The *Grundnorm* is the paradigm of an exceptional reciprocal grounding of law and life, a threshold in which law and life represent each other as separated and therefore articulable. It is, therefore, the paradigm of a signature of legal thinking which produces the 'enunciative function' of articulating the two divided realms of law and life[202]. The legal order, in other words, is a sphere of two orders or, more precisely, sphere of ordering these orders together. Legal theory is exposed to the endless task of speculating on the possibility to articulate together law and the life that has been separated from it. Impure theories share with the pure theory the same assumption, namely that this articulation is possible, or better, that it cannot be impossible.

(b) Schmitt's theory of legal hermeneutics, which will ground his later work on the state of exception, is laid down in 'Statute and Judgement'. The book shares many of Kelsen's assumptions and goals: specifically, it represents the decision as a form of suspensive self-referentiality but situates this suspension in the 'creative' moment of the decision, whose function is, in a way which is specular to Kelsen's theory (where the function is the conservation, in every decision, of the purity of the form of law), a conservation of a power to decide on the form of law. Decisions here are made to recreate

[202] According to Kelsen, this is reflected in the 'uncritical way' in which "jurisprudence has been entangled in psychology and biology, in ethics and theology" with the consequence that "[T]oday the legal scholar regards almost no specialized field of enquiry as beyond his purview". But that, I would argue, is possible precisely as a consequence of the ambiguous nature of the *Grundnorm*.

the context in which decisions can be made (suspensive self-referentiality), and this, incidentally, produces the validation of a system of norms that pre-exists the decision (Kelsen's aim) whose normative content, however, is suspended in order for the decision to take place. Both Kelsen and Schmitt the function of legal thought is to address the problem of the ambiguous[203] relation between two spheres of law, a form (validity, norm, law, etc.) and a force of law (efficacy, decision, life, etc.). For both, the power to articulate as such cannot be really questioned (i.e. made impossible): in Kelsen, due to the pure applicability of the law; in Schmitt, due to what he calls pure decidability ('pure-being-decided') of the law, the fact that 'deciding is more important than what is decided'[204]. For Kelsen, in other words, the decision (efficacy) is instrumental to the pure applicability of law (validity), while for Schmitt, the application of the norm (validity) is instrumental to the pure-decidability of law (efficacy).

In simple words, for Schmitt a judicial decision is correct if it can be assumed that another modern expertly trained *jurist* would have *decided* in the same way in that particular circumstance[205]. The measure of the decision is, therefore, another decision, which also means that the decision is not pre-validated by a norm and therefore legitimate: rather, it has to legitimate itself, to produce its own determinacy[206] (self-referentiality). More practically, the aim of the decision is the consolidation of a 'shared professional praxis' that would be able to offer some criterion for guiding future legal *adjudication*'[207]. The aim of this though is, for Schmitt, legal adjudication itself, the possibility to decide as such, which is why Schmitt argues that the 'fact that a decision can be taken is more important than the specific content of the decision itself'[208]. What matters is the creation of an effective context in which the function of the judge can be exercised and the creation of a context of stable predictability is, normally, the means to that end. The decision, by always suspending the content of the norm (conformity), creates a context in which decisions are possible, a normal context of decidability. Decidability stands therefore for the self-referential suspension of the semantic context of the existing norm (desemanticisation), which reproduces a context of (social) normality beyond the legal rule, i.e. a social norm. The judge has to represent, in the decision, the normalised social

[203] For an overview of the problem of legal indeterminacy in Schmitt see Salvatore and Croce (2014:143-157).
[204] These is how Castrucci translates Schmitt's expression '*Entschiedensein*' (2016:v).
[205] Schmitt, 2016:93.
[206] Ibid:125.
[207] Ibid:148. Judges might accidentally use deduction as a means to this purpose.
[208] Ibid:88.

context in which future decisions will also be possible. Social life is internalised into the decision, but always as a zero-degree of decidability: the reproduction, in the decision, of a social norm(ality) is functional to the representation of a context in which decisions can be made, which means that the only thing which is really abnormal (impossible) is undecidability. Like for Kelsen 'application is always possible', for Schmitt 'decisions are always possible' and in both case, such possibility rests on the presupposition of a zero-degree of life (of the law).

Crucially, Schmitt's theory of judgement has strong affinities with his later work on the sovereign exception, particularly, his analysis of commissarial and sovereign dictatorships as the two species of the genus 'state of exception'[209]. While for Schmitt the judge, in order to create a context of (normal) decidability is allowed to go against 'the will or the letter of the law' while maintaining the *fictio* of conformity, the dictator is allowed to suspend altogether the application of the law, and therefore to 'deliberate without consultation'[210]. Moreover, the dictator, like the judge, maintains the possibility to decide as his primary task. To be in command during a dictatorship means, in general, 'having to decide'[211] and the only stable content of the decision is, self-referentially, "the fact that a *decision* as such has been made at all"[212]. The dictator is not bound to a content but to decidability as such, to the creation and the preservation of a context of decidability.

The difference between the judge and the dictator, if considered from the perspective of decidability, is not qualitative: it concerns the different degree of threat to the possibility of deciding and therefore the means that, in each instance, the decider is allowed to employ. While the judge is allowed to go against the letter of a particular law, thus producing an exception from within the broader limits of the legal system, the commissarial dictator suspends momentarily the application of the whole constitution ('law-implementing norms') in order to re-establish the conditions needed in order for the same constitution ('legal norm') to be applied again in the future[213]. The function of a commissarial dictatorship is therefore the self-referential creation of "a condition in which the law can be realised"[214] or, in other words, the suspension of the sphere of reference that makes decisions possible. This suspension though, since it is authorised by

[209] Agamben, 2017:194.
[210] Schmitt, 2014:4.
[211] Ibid:13.
[212] Ibid:17.
[213] 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 (2014:118).
[214] Ibid.

the constitution itself[215], is not a suspension of validity. On the other side, sovereign dictatorship is completely unrestrained, and yet while it suspends the validity of the constitution it does not suspend *the idea of validity*. He is still bound to a *Grundnorm* and actually his function is to maintain the possibility of actualisation of a *Grundnorm* beyond any actual constitution. Its scope, in fact is the creation "a state of affairs in which it becomes possible to impose a new constitution", a constitution "that is still to come"[216]. With Agamben, the sovereign decision is "juridically formless (*formlos*), [and yet] it represents a 'minimum of constitution'"[217]: 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.

With sovereign dictatorship, the dialectic between 'law-implementing norms' and constitution which characterises commissarial dictatorship, as well as that between norm and decision which characterises judicial decisions, is replaced by a dialectic between law and not-yet-law, a power that has not become law yet (constituent) and a power that in the end will be law (constituted). Despite their differences these three moments reproduce the same structure so that, it can be argued, in Schmitt the structure of sovereignty is ultimately the structure of legality, and vice-versa. In general, both form of dictatorships – but this applies also to the judicial decision taken from within an existing legal basis – are concerned with the institutionalisation of the presuppositions needed for the application of law, that is to say, social life as "a *normal* condition as a homogeneous medium in which [the law] is valid"[218]. But that the law is valid means ultimately, for Schmitt, that it can be used – together with the life that sustains it as a 'homogeneous medium' – as a means for the maintenance of a pure decidability, which is why Agamben argues that "at issue in [the sovereign] suspension is, once again, the creation of a situation that makes the application of the norm possible"[219]. Life ('the homogeneous medium') is here, like in Kelsen, a zero-degree of law and, specifically, a zero-degree of decidability. The sovereign, as a methodological concept, represents the *contact* between law and life as a 'reciprocal grounding' in which they constitute each other representatively as form and force of law, validity and efficacy.

[215] 'The existing legal basis' (ibid:119).
[216] Ibid:119
[217] Agamben, 2017:194.
[218] Schmitt, 2014:118.
[219] 2017:196.

The sovereign, like the judge, has to both produce and represent that minimum context of efficacy (the homogenous medium) which, even for Kelsen, represents the condition of validity. Like there is no validity without efficacy in Kelsen, and yet efficacy is not the cause of validity, similarly, for Schmitt there is no efficacy without validity – because the sovereign has to create the conditions for a 'constitution to come' – and yet validity is not the cause of efficacy. That is because for the former law is pure applicability (validity or form) whereas for the latter it is pure decidability (efficacy or force). Life as such as decidable is what, in Schmitt, represents the pure sphere of law, which has to be articulated with an impure – because indeterminate and ambiguous – form of law. But both pure applicability and pure decidability presuppose, in general, the power to articulate law and life as the fundamental enunciative function of (legal) though: a power of – methodologically speaking – sacralisation, namely of articulation of purity and impurity.

(c) In order to clarify some point, it is worth considering how central the figure of the 'jurist' is in both Kelsen and Schmitt's reflections. As already mentioned, for Schmitt, 'the cultured jurist' is the measure of the decision, an ideal-type who has both the technical knowledge of a judge and an 'understanding of the common issues of practical life'[220] [Translation mine]. Every decision must be ideally addressed to this jurist. The sovereign, from this perspective, represents the ultimate representation of the figure of the jurist. Both are, in fact, concerned, at different levels with the stabilisation of the relation between law and life. The sovereign decides 'whether the normal situation actually exists' and, more generally, constitutes the 'normal framework of life' which is to say, a space in which legal decisions are possible. Once this place has been (re)constituted the jurist administers it, making of it a space in which decisions can be legitimately taken. By doing this the jurist administers both law and life. To this purpose the jurist gives voice to 'the exigencies that emerge from social reality'[221] [translation mine] insofar as these constitute a means to the calculability of future decisions[222]. The exigencies of social realities are comprised, at the same time, of both juridical and common issues of practical life[223], so that – through the use of ambiguous categories such

[220] Schmitt, 2016:110.
[221] 2016:109.
[222] Ibid:124.
[223] Ibid:109.

as 'modern and concrete juridical life' and 'juridical sensitivity'[224] – Schmitt transposes the technical distinction between *quaestio iuris* and *quaestio facti* from law to society itself. The jurist's 'adequate experience and knowledge of life', as a result, is instrumentalised to the purpose of decidability[225]. This applies to the sovereign too, who in fact is represented by Schmitt as the expression of the life of the community, of homogeneity and *normality*, but only insofar as this provides the substance of a legal framework, that is to say, as pointed out by Fusco, a direction for the application of the law[226]. Both the sovereign and the jurist represent, at two different levels, a threshold of indistinguishability between law and life, which is to say, the possibility of their articulation in and through a decision. It is for this reason then, that when Schmitt becomes 'the jurist of the Nazi regime' he advocates for a 'reform of jurists' that would allow them to "dependably apply the law as it is interpreted by the leader", in order to jointly produce 'the law of a certain people'[227].

Even in Kelsen the figure of the jurist is crucial. Specifically, the *Grundnorm*, in spite of its objectivity, is valid because it is subjectively presupposed as valid by the jurist: it is the *subjective* means through which the jurist is able to make *objective* judgements about the law[228]. The *Grundnorm* can only be 'presupposed as the basic norm'[229], where to presuppose means to *regard* or *consider* in either a psychological or epistemological sense[230]. Green argues that Kelsen's "law is relative to a jurist's presuppositions", and that jurists '*create* their object of knowledge'[231], the law's objective meaning ("a meaning independent of anyone's beliefs and attitudes, including the jurist's own"), a fact which "makes the law, in some sense, subjective"[232]. For Green "Kelsen would be compelled to reduce the law to the beliefs and attitudes of an *individual*—of the person thinking about the law (whom we can call a *jurist*)"[233] to the point that in a world without laws, as long

[224] Ibid:109-110.
[225] Ibid:126.
[226] Normality for Schmitt "presuppos[es] a decisional moment towards the imposition of an order" (2016:143).
[227] Croce & Salvatore, 2014:57-58.
[228] With Kelsen's own words: "The basic norm is presupposed by whoever interprets the subjective meaning of the constitution-creating act, and of the acts created according to the constitution, as the objective meaning of these acts, that is, as objectively valid norm" (2008:205). See also Green, 2016:73.
[229] Kelsen, 2008:203.
[230] Ibid:205.
[231] With Green's own words: "[t]he science of law as cognition of the law, like any cognition, has constitutive character – it 'creates' its object insofar as it comprehends the object as a meaningful whole" (2016:73). See also Kelsen (2008:72).
[232] Green, 2016:73.
[233] Ibid:72.

as there is a jurist, there would still be law because, by presupposing the *Grundorm*, the jurist would still be applying the law in every decision[234]. The *Grundnorm* is the result of an act of 'cognitive creation' that makes the law intelligible as law.

When, in his pure theory, Kelsen argues that the "[a]pplication of law is at the same time creation of law" – he intends that in the (*top-down*) sense that "every legal act is at the same time the application of a higher norm and the creation of a lower norm"[235] by the legal official. Since every judgement has a creative moment, Kelsen even argues that the judge, in applying the law, is like a legislator that makes a statute within the framework of the constitution, so that, qualitatively, there is no difference between judge and legislator[236]. At the same time though, application itself can be understood as a (*bottom-up*) act of 'cognitive creation' of the presupposition of the principle of validity as such. Every act of adjudication is the act of a legal scientist, of a jurist, who is presupposing an unwritten *Grundnorm*[237]. Similarly, the legal theorist, as a jurist, is a law-maker, or in Schmittian terms, a sovereign, in the sense that he creates (by thinking it) the presupposition on which the application of law becomes possible. That is why Schütz argues that the *Grundnorm* is like an exception[238]: it serves exactly the same function played by the sovereign in Schmitt's framework. And, in fact, both the *Grundnorm* and the sovereign are representation of the 'jurist' as a virtual space of indistinction and articulation of the inside and the outside of law (objective and the subjective, validity and efficacy, norm and decision, law and life etc.).

As suggested by Agamben, when it comes to law, "the application of a norm is in no way contained within the norm and cannot be derived from it" [239]. This is the problem of the legal indeterminacy of the norm – or with Benjamin, of the ambiguity of law – that both Kelsen and Schmitt[240] articulate in and through what, can at this point be defined,

---

[234] Kelsen provides the radical example of the judge in Plato's Republic:
"[I]n Plato's ideal state, in which judges may decide all cases entirely at their discretion, unhampered by any general norms issued by a legislator, every decision is, nevertheless, an application of the general norm that determines under what conditions an individual is authorized to act as a judge. Only on the basis of this norm he can be considered as a judge of the ideal state; only then can his decision, as having been reached within the ideal state, be attributed to this state" (Kelsen, 2008:235).
[235] Ibid:234.
[236] 1990:131.
[237] Green speaks of the jurist as a 'legal scientist', "the person cognizing the law—who need not be a participant in any legal practices at all" (2016:66).
[238] 2008:123.
[239] And he adds: "otherwise, there would have been no need to create the grand edifice of trial law" (ibid:200).
[240] The decision, for Schmitt – but that is ultimately true for Kelsen as well (2005:247-248) – might even be 'contrary to the literal wording of a statutory disposition' (2016:148) [translated by me].

their theory of the jurist. Agamben's analogy between law and language is particularly instructive at this point. In his own words:

> "the passage from *langue* to *parole*, or from the semiotic to the semantic, is not a logical operation at all; rather, it always entails a practical activity, that is, the assumption of *langue* by one or more speaking subjects and the implementation of that complex apparatus that Benveniste defined as the *enunciative function*, which logicians often tend to undervalue. In the case of the juridical norm, reference to the concrete case entails a 'trial' that always involves a plurality of subjects and ultimately culminates in the pronunciation of a sentence, that is, an enunciation whose operative reference to reality is guaranteed by the institutional powers"[241].

Both Kelsen's and Schmitt's theories, from this perspective, represent an attempt at articulating an 'enunciative function' – which involves a 'plurality of subjects', namely jurists (including not only judges, but also legal theorists and, ultimately whoever thinks as a jurist) – and that would make the passage between *langue* and *parole*, form and force of law, possible. The jurist, for both Kelsen and Schmitt, becomes the paradigm of law's signature of exceptionality, of the possibility to think law and life thorough an inclusive-exclusive articulation. Notions such as *Grundnorm* or sovereign stand, from a methodological point of view, for very practice of articulation that allow the theorist to think. But this turns theory itself into a kind of decision-making, or better, into a form of thought whose task is to make decisions possible. To be a jurist means, according to Agamben's interpretation of Schmitt's juristic practice, to be "a vehicle and an interpreter of the constituting power of a people of which [the jurist] is a part"[242]. In methodological terms this constituting power is life itself, as the zero-degree of law that the jurist has to include into law through an exceptional articulation. Whether the result of this operation is called *Grundnorm*, sovereign or, to mention a different (but methodologically similar) solution, a 'living law', what matters is that all these hypotheses are paradigms of the enunciative function of the jurist as a signature of exceptionality.

Taking Kelsen's *Grundorm* as a modern paradigm of this signature, the entire history of legal thought (including the tradition before Kelsen) can be investigated anew

---

[241] 2017:199.

[242] 2017c:458.

as the history of an ambiguous articulation of law and life. The point from this perspective is not to establish who, among these jurists, is *right*, but rather to appreciate that these authors *exist*, and that their thought is possible in the form of an articulation.

The Living Law

The potentiality of law – its exceptionality – as the capacity to maintain itself in relation with an exteriority, is generally exemplified in the way in which theorists themselves think about it as, precisely, the medium of articulation of inside and outside. It is worth considering in this respect, in what terms Eugen Ehrlich, a peer of both Kelsen and Schmitt, and founder of modern sociology of law, was able to formulate a theory of the living law as, precisely, a law outside the law. This attempt triggered a debate between Ehrlich and Kelsen and the way in which this debate has been recently re-interpreted by some commentators[243] is particularly instructive of the issue of exceptionality, as discussed so far. The focus here will not be on the debate – still untranslated in English and consisting in a critical review by Kelsen of Ehrlich's book on the Fundamental Principle of Sociology of Law, a counter-reply by Ehrlich and a final one by Kelsen – but rather on why modern commentators tend generally to agree that Kelsen's arguments were more convincing.

The issue at stake was mainly to determine whether or not a *science of law* should be focused on the study of social reality. Ehrlich's position, which created the conditions for the debate, is that the only way to study law scientifically is by focusing on the relation between law and society. To this purpose, he speaks of 'legal life' as "that which lives and is operative in human society as law" and, accordingly, distinguishes firmly between 'rules of human conduct' and 'rules according to which men *ought to* regulate their conduct'[244], or better, 'rules according to which courts render their decisions', with the former being the object of his pure science.[245] The dominant juristic practice fails to maintain this distinction, so that both historical and natural schools of law have, according to Ehrlich, "blindly accepted as law what the state declared to be law" and are merely concerned with establishing which law should be considered "binding upon the judge".

[243] Including, among others, Carrino (1993), Konzen & Bordini (2019), van Klink (2009), Likhovski (2009).
[244] Ehrlich, 2017:8-11.
[245] Ibid:11.

For Ehrlich this is a consequence of 'the concept of purpose', an instrumental logic or structure, which dominates human thinking in general and therefore also the juristic science. In that context, law is ultimately defined by the practical purposes of the State so that non-state law is thought and considered only in order to ground a decision on its potential (state-)legal status.

Ehrlich does not question the instrumental logic per-se, but rather displaces it into society itself. Here the living law of human associations produces order spontaneously so that it can be argued that the law has indeed a purpose (a 'main function') which is not (only) decision-making but, more generally, ordering, i.e. "to create order in and between associations within society" [246]. That the order is spontaneous means that it just *is*, that it *is* something that can be observed as self-evidently legal even in the absence of any prior formal legal recognition. Carrino argues therefore that Erhlich's sociology is presented as dealing with law as it is ("il diritto che è) in contrast to philosophy of law, which deals with law as it ought to be ("come deve essere")[247], or better, which essentialises the law as an ought. The State is therefore only of one many orders which also emerges spontaneously from the union of different 'genetic associations' such as 'clans, families, house communities, and tribes'[248]. Every social group has, from this perspective, its own 'living law', an 'inner order' that constitutes it as an association, regardless of whether this order is recognised or not by formal law. Only to an 'observer from the outside', according to Ehrlich, similarities among different orders "might appear to constitute a common law of the nation", as in the case of Tacitus with the ancient Germans[249].

Ehrlich too, one could argue, acts here as an 'observer from the outside' who makes generalisations about certain highly differentiated groups, so as to produce a common law not of the nation but of society (as order). To this purpose Ehrlich re-systematises the socio-legal order splitting it into two distinct spheres: 'legal propositions' – 'the arbitrary universally binding expression of a legal prescript in a statute or a law book' – and 'living law' – 'the inner legal norms of social associations' – and further specifies that the former constitutes only "an infinitesimal part of the legal

[246] Van Klink, 2009:128
[247] Carrino, 1993:4.
[248] Ehrlich, 2017:27.
[249] Ibid:32.

order". Legal norms, in turn, represent rules that any given human association develops from the so-called 'facts of law'[250].

It is worth suggesting that Ehrlich's schematisation of these 'facts of law', which he divides into "usage, relations of domination or possession, and a declaration of will" is very similar to Gaius abstract tripartition of Roman law into persons, things and actions (*de personis*, *de rebus*, *de actionibus*), a scheme which also had an influence on the description of society developed few years before Ehrlich published his book by Jhering, another leading figure of the sociological movement in Europe. Kelley, crucially, has stressed that for the Romans this classification entailed "a characteristic mode of perceiving, of construing, and potentially of controlling the social field" – the "metaphysical (or metanomical) foundation[s] of Roman social thought"[251] – which ended up 'permeating' also 'modern social and legal thinking'[252], to the point that it is possible to argue that "European social theory had its origins in legal scholarship"[253]. The point here is that the historically consolidated form of law is what allowed sociologists to conceptualise the social order. The process of formation of a concept of the social order presupposes a juridified understanding of the world (as society), the juridification of our experience of the world as, precisely, a space that has to be ordered (a socio-legal order). This is, implicitly, one of the main points of Kelley's "historiographical tradition of 'nomical' science". In his own words, in fact:

> "(…) the primary vehicle of Nomos is the grand tradition of Western jurisprudence, which (like natural philosophy but in many ways independent of it) is rooted in Greek consciousness and was formalized and canonized by the Romans, elaborated along different lines by European interpreters and adapters, and—through a complex process of sublimation and increasingly liberating and even destructive criticism— transmuted into recognizably "modern" sciences of society and culture"[254].

[250] "The inner order of the associations is determined by legal norms. Legal norms must not be confused with legal propositions. The legal proposition is the precise, universally binding formulation of the legal precept in a book of statutes or in a law book. The legal norm is the legal command, reduced to practice, as it obtains in a definite association, perhaps of very small size, even without any formulation in words" (Ibid:38).
[251] Ibid.
[252] Kelley, 1990:49.
[253] Scheppele, 1994:385.
[254] Kelley, 1990:2.

Humanity as such, from this perspective, is to be understood "in terms not of a primordial physical or socio-biological existence but of its own self-created 'second nature'"[255]. The fundamental legal (and thus sociological) performance (which is ultimately also a fundamental performance of *human* thought) is the production of a 'second nature'. The nomic function of thought is, from Kelley's perspective, to provide for a bridge between what are thought as respectively 'first' and 'second' nature, *physis* and *nomos*. For Kelley, moreover, the articulation of these two natures can be represented as an articulation of 'is' and 'ought', the possibility to have "the way things are being construed in one form or another as the way things ought to be"[256].

As pointed out by van Klink, this is precisely the ground of Kelsen's criticism of Ehrlich, namely that in order to understand regularities within a social context as legal norms, one has to presuppose an 'ought' form which is provided, in its most clear representation, by the legal proposition. The legal proposition embodies a *normative* logic, which anticipates ("logically, not temporarily"[257]), as its fundamental presupposition, every attempt to project 'legal meaning' on a certain factual situation[258], i.e. every attempt to think the world legally. Ehrlich fails precisely to recognise this when he speaks of the legal norm as something merely observable in its reality, something that just *is* in society, without any formal validation that validates that it 'ought-to-be' a norm. The mere repetition of a usage for Kelsen denotes only a factual regularity and, in order to claim that that it constitutes a legal norm, one has to presuppose an ought-form provided by a legal proposition. The production of uniformity through the application of the principle 'treat like case alike' implies not only the actual repetition of the same phenomenon, but also that this repetition is treated as a *fact* of the law, that is to say, as something that ought to be in consideration of a legal proposition that validates it.

Ehrlich calls this assimilation of similar cases the 'law of stability' of norms of decisions, but it can be suggested that the rule of conduct or legal norm, in his analysis, performs exactly the same function: it articulates a fact of law to a legally binding representation, the '*is*' and the '*ought*'. A social association, in fact, is "a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding"[259], that is to say, as 'social facts' and yet these facts, insofar as they are

---

[255] Ibid.
[256] Ibid:3.
[257] Ibid:131
[258] "A fact only acquires an objective value if confronted with a norm" (van Klink, 2009:132).
[259] Ehrlich, 2017:39.

binding, constitute '*norms*' in an abstract sense which reproduces the logic of the legal proposition:"[a]s to form and content, they are norms, abstract commands and prohibitions, concerning the social life within the association and directed to the members of the association"[260].

Legal norms are for the facts of law what legal propositions are for legal norms, that is to say, the representation of their ought-form, their second nature. They have the same uniforming *function* and, in this respect, it should be noticed that Ehrlich ends up arguing that "the social norms which prevail in these communities are nothing more than the *universally valid* precipitate of the claims which the latter make upon the individual"[261]. More specifically, they produce uniformity in the form of 'conformation'[262] as a particular form of coercion that resembles the one produced by norms of decisions.

Ehrlich has to presuppose the 'ought-form' of law but, in any case, according to Kelsen, he also fails to explain why the legal norms that ought to be considered legal for sociological jurisprudence are actually legal and not, for example, moral. To this purpose, it should be stressed that most of the examples Ehrlich provides comes from customs that were binding in society *before* they ultimately consolidated into a set of legal propositions. To this purpose, it could be argued that his remarks about the existence of legal norms beyond the legal proposition are possible from within a horizon of thinkability of the law which is already dominated by the legal proposition, by the legal form as the paradigm of law. In order to articulate his argument, he has therefore to use the legal proposition as a point of reference. For example, while talking about the inner nature of private law, Ehrlich further argues that there "the law of things and contract and the order of the family serve the same purpose that is accomplished elsewhere by a constitution or by articles of association"[263]. Most importantly, in Ehrlich's analysis state and society (including its most nuclear form, i.e. the family) seem to mirror each other conceptually as two orders of coercion:

> "[a] man therefore conducts himself according to law, chiefly because this is made imperative by his social relations. In this respect the legal norm does not differ from the other norms. The state is not the only association that exercises coercion; there

[260] Ibid.
[261] Ibid:63.
[262] Ibid.

[263] Ibid:54.

> is an untold number of associations in society that exercise it much more forcibly than the state. One of the most vigorous of these associations is the family"[264].

Ehrlich's historical account of his own sociology actually seems to suggest that the social and legal order of the State become, at some point, indistinguishable. This becomes evident in particular when Ehrlich criticises Marx's conception of the state: contrary to what Marx argues, for Ehrlich an analysis of the very limited extension of application (with respect to the overall population) of the coercive measures of the state, shows that "there is no need for any exertion on the part of the state to subdue the great mass of the people"[265] because ultimately the order of the state and the order of the people are one and the same thing; in his own words, the people "submit to the legal order willingly because they realize that the legal order is their order, the order of the economic and social associations, of which each one of them is a member". The sociological account of the modern State provides for what Agamben would call the inclusion of membership. This conflation of state and society into a socio-legal order, moreover, has a fatalistic connotation (in Benjamin's sense), which is reflected in Ehrlich's argument that "for the moment, there is no other order available [than the State's] that could do more, or even as much, not only for those who have, but also for those who have not".

As already anticipated, the main problem of Ehrlich's approach is that, with Carrino, he fails to recognise that "modernity is precisely the domain/dominion of abstract over concrete, of forms over life"[266] [my translation]. With 'modernity' Carlino refers to a time in which the conceptual framework of the State has become predominant and with it also the idea of a "form [that] coerces into its powerful network a considerable portion of reality"[267] [my translation]. Kelsen's formalism then is effective because it "really (...) coincides with modern State's proper dimension, more and more form an abstractness" [my translation][268]. It accounts for what Carrino further calls – with a formula which reminds Agamben's own formula of the law as an 'empty form in force without signification' – a 'vuotezza espansiva del diritto', 'expansive emptyness of the law', which makes it possible to "include all possible material contents of norms into the

[264] Ibid:64.
[265] Ibid:76.
[266] 1993:6.
[267] Ibid:12.
[268] Ibid.

law-form, which is the State-form"[269] [my translation]. A form which, in its most radical manifestation, can be represented, with Agamben, as a pure form in force without significance. It should be also observed 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: this does not make that logic less logical, it makes of it a *historical apriori*, a paradigm for the study of the historical unfolding of the legal experience.

Ehrlich's account of the legal order as including not only rules of decisions embodied by legal propositions but also the legal norms of associations is, in itself, a reversed expression of that 'vuotezza espansiva del diritto' which characterises what legal positivists call the defeasible universality of legal rule, which admits precisely the incorporation of extra-legal norms and values into the rule. Legal norms, as understood by Ehrlich, constitute a fundamental interpretative tool that legal officials use when apply the legal proposition beyond the limits of its content and the social order is a specular representation of the legal order, the legal form looked at from the perspective of society. That is why, for example, it has been suggested ultimately there is no real contradiction between Kelsen and Ehrlich and, more precisely, that "Ehrlich's sociology of law, in its present state, already fully complies with Kelsen's demands"[270]. The socio-legal scholar, from this perspective, is a *jurist* in both Schmitt and Kelsen's terms and concurs to the re-definition of the potentiality of law to apply, to become the object of a decision. Sociology of law concurs to the definition of what Agamben calls, in general terms, 'the enunciative function' of the law, that which makes the passage between rule and application possible.

The very existence of a theory of the living law is, in itself, a manifestation of the centripetal force of the form of law. The fact that Ehrlich, at the beginning of the 20th century, came to think the law as 'living' beyond its juristic form is, in itself, paradigmatic of a form (of both law and thought) that had already begun to develop the biopolitical features denounced by a Foucaultian critique of the law-norm nexus. Similarly, the very fact that it is thought by Ehrlich as both an *is* and *ought* is an expression of the modern process of indistinguishability of fact and right, being and having-to-be denounced by

[269] Ibid:12.
[270] Van Klink, 2009:147.

Agamben in his reflection on law's exceptionality. The living law is, from this perspective, a particular manifestation of power, of a force-of-~~law~~ that aspires to maintain itself in relation with an ought-form of law. When van Klink argues that the living law "distinguishes itself from other trends by being powerful enough to assert itself at the expense of the others"[271] he might be re-interpreted as suggesting that the living law has the force to constitute itself as a form in its own terms – the transposition of the idea of form from law to society, i.e. the social order: living law as a a force-of-~~law~~ that desires the form of law: a *forиa*, the attempt to articulate together force and form (of law). To be 'powerful enough' in a context in which the form of law is, as Carrino suggests, the most powerful, means to be a force-of-~~law~~ that desires its form (either logical or propositional).

It is not by chance then that, as Van Klink has observed, the 'living law', as a concept, can play (and in fact played) a fundamental role, especially through anthropological jurisprudence[272], in the so-called "*rhetorical-political* sphere, where it may elicit powerful pleas for the recognition of norms that have originated in society, independently of the state"[273]. Sociology of law, from this perspective, becomes a means to the ends of law as well as an end for legal means[274] and, in this sense, it partakes to the logic of instrumentality criticised by Benjamin in his *Kritik*. The self-referential production of a form of law and, therefore, of a mechanism that make decisions possible – i.e. a rule of decision – is also what produces a living law, a rule of conduct. Or, vice-versa, the self-referential organisation of society into a form of ordering, is what produces the force of a legal proposition. The two movements are bound by a dialectical oscillation and one of the possible tasks of critique is to expose it.

[271] Ibid:146.
[272] Van Klink mentions also the case of von Benda-Beckham in Indonesia.
[273] Ibid: 2009:153.
[274] Carrino makes a very similar argument when he argues, with Rehbinder, that for Ehrlich "la ricerca empirica della vita giuridica deve servire alla ricerca delle sue leggi immanenti 'nel presente', fino a farsi 'moderna teoria del diritto' che possa essere d'ausilio per una politica del diritto" (1993:3). For this very reason. Van Klink, along these lines, has suggested that Ehrlich's sociology falls within the tradition of natural law (2009:144). Here though ought and is of the law are made indistinguishable: with Ehrlich, in order to be just, a legal proposition must "advance the human race in the direction of its future development" (2017:204), it must become *itself*, that is to say, something that it already is.

Threshold (or 'Factum Loquendi, Factum Pluralitatis')

Agamben's theory of exceptionality, coherently with Benjamin's reflections on law, language and communicability, concerns the attempt to think, and therefore to *experience*, the so-called 'event of language', 'the fact that there is language', through the study of law. Paradigms of exceptionality in law are, more generally, paradigms of a signature of language as such, which functions as an exceptional device in and through which man becomes human, that is to say, makes the (anthropogenetic) experience of his own historicity. For Benjamin, in fact, "the range of life must be determined by the standpoint of history rather than that of nature", and [t]he philosopher's task consists in comprehending all of natural life through the more encompassing life of history"[1]. Along the same lines, Agamben has spoken of man as "the living being that has access to its nature only through history"[2]. Man's history, including the history of his laws, is at the same time, the history of his nature as that which, in and through history (and law) has been presupposed. The history of this presupposition (ex-ceptio) is the *anthropogenesis* of man, the becoming human of man. The study of such history is the *experiment* through which the student makes an anthropogenetic experience.

The primary aim of a theory of exceptionality is, therefore, to provide the tools to make in and through *writing* (and *reading*) this anthropogenetic experience. Agamben's theory provides the tools to make what he calls an *experimentum linguae*, that is to say, the experience of anthropogenesis provided by the study of language as an exceptional device. More concretely, he suggests that exceptionality as a form of inclusive exclusion (from '*ex-capere*') is 'constitutively connected' to the linguistic experience in and through which man recognises himself as human[3]. This mechanism, quite simplistically, implies that "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"[4]. This exceptional procedure produces therefore a *presupposition* namely, something which "is divided, excluded, and pushed to the bottom, and precisely through this exclusion (…) is included as *archè* and foundation"[5].

---

[1] 2004:255.
[2] 2018c:14.
[3] 2017:1266.
[4] Ibid.
[5] Ibid.

Ontology itself represent a form of *sovereign* – in the sense of foundational – exception insofar as it is, precisely, an onto-logy "the fact that being [on] is said and that saying [logos] refers to being"[6]. Ontology thus represents this condition through the *ambiguous* category of *prote ousia*, which stands, at the same time, for a singularity and a '*substantia*', namely that which "lies under predication"[7]. Singularities are therefore turned into what Agamben calls 'primal and simple elements' that have "no defining discourse but only name": the name speak of and on these elements, but is *unable* to assert or express them, to give them a defining discourse and, in this sense, it makes of them the presupposition of every discourse[8]. Language constitutes being as its presupposition or, with Agamben, as the *factum loquendi*.

The whole history of western thought, from this perspective, becomes intelligible as Western civilisation's '*decision* to understand'[9] the fact that language exists, and humans speak – 'the *factum loquendi*' – as a process of desemanticisation that begins from a singularity, turns it into a *substantia*, the substratum of language, and then develops into, first, names (*onoma*) that are used in a discourse (*logos*) and ends, with modern linguistics, with the idea of an abstract self-referential system of signs, a *langue*, that represents the presupposition or *potentiality* of every *actual* discourse (*parole*). With Agamben, "[t]he ontological movement of the presupposition corresponds to the articulation of linguistic signification on two distinct levels"[10], *langue* as presupposition of *parole* and, in fact, the very term 'articulation' has its first paradigmatic manifestation in Artistotle's theory of signification as re-interpreted by Medieval grammarians: human voice here is considered *vox articulata* (*enarthros*) by means of letters, *grammata*, that is to say, produced through an inclusive-exclusion of a bare animal voice[11]. The anthropogenesis becomes intelligible, through the tools provided by philosophy, as an articulation of language that, at the same time, represents the removal of a bare voice and the presupposition, in every speech, of an abstract, self-referentially organised *langue*[12].

This articulation constitutes, methodologically speaking, a signature, an enunciative function that represents the very fact of the co-implication of man and

---

[6] Agamben, 2018c:4.
[7] Ibid:5.
[8] Agamben, 1999:69.
[9] Agamben 2018c:7.
[10] Ibid:9.
[11] Ibid:19.
[12] For a comprehensive overview of Agamben's account of language, including the issues of voice and self-referentiality, see Doussan (2013:5-46)

language, as well as the possibility of displacing this logic, beyond ontology and linguistics, into different discursive fields, such as law, politics, sociology, anthropology, etc. This displacement is *analogical*, in the sense that it consists in studying how this logic repeats itself into different domains through paradigmatic figures of exceptionality. Along these lines, Abbot has spoken of Agamben's work as a 'political ontology' that allows to think "our political situation in terms of its metaphysical heritage, working from the premise that the blindness before the ontological question characteristic of metaphysics has real consequences for ontic politics"[13]. In line with Heidegger's famous distinction, ontic here refers to the multiple ways in which we make concretely sense of the fact of 'being-in-the-world', our attempt to essentialise the fact of existence by representing it. Various domains of knowledge, including law, can therefore investigated as 'ontical sciences' that, like ontology and linguistics, have to *represent* their own condition of possibility through what Heidegger calls 'objectifying of whatever is', or with Abbot, in "the setting up of the world as representable"[14]. The 'representational paradigm' is always 'linguistically constituted'[15] and thus the ontical sciences constitute historical manifestations of language which, in general, provides for what Heidegger calls an 'equipmental context', a pre-understanding. Specifically, considering that historically language's experience has consolidated as 'instrumentalist/designative'[16], ontical sciences provide for particular forms of intstrumentality of language.

This view which is specular to Benjamin's critique of the instrumentality of language, is criticised by Heidegger for the same reasons provided by Benjamin: namely, that it fails to account for the fact that prior to any communication language communicates itself, its own communicability or, with Abbott, its own materiality, to be experienced as, precisely, the breakdown of its instrumental function[17]. Agamben's methodology of study, similarly, is the attempt to discloses language's communicability through a breakdown of its instrumental function, which is achieved, crucially, by breaking-it-down, that is to say, by exhibiting it without, at the same time, performing or reproducing it. Law, as a priviledged ontical field, is therefore investigated on these premises. To this purpose, it should be noted that '*experimentum linguae*' is both personal – it concerns directly the one who writes and reads – and impersonal – it concerns an

[13] 2014:16
[14] Ibid:165.
[15] Ibid:41.
[16] Ibid:47.
[17] Ibid:50.

impersonal community of writers and readers[18]. The anthropogenetic experiment rests on two related questions: "what it means that *I* speak?" (personal) and "what it means that there is language" (impersonal)[19]. In order for me to speak, however, I have to become a speaking subject which means that I have to enter (or be captured by) a language that pre-exists me and, in this sense, the *experimentum linguae* can only made on that threshold in which the (psychological) subject disappears into the realm of impersonality. The experiment consists in entering the enunciative function that defines the limits of communicability of a certain community of speakers, such as, when it comes to law, that of so-called 'jurists'. Agamben has stressed that '*factum loquendi*', "the simple fact that human beings speak and understand each other" is always also a '*factum pluralitatis*', "the simple fact that human beings form a community"[20] and the signature of exceptionality describes the way in which these two *facta* have been historically articulated into a particular language and a particular community[21].

From this point of view, the study of exceptionality does not provide for a theory of law but, only, eventually, for a reflection on what it means to be a jurist, namely, on the fact that law is made communicable within a certain community of speakers whose limits, temporal and spatial, are to be drawn by the inquiry itself. The presupposition of law, like the presupposition of language, is, from a methodological point of view, not an unnameable thing (a transcendental justice or being), but rather communicability itself, the very possibility for a community of speakers, to understand each other. This possibility is not investigated for its own sake but only insofar as it displays an anthropogenetic character so that, ultimately, the communicability that brings together a community of jurists – i.e. the presupposition on which jurists communicate and exchange legal meanings – is the fact that human beings, at large, form communities and speak. Communication, within a community of jurists, presupposes the *factum loquendi* and *the factum pluralitatis* as such.

It has been observed, in this respect, that the tradition of *western* thought, places a particular emphasis on the role of law, as a language, in the production of sociality at large: Supiot calls this operation, precisely, 'the anthropological function of the law', and

[18] For a similar argument see Kishik, 2012:108.

[19] In Agamben's own words: "In both my written and unwritten books, I have stubbornly pursued only one train of thought: what is the meaning of 'there is language'; what is the meaning of 'I speak'?" (1993:5).

[20] 2000:65.

[21] LeBrun speaks therefore of a 'communal anthropogenesis' (2017).

describes it, with Arendt's words, as the capacity to "guarantee the pre-existence of a common world"[22]. Similarly, Kelley argues that jurisprudence, understood as both a theory and a practical endeavour, has been, in the history of the west, fundamental for the understanding and administration of the human *social* condition and, more specifically, for the development of social thought and theory[23]. To a certain extent, it might be argued, the historical articulation of the '*factum pluralitatis*' in general (and not only of particular communities of speakers) has, at least in the western tradition, the form of a legal articulation. To be a jurist, from this perspective, means to think the *factum pluralitatis* through an articulation.

It has already been suggested that the *factum loquendi* is presupposed in and through a historically determinable process of self-referential formation of language. The analogy between law and language can therefore be used to address the process of formation both law and society as a self-referential process. In other words, the attempt, in and through law, to articulate the *factum pluralitatis* is structurally analogous to the attempt to articulate the *factum loquendi* into some kind of potential grammar, "a unitary system with describable characteristics that could be called language"[24]. Similarly Goodrich has suggested that 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[25] and, more generally, that it is theoretically possible to analyse law "as a specific stratification or 'register' of an actually existent language system"[26]. Supiot, similarly, emphasises the relevance that the legal notion of system of rules (a '*corpus juris*') "exercise[s] (…) on [w]estern thought" in general[27]. To him, the (legal) idea of a system of universally applicable rules provided with an internal order that defines the way in which each rule relate to the system as a whole ('the relativity of rules') "continues to pervade our ways of thinking about the human being and society" and is reflected, for example, into some of the most fundamental (and often competing) paradigms of the social sciences, such as market, field, network, autopoiesis and so

[22] The law according to this view would provide for "reality of some continuity which transcends the individual life span of each generation, absorbs all new origins and is nourished by them" (2007:58).
[23] 1990.
[24] Agamben, 2000:65.
[25] 1990:11-12.
[26] Ibid:1.
[27] 2007:60.

forth[28]. Until a certain point in the history of western thought these two systems were perceived as one system[29], but it is at least since Kelsen that the two systems bifurcated thus shaping the enunciative function of the jurist as one of articulating the two separated spheres of law and society. The law becomes one system among many other systems and what remains is the search, beyond law, for what Lévi-Strauss calls an 'order of orders' which would provide for some kind of infra-systemic homogeneity and, specifically, for an "abstract expression of the interrelationships between the levels to which structural analysis can be applied" [30]. In this sense, a pseudo-juridical mode of thinking is maintained even after the law loses its grasp on reality as a whole.

Society, as a representation of the *factum pluralitatis*, becomes with modernity a presupposition of law, in the same way in which for centuries nature was represented as a presupposition of society (as law). This brings about an understanding of society itself as a naturalised social reality, in the sense of constituted as a direct expression of man's biological nature which remains somehow presupposed in every social construct and yet provided with a form by social theory itself[31]. This however is, in itself, a manifestation of a very ancient problem, namely the fact that, as already mentioned, the process of language's self-referential desemanticisation produces, at the same time, the removal and presupposition of a bare voice, a natural zero-degree of language which, as suggested by Agamben, becomes in the politico-juridical tradition a 'bare life', a zero-degree of sociality. In his own words:

> "[j]ust as the natural life of man is included in politics through its very exclusion in the form of bare life, so human language (which, after all, according to Aristotle, founds the political community [*Politics* 1253a18]) takes place through an exclusion-inclusion of the 'bare voice' (…) in the logos. In this way, history takes root in nature, the exosomatic tradition in the endosomatic tradition, and the political community in the natural community"[32].

---

[28] Ibid:60-77.

[29] Law, in Arendt's words, used to grant the 'pre-existence of a common world'. A historical perspective on social theory, for example, suggests that medieval jurisprudence, the civil science or civil wisdom, constitutes the "infancy of modern European social thought" (Kelley, 1990:113).

[30] 1963:333.

[31] An example of this is Searle's constructionism (2010).

[32] 2018c:19.

The anthropogenesis can be experienced, at the same time, as an exceptional process of both exosomatic self-reflexivity (of law and language) and endosomatic grounding, in the sense that the production of a form (of law and language) consists, at the same time, in the production of a pseudo-natural zero-degree of form, a force of law, society, etc. Lewis has thus spoken of anthropogenesis as a machine "that perpetuates the production of humankind by ceaselessly dividing life"[33] and similarly, Whyte of "a political operation that has always been bound to processes of dehumanization"[34]. Agamben's move, in other words, is to develop a historico-philosophical inquiry which re-considers the western tradition as field in which the fact that there is language has been presupposed as a thing, an unnamed *archē*, thus producing a series of 'mythologemes of origination' in which something is *originated*, that is to say, produced as the ground (force) of what is meant to come after it (man, language, society, law, etc.) and, in this sense, also removed in order for what comes after (form) to come self-referentially about. This operation, in itself, is the expression of the fact that there is language, the expression of a general *communicability* that is always already articulated into two spheres (bare and political life, voice and language, force and form, etc.). The jurist represents therefore an enunciative function that in both the modern and the ancient world decides on the relation between these two spheres.

In what follows I will therefore discuss three examples of *sacralisation*, understood methodologically as the constitution of a zero-degree of thinkability of society in terms of appropriation (*res nullius*), labour (use of body) and subject (guilt).

Then I will consider sacralisation from the perspective of the theory of performativity of language. The ambiguity of the so-called *leges sacratae*, *both* law and oath, depends from the fact that the law as such represents a *performance* which, like the oath, produces self-referentially its own efficacy, the space in which law is in force. It is possible to speak of this force as a 'legal mana', an empty signifier (form) which produces an excess of signification which grounds (a function of) sociality on the possibility to articulate together inside and outside of society. Agamben's analysis of language, however, will be shown to provide an ethical understanding of the experience of language's performativity which consists in considering language and the world as *co-*

[33] 2020:96.
[34] 2013:74.

originated. This (ethical) experience, which is the experience of a generic potentiality or communicability, however is *technicalised* and *organised* into a sacrament of power.

This procedure of organisation is observed in terms of the relation that law historically establishes with nature. The focus will be in particular on the shift from the roman experience of nature as included into law to the medieval experience of law as included into nature: from legalisation of nature to naturalisation of law. In both instances, this movement produces a process of abstraction, the constitution of a form of law. In medieval times in particular it is nature itself that will be split into *naturans* and *naturata*, form and force and my suggestion is that this division can be studied (in the present) to make intelligible (anew) a series of biopolitical paradigms of management of the *factum pluralitatis*.

Zero-Degree(s)

Zartaloudis has described the anthropogenesis, as manifested in the politico-juridical tradition, as a 'sacrificial mythologeme of origination', provided with the following dipolar structure: a "negative metaphysics of power and of law [that] presuppose[s] a founding Power that is absolute, outside and simple, which reproduces not only the myth of a self-referential origin of power and of law, but also a form of life devoid of life (bare life)"[35]. The idea of a political community that has law has therefore been thought by tradition (and this act of thinking is, in itself, anthropogenetic) by means of an 'architectonics' or 'structure' whose form is represented by Zartaloudis in terms of a 'Power of power', a 'Law of law' and, ultimately, a '(bare) Life of life'[36]. The hypothesis here is, in other words, that the politico-juridical tradition, considered as a whole, displays an inclination to represent the fact of 'the institutional integration of life' – 'the problem of the relation between law and life' – through what might be interpreted as a presupposition of life which is performed by founding power and law on their own self-referentiality. The sacrifice of life, its removal or presupposition, coincides with the operation through which law and power found themselves self-referentially. Bare life, a life devoid of life, is therefore the remainder of the mechanism of self-referentiality of

[35] Ibid:4
[36] Ibid.

law and power, the excluded ground of self-referentiality which provides it with an excess of signification that can be used to provide a *coherent* representation of the world. From the perspective of a theory of exceptionality then, *sacralisation*, namely the production of a bare life (a 'life devoid of life') and systematisation, namely the production of self-referentiality among rules (Supiot's 'relativity of law'), can be considered as related operations.

Below three examples – (a), (b) and (c) – of this *sacrificial self-refentiality* in the (pre-modern) juridical sphere will be explored as, precisely, paradigms of anthropogenesis, namely of the articulation of the *factum pluralitatis* by legal means. Sociality and some of its (still today) most fundamental categories (including property, labour and imputability) are produced through a process of legal desemanticisation (form) that, at the same time, gives a pseudo-natural (zero-degree of) force (i.e. sacrificial) to that which it formalises.

(a) The distinction, in Roman law, between *res* and *res nullius*

Given the importance that the category *res* has for the history of social thought[37], the case of *res nullius* can be treated as paradigmatic of a broader process of juridification which has interested the (western) experience of the world. Thomas has suggested that the juridical constitution of things through the category of *res* (*nullius*) is, for the Romans, constitutive of the social sphere itself and, more specifically, that through the category of *res nullius* things are 'juridically constituted' as 'goods that belong regularly and immediately to a social sphere of appropriation and exchange"[38] [my translation]. Through the legal category of *res nullius*, law's sphere of reference becomes the social sphere which, in turn, is turned into an abstract space of formal (legal) procedures that define the price of things, i.e. a market[39]. The word 'thing', '*res*', designates thus not the thing in the world but rather the juridical process through which the thing is socially formed. Etymologically '*res*' designates things insofar as they are captured into a process,

---

[37] See for example Kelley, who argues that Roman law's tripartite articulation of reality into persons, things and actions (*de personis*, *de rebus*, *de actionibus*) has shaped much of the modern conceptualisation of society (1990:48-49).

[38] 2016:21.

[39] In Thomas' terms, law becomes a *means* through which society is given an abstract form (Thomas, 2015:25) and, similarly, Spanò and Vallerani have spoken of law's fundamental power to '*form* the social', in such a way that the (abstract) constitution of the 'thing' of law is, at the same time, the constitution of the 'thing' of the social (2016:89) [my translations].

a trial[40], and Agamben has recently suggested that also juridical notion of '*causa*'[41], i.e. cause or trial, indicates "both the trial and its foundation, both the controversy and that which gives rise to it"[42], namely the 'thing' of the trial, "the affair to the extent to which it is included and juridically defined in a trial"[43]. Technically, the cause is not the trial defined in all its formal aspects – the word for that is '*lis*' – but rather the very process through which a '*res*' is turned into a '*lis*' – the process of abstraction and formalisation – so that, Agamben suggests, '*causa*' represents a dipolar field which holds together 'the substantial material prior to any juridical formulation' and 'the formal point of view of encounter of parties and interests in a procedure'[44]. 'Causa' refers, in this sense, to the *articulation* (which makes them *both* indistinguishable and separated) of matter and form, *quaestio facti* and *quaestio iuris*, things and their abstract value and, when it comes to things that are made object of exchange, this is reflected in the use of the term *pecunia*, money, as a synonym for *res*[45].

This whole process of abstract reification (and juridification of the social) presupposes a procedure of *sacralisation*, the production of a zero-degree of appropriability in the form of a *sacred* zone of inappropriability. The crucial distinction which grounds Roman societies is not that between private and public, but rather the one, elaborated in Gaius' *Institutiones*, between 'patrimonial and extra-patrimonial things' which only at a later stage will be further articulated into the distinction between things *divini iuris* and *humani iuris* (either public or private) and, in fact, Thomas observes a 'juridical homogeneity', in terms of treatment, between religious and public things[46]. Sacralisation refers, in this context, to the production of an extra-patrimoniality, an outside of appropriation which, at the same time, becomes instrumental to appropriation in the sense that it, practically, founds a threshold of (in)appropriability, that is to say, a space (a sanctuary) in which things can either be re-appropriated or made inappropriable[47].

---

[40] At the same time, the 'cosa messa in causa' and the 'messa in causa della cosa' (Thomas, 2015:24) [my translation].

[41] It should be noted that the Italian word '*cosa*', i.e. thing, originates from the latin 'causa'.

[42] 2018a:3.

[43] In latin, '*res de qua agitur*' (ibid:4).

[44] Ibid:3.

[45] Thomas, 2015:59-71.

[46] Ibid:34-35.

[47] Temples and sanctuaries for example, are consecrated and declared permanently *inappropriable*, so as to turn them, at the same time, into spaces of administration of goods (donations, deposits, services, labour, lands, etc.) that are, in turn, deemed inappropriable only temporarily, that is to say, as long as they are under the sacred administration.

Through the category of *res nullius*, in other words, the outer limit of society, as the realm of appropriability, is instituted. This limit is a threshold through which things can *enter* and *leave* society itself. Technically, the social sphere of commerce is juridically constituted by splitting the thing into two beings of the thing, namely the thing as an object of appropriation and the thing as an object that cannot be appropriated, which is in fact defined negatively and quite paradoxically as '*res nullius in boni*'. If on one side the law gives *form* to the act of appropriation, creating procedurally an abstract value for it, on the other, it manifests its *force* in the capacity to suspend *tout court* the relation of appropriation. The law functions as a *forиa* that, at the same time, transforms *res* into *pecunia* and into *res nullius in boni*, a thing devoid of value which, in Gaius' Institutiones, is also defined *res ipsa*, the thing itself[48]. It might, therefore, be argued that the constitution of a social sphere of appropriability rests on a double suspension: on one side, the temporary suspension of the relation of appropriation which occurs when, through the form of law, a market value is established[49]; at a deeper level, the suspension of the possibility to appropriate as such is suspended and therefore its foundation in the name of an originary force of law, a sacralisation[50]. The juridical performance is the creation of the boundaries of sociality as such through the institution (which is also their articulation) of two spheres, a sphere of abstract value – a form of law – and a sacred sphere – a force of law devoid of law (a force of ~~law~~).

This operation is ontological in the sense that it produces the world as a 'world of commerce' which is divided into a sphere in which things can still be appropriated (an abstract social sphere) and a sphere – which represents only the fictional 'anteriority of commerce' – in which things cannot be appropriated anymore, the sphere of *res nullius in boni* (the suspension of sociality as such)[51]. The institution of the city rests therefore on a double operation, or better, on an act of self-foundation that, at the same time, produces and isolate a sacred sphere of the world[52]. The two spheres are, from this point of view, co-instituted[53]. The first sphere, which presupposes the second, comprises things that already belong to someone and things that do not belong to anyone *yet* (*res nullius*).

---

[48] Ibid:84.

[49] In other words, '*causa*' as the suspension of a relation of appropriation which transforms '*res*' into '*pecunia*'.

[50] In other words, 'sacralisation' as the suspension of the relation of appropriation that transforms *res* into *res ipsa*, the thing itself, namely, a thing devoid of value.

[51] Ibid:24-25

[52] Ibid:84.

[53] Ibid:55-56

The ontology thus produced is one in which, paradoxically, things are de-ontologised: they have no content other than the one which is given to them by appropriation or, with Agamben, "they are only the presupposition of the act of appropriation that sanctions their ownership"[54]. They are, so to speak, a zero-degree of appropriation. This *ontology of appropriability* establishes an abstract relation between a subject (of appropriation) and an object (to be appropriated) and, at the same time, presupposes (through a juridical operation) a space of permanent inappropriability in which, in fact, it is the subject-object relation as such that can be, according to Thomas, temporally suspended[55]. The suspension of the subject-object relation, itself understood as a relation of appropriability (the relation of a subject who appropriates an object), produces a state of exception in which things are not yet/anymore appropriable, emptied of their social life and, in this sense, de-ontologised (deprived of their relation with a subject). Through this very operation though, they are also exposed to a de-ontology, to the 'having-to-be' of social life, where things can be only insofar they are appropriated, i.e. have to be appropriated.

(b) The Roman notion of 'labour' ('*travail*').

With the introduction of the juridical category 'usufruct of the slave', for the first time in the classical world the idea of (the value of) 'labour' considered as an 'autonomous juridical reality' separated from the 'characteristic proper to the object produced' ('*opera*'), made its first appearance[56]. Up until that moment it was assumed – and this was true at least since Aristotle – that the activity of a labourer, the artisan, could only be defined by and evaluated in accordance with its '*ergon*', the product of work ('*poiesis*' as opposed to '*praxis*')[57]. *Poiesis* was therefore defined by the presence of an external *telos* (the object produced), while *praxis* was self-sufficient, in the sense that 'acting well' (*eupraxia*) represents an end in itself[58]. For this very reason, the value of the

[54] 2017:996.
[55] 2016:55-56.
[56] Agamben, 2017:1040.
[57] Vernant, 1965:219-225. Vernant suggests that the artisan is, at least for the Greeks, an "esclave dans la sphère de son métier", in that his activity, 'the fabrication of an object', is entirely 'submis' to the use that someone else is going to make of that object (Ibid). That is why Aristotle speaks of the act of fabrication as a '*kinesis*', an imperfect movement whose '*energeia*' resides outside of itself, in the form of the object fabricated (Ibid).
[58] Agamben, 2017:1045.

artisan's activity is, with Vernant, a '*valeur d'usage*' which resides in the use made by others, of the product of that activity.

The slave's activity though, contrary to all other activities, is "defined only by the use of the body"[59] and, therefore, believed to be both without '*ergon*' (i.e.'*argós*') and without virtue or end in itself: an '*eupraxia*' of the (slave's) use of body is impossible due to its purely instrumental nature (as a means for someone's else '*praxis*')[60]. The unproductive labour of the slave was, in other words, neither *poiesis* (productive of a work) nor *praxis* (an end in itself) but represents rather a zero-degree of use of body ('*to somati ergazesthai*') which serves, with Arendt, 'the maintenance of life', representing that which in a corporeal life is absolutely necessary[61] and therefore set against any positive conception of freedom[62]. When then, through the usufruct of the slave, the '*fructuarius*' exercises the right to alienate, by renting it out, the labour of the slave, such labour without '*ergon*' or 'value in itself', comes to constitute the first example of a use of body's abstract value (for, as a value of exchange, it is separated from it), a '*fructus*', 'the revenue derived from a good, namely, the work of men' [my translation][63]. More precisely, given the particular nature of the slave's work, which, being '*argos*', makes impossible the separation between use of body and the product of work, it is the use of body itself to be split into two, namely, "the body as object of use" and "its activity as alienable and remunerable"[64]. A productivity is therefore extracted from the, by definition, unproductive labour of the slave so that, as Arendt, with Marx, suggests[65], labouring activity gains 'a productivity of its own', a 'labour power', that is to say, a surplus of labour itself which becomes therefore "capable of producing (…) more than is necessary for its own reproduction"[66]. The labour of the slave, like a proletarian *ante-litteram*, generates a surplus of labour in the form of abstract labour, 'labour in abstraction from its use'[67]. The Roman slave, anticipating the modern worker, is, with Thomas, "divided between two zones of law that correspond respectively to what he is as body and

[59] Ibid:1040.
[60] Ibid:1045-1046.
[61] 1998:81-83.
[62] Which is why Arendt argues that since "men were dominated by the necessities of life, they could win their freedom only through the domination of those whom they subjected to necessity by force" (1998:84).
[63] Thomas, 1999:8-9.
[64] Agamben, 2017:1041.
[65] Her focus is on modernity only, but this analysis could easily be extended to the Roman society.
[66] Arendt, 1998:88.
[67] Hunt, 1989:24.

what he is as merchandise, as incorporeal good"[68]. The idea of a 'labour activity' as a fundamental social category of modernity, can be traced back to the juridical construction of an 'abstract work' in Rome, through the split into 'a body' and 'an incorporeal good', 'work as a commodity' and the body that works[69].

The transformation of the use of body into an abstract value requires the institution of an abstract 'unitary referent', a market[70]. Agamben, quoting Vernant, suggests that the market provides in fact for the 'universal equalization of the products of labour' which transforms "diverse labours, completely diverse from the point of view of their use, into merchandise comparable from the point of view of their value" and, therefore, groups such diverse labours "into one same general and abstract labour activity"[71]. The constitution of an 'abstract unitary referent', the sphere of the work market, and therefore of an entirely new area of sociality[72], rests on the split, performed on the body of the slave, between a zero-degree of human action (i.e. '*argós*', neither '*poiesis*' nor '*praxis*') and an alienable, abstract, value attached to it. The body of the slave is constituted as a zero-degree of sociality, an "undecidable threshold between *zoè* and *bios*, between the household and the city, between *physis* and *nomos*"[73] that makes the passage between the two possible. This (juridical) performance is, again, ontological in its character, in so far as it defines the *logos* of society, by defining, at the same time, its outside, the being which grounds it: the thing itself of human action. The construction of an ontology implies, from this perspective – as in the case of '*res*' – a process of de-ontologisation, the constitution of a zero-degree of use of body, a use devoid of virtue or work. Such emptied ground grounds the logic of relationality, among men and between men and things, through which a society of labourers is produced[74].

---

[68] Agamben (quoting Thomas), 2017:1041.
[69] Thomas, 1999:22.
[70] In this respect, it is worth noticing that the split of the body into incorporeal good and body that works is reflected into the presence, in ancient economies, of 'a market of slave work distinct from a market of slave' (Ibid).
[71] Agamben, 2017:1044.
[72] In Vernant's own words, "un même effort humain créateur de valeur sociale (…) une grande fonction humaine, le travail" (1965).
[73] Agamben, 2017: .
[74] Agamben also speaks of a "reemergence of the figure of the slave in the modern worker [which] appears, according to the Freudian scheme, as a return of the repressed in a pathological form" (2017:1045).

(c) the Latin notion of *culpa* ('guilt').

In a strict legal sense, the term refers to negligence as opposed to malice in the commission of an unlawful act. However, Agamben argues that the Justinianic sources also use it with the meaning of imputability to a person of a certain (illegal) act[75]. '*Culpa*' refers at the same time to 'responsibility' and 'its limitation'[76], which is to say, to the minimum degree of responsibility required in order for an illegal action to be imputable to a subject. For this to be possible every proscription has to refer back to a prescription so as to *self-referentially* produce a "general and abstract prohibition of violating legal injunctions as such"[77], the principle of law's *sanctitas*. This produces a situation where "every human being (…) by the very fact of living is constitutively called into question [*in causa*] and accused"[78]. '*Culpa*' comes therefore to represent "the interiorisation of guilt (…) a principle inherent in the subject, which constitutes the subject as culpable"[79], the institution of the subject himself as the one who can be accused, a zero-degree of guilt. The subject becomes the ground of 'sovereign structure of law', understood as the exceptional capture of life in and by the juridical order[80]. Zartaloudis, along the same lines, stresses that the juridical order produces bare life as a zone of indistinction of guilt and innocence, a sort of (Benjaminian) "natural guilt [as the] being-in-potentiality of a transcendental Law of the law that defines 'innocence'"[81].

Oath and Ethos

The *ambiguity* (in terms of its relation to law) of the term 'sacralisation' is reflected in the difficulties faced by the interpreters when it comes to determine whether the so-called *leges sacratae* had juridical or extra-juridical nature, namely whether they were laws, in the strict sense of the term, or oaths[82]. This can be read as an ancient

[75] 2108a:5. An example of this might be (Dig. 9.2.5, Ulpianus 18 ad ed).
[76] 2018a:6.
[77] Ibid:7.
[78] Ibid:6-7.
[79] Ibid:9.
[80] Agamben, 2017:26.
[81] 2008:161.
[82] It is worth mentioning, in this respect, that it has been recently suggested, in contrast with the conventional reading, that most *leges sacratae*, including the one which established the plebeian tribunate, were actually laws in the full sense of the term, although of a special character and gravity,

formulation of the modern problem of the ambiguous (in)distinction of sovereignty and legality and the point, in both instances, is not to determine the true essence of law – sovereign or valid, oath or rule, etc. – but rather to study this ambiguity as a signature of the very act of transmission of the *factum pluralitatis*, an ambiguity (*forиa*) which defines the limits of law's thinkability and, therefore, of the enunciative function of the interpreter who has to decide how to articulate it.

The tradition gives to the oath a particularly central role in the formation of the juridical order. Already in ancient Greece the oath, in the form of a curse, had a fundamental role for the constitution of the *polis* as a 'politico-sacred realm': the Greek legislation curses its citizens [*epiorkoi*], constituting them as at the same time, infidels – without credibility and faith [*apistoumenoi*] – and able 'to attain fiduciarity' – to become faithful [*pistoi*] – through oaths to be repeated at the beginning of every assembly[83]. A juridical order appears in this sense as, first of all, a manifestation of language's power to institute a zero-degree relation between words and things to be then organised in a stable manner. That is how one can interpret the notion of *fides* as used by Cicero, namely to designate the particular *force* (*vis*) of the oath which sanctions the "conformity between words and actions" beyond any particular meaning and through which "one abandons oneself completely to the 'trust' of someone else"[84]. Similarly, in Pufendorf the oath makes effective a path without adding anything to its content other than the guarantee and confirmation of "the ability of men to make profession of their condition as speaking beings"[85]. The oath exemplifies a pseudo-legal power to institute a stable relation between words and things, a zero-degree of signification in which words can then produce their (legal) meaning.

In modern terms, the relation between oaths and law is made less ambiguous if both are considered as expressions of the so-called performativity of language, language as a speech or illocutory act[86]. In general, speech acts express the intention of the speaker

---

such that they required "divine intervention to guarantee obedience to their terms" (Pellam, 2015:329). For this reason, according to Pellam, an oath was incorporated into the *lex sacrata* which, in turn, was not to be considered as an oath in itself (Ibid.). In the same vein, Pellam further argues that the *lex sacrata* which established the plebeian tribunate is not to be considered, as is commonly assumed, as the act of an extra-constitutional and revolutionary constituency but rather as already embedded in the constitutional structure of the Republic.

[83] Agamben, 2017:329; Zartaloudis, 2008:196-199.

[84] Agamben, 2017:321.

[85] Ibid:306.

[86] It is generally held among academics that the best description of language's performativity is provided by Austin's theory of 'speech acts', those acts that "can (…) be performed by a speaker by saying that one is doing so" (Green, 2020:4).

to enter a certain framework of meaning (a 'language game') in which a proposition uttered acquires a certain (illocutory) force which depends not on the (semantic) content of the proposition but, precisely, on the said intention and framework[87]. A performative statement is one which produces the event designated by the statement so that its force, in the most extreme case, is that it produces, by enunciating it, its own veracity and efficacy[88]. According to Zartaloudis then the oath institutes a 'virtual state' which "enunciates nothing but the *self-referential* efficacy and veracity of the enunciation itself"[89]. Language performatively "refers to a reality that it itself constitute" but technically, this operation is possible as a form of "suspension of the normal denotative character of language": the meaning of a denotative expression ('I went to school') is suspended if preceded by a performative ('I swear I went to school') so that a "self-referential relation (…) putting the former out of play, puts itself forward as the decisive fact"[90].

Analogously a legal system of rules represents the self-referential suspension and desemanticisation of life and a sovereign exception represents a further self-referential suspension of the semantico-denotative context created by a system of rules. Both therefore represent the capacity of law to institute self-referentially a sphere in which legal meaning is possible, i.e. a legal order. This operation produces an excess of (legal) signification which coincides with a process of *subjectification* or, more generally, of *substantialisation* of life, that is to say, its instrumentalization for legal purposes, its constitution as a ground *of* the law. As Zartaloudis suggests, like language performatively "says its veracity and so self-projects its efficacy"[91], equally the law "commands its own legality and obliges submission"[92] (to the law).

The self-referential production of a sphere of legality (form) produces a fracture between law and life that, at the same time, presupposes an excess of legal signification, a force, which makes law and life indistinguishable and, therefore, grounds the power to decide on their separation[93]. At this level law has not content other than the fact of a

[87] Ibid:8-9.
[88] Zartaloudis, 2008:196.
[89] Ibid.
[90] Agamben, 2017:342-343.
[91] Zartaloudis, 2008:196.
[92] Ibid.
[93] That is why Agamben argues that "the sphere of law is that of (…) of a saying that is always *indicere* (to proclaim, to declare solemnly), *ius dicere* (to say what conforms to the law) and *vim dicere* (to say the effective word)" (2017:347).

necessary relation between law and life, one which must be decided on. This condition can be described, linguistically, with the words of Lévi-Strauss, as "a fundamental inadequation between signifier and signified that was produced in the moment in which, for the speaking man, the universe suddenly became meaningful"[94]. Lévi-Strauss here re-interprets Mauss's notion of *mana*[95] as the relation established with 'an indeterminate value of signification'[96]: the *mana* from this perspective refers to a 'signifier-totality' or a 'signifier-surfeit' (an empty form) which provides for a 'surplus of signification' to be employed in the 'effort to understand the world', or better, to 'restore it to unity'[97] (a force). In this respect, *mana*, for Lévi-Strauss is an answer to 'the need to supply an unperceived totality' and its performance is 'symbolic synthesis', the grounding of 'apriori synthetic judgements'[98]. The performance of the law is, therefore, the production of an 'empty signifier', a form of law which, in its most extreme manifestation represents at the same time a radical separation and a radical indistinguishability of law and life, a *forиa*, which provides a symbolic synthesis between the two and grounds an *apriori* judgement on the necessity of their articulation: this is what allows to understand life itself as normatively charged for legal purpose. This *forиa* stands for what Agamben calls a 'legal mana' namely an excess of signification that can be strategically employed to decide on the relation between law and life[99].

The fundamental performance of law is the biopolitical constitution of a 'legal mana' in which life and legal forms are made indistinct in order to be articulated. This methodological configuration though allows to interpret them as co-implicated and, therefore, co-originary and, in this sense, really indistinguishable. With Agamben:

> "[t]here are not *first* life as a natural biological given and anomie as the state of nature, and *then* their implication in law through the state of exception. On the contrary, the very possibility of distinguishing life and law, anomie and *nomos*, coincides with their articulation in the biopolitical machine. Bare life is a product

[94] Agamben, 2017:351.
[95] Technically the mysterious *force* which is transferred from person to person through the exchange of a gift.
[96] Lévi-Strauss, 1987:55
[97] Ibid: 58-62.
[98] Ibid:56-58.
[99] 2017:209.

of the machine and not something that preexists it, just as law has no court in nature or in the divine mind"[100].

In other words, this suggests that indistinguishability stands for the *fictional* production of a co-implication of law and life that grounds, at the same time, the *power* to decide on their relation or, more generally, the power (of thought) to articulate them (their thinkability in terms of an articulation).

The law biopolitically represents a zero-degree of sociality – a formless, bare animality or nature of man which is held in relation with a form of law. The force of law is the possibility of this articulation, of the constitution of animality and nature as always-already included in law as their 'zero-degrees'. This is a manifestation of the anthropogenetic character of tradition at large, understood as 'a passage from animal to man' – through the *self-identification* of man with language or, more precisely, as the constitution of language itself as the means through which "man (…) progresses (…) from animality to humanity" [101]. The fictional representation of the relation between between language and world is also the fictional representation of the relation between man and animal: man is thus represented as emerging from a 'pre-linguistic stage of humanity'[102], or with Haeckel's technical formulation, as a 'speaking man' which 'arises' from a *Pithecanthropus alalus*, namely, an 'ape-man without speech'[103] which, in turn, is nothing but the fictional presupposition of the former, "a shadow cast by language"[104]. Jurisprudence represents one of the many (ontic) fields in which this passage takes place in the form of a 'cognitive experiment'[105] which consists, first of all, in the attempted articulation of an inside and an outside of man, a human side and an animal side, 'a man-animal and an animal-man' as "the two sides of a single fracture, which cannot be mended from either side"[106].

Study stands therefore for the exhibition of the western tradition as an experiment of this kind. What one discovers though is not some prior, truer, semantico-denotative relation between language and the world, man and animal, society and nature, and so forth. Actually, the very primacy of the semantico-denotative relation over language's

[100] Ibid.
[101] Agamben, 2004:35-36.
[102] Ibid:35.
[103] Ibid:34.
[104] Ibid:36.
[105] Ibid:22.
[106] Ibid:36.

performativity is not to be taken for granted but questioned as a particular representation of the co-implication of language and world. As suggested by Zartaloudis, the theory of speech acts allows to blur the very distinction between constative and performative utterances, in the sense that every utterance "can be seen either implicitly or explicitly to presuppose the presence or disappearance of a deictic 'I' (I affirm, I declare, I say, etc.)"[107]. Every utterance, in other words, presupposes an *enunciative function* and is, therefore, performative in character. Every use of the name presupposes a 'faith', 'trust' or 'certainty', i.e. 'the security of the propriety of names', e.g. the certainty "that 'dog' means dog", or that 'I am my name'[108]. This certainty is 'neither logical nor empirical' (and certainly not legal) and is rather akin to a religious and, yet, purely immanent experience which, "puts in plays the commitment and praxis of men"[109]. It is the same experience implicit in the pronouncement of the name of God, which in fact, according to Agamben, "names the name that is always and only true, that is, that experience of language that it is not possible to doubt"[110], the experience of 'existence of language itself' which coincides with 'the miracle of the existence of the world'[111]. Pretty much like in Benjamin's analysis, where the word of God exemplified the creative force of language, here the name of God is exemplification of the fact that "every name is an oath" and that "[t]o speak is, above all, to swear, to believe in the name"[112].

Oaths then *exemplify* a fundamental (anthropogenetic) experience of language as such, "by means of which the living being, who has discovered itself speaking, has decided to be responsible for his words and, devoting himself to the *logos*, to constitute himself as the 'living being who has language'"[113]. Man's being, in other words, lives – it is a *living* being – insofar as it *has* language[114] (or, with Agamben, man is "the living

---

[107] 2008:189.
[108] As in Wittgenstein famous questioning: "do I know or do I only believe that I am called L. W.?" (Agamben, 2017:341).
[109] Constituting what Wittgenstein, used to call a 'language game' (ibid.).
[110] Ibid.
[111] Ibid.
[112] Ibid:341.
[113] 2017:353.
[114] 'To have language' instead of 'to be language': while all living beings *are* language, man is the living being who has to *have* it, to master it or to be enslaved by it, to tell the truth or to lie. With Agamben's own words:

> "It is not language in general that marks out the human from other living beings (…) but the split between language and speech, between semiotic and semantic (in Benveniste's sense), between sign system and discourse. Animals are not in fact denied language; on the contrary, they are always and totally language. (…) Animals do not enter language, they are already inside it. Man, instead, by having an infancy, by preceding speech, splits this single language and, in order to speak, has to constitute himself as the subject of language – he has to say *I*. (51-52) (…) Contrary

being whose language places his life in question"[115]), which means that it is the world as such which is at stake in language for man, or vice-versa that it is language as such which is at stake in the world for man (or, paraphrasing Wittgenstein, that "the existence of language is the performative expression of the existence of the world"[116]). To be experienced here is the co-originarity of language and world (or, with Benjamin, of mental and linguistic being), which is to say, language's own communicability.

This is for Agamben a truly anthropogenetic or, more simply *ethical*, experience: the experience of the fact of language as that which "prepares within itself a hollowed-out form that the speaker must always assume in order to speak"[117] thus becoming ready "to respond with its life for its words, to testify in the first person for them"[118]. To this experience, which, normatively speaking, does not prescribe anything in particular, corresponds as one of its possible manifestations, the study of how tradition always splits the fact of language into two orders, ethical and cognitive, as if the two were actually separable when, instead, according to Agamben, they are co-originary[119]. The co-originarity of these two dimensions though, becomes historically experienceable as the study of their articulation. Agamben speaks in this respect, of the possibility to distinguish between *assertion* – a semantico-denotative connection between words and things which is objectively true and measurable – and what Agamben, with Foucault, calls *veridiction* – a performative connection between words and things that is authorised by a subject[120] or, between locutionary and illocutionary acts[121]. This is further reflected in the thinkability of *knowledge* as always divided into 'science and logic' – that "are born from the *management* of the assertorial aspect of the *logos* – and 'law, religion, poetry, and literature' – that *manage* veridiction instead[122]. The experience of the articulation of these dimensions is also the (exceptional) history of their mutual 'crossings and

to ancient traditional beliefs, from this point of view man is not the 'animal possessing language', but instead the animal deprived of language and obliged, therefore, to receive *it* from outside himself" (1993:57).

115 2017:353.

116 Ibid:343.

117 Ibid:354-355.

118 Ibid:353.

119 Ibid:352-354.

120 Ibid:344.

121 The two distinctions (assertion-veridiction and locution-illocutions) are analogous. Illocutory acts are, with Agamben, "the relics in language of this constitutive experience of speech—veridiction—that exhausts itself with its utterance, since the speaking subject neither preexists it nor is subsequently linked to it but coincides integrally with the act of speech" (2017:344).

122 Ibid:345-346.

superimposition'– as suggested, for example, by the introduction, already in Aristotle, of a distinction between 'assertorial oaths' (that can be, objectively, either true or false) and 'promissory oaths' (that can be fulfilled or non-fulfilled)[123] or in the development of a peculiar legal logic of self-referential organisation (validity, deduction, etc.)..

The role of study, as a form of historico-philosophical inquiry, is to reflect on 'the fact that language takes place', namely that the co-origination of language and the world ("the existence of language is the performative expression of the existence of the world"[124]) occurs in and through a process of historical articulation that *prescribes* specific enunciative functions in the attempt to represent, manage and organise the experience of language as such. This experience can be described, with Heidegger, as one of 'originary possibilitization', of "*whatever it is* that make possible, bears and guides all essential possibilities"; and yet this experience, even for Heidegger, consists in "the suspension and withholding of all concrete and specific possibilities" (Heidegger's 'profound boredom')[125]: a suspension of power, understood, in general, as a 'the organisation of potentiality', its articulation into specific enunciative functions.

Therefore, Agamben suggests that "the distinction between sense and denotation is perhaps not, as we have been accustomed to believe, an original and eternal characteristic of human language but a historical product (which, as such, has not always existed and could one day cease to exist)"[126]. The distinction represents the "attempt to nail down the originary performative force of the anthropogenic experience" and to produce a linguistic enunciative function for it, namely the constitution of the speaker as the one who uses language as a means to an end[127]. This operation produces what Benjamin has criticised as the bourgeois conception of language, the instrumental representation of language as a means for communication. Along the same lines one can investigate the process of production a legal enunciative function. Law, more precisely, represents, in Agamben's scheme, the technicalisation of *ethos*, the attempt to govern and organise the performativity of language, an attempt which makes 'the living being's commitment to respond with its life for its words, to testify in the first person for them' somehow impossible or, at least, mediated, insofar as it turns the *factum pluralitatis* into a sort of pre-determined *function*.

[123] Ibid:344-345.
[124] Ibid:343.
[125] Agamben, 2004:49.
[126] 2017:342.
[127] On this see also Tritten's penetrating critique of the instrumentality of language (2014).

Law represents, in its own terms, 'the fact that there is language' and in doing so turns its generic potentiality into a power:

> "[t]he performative experience of the word is constituted and isolated in a 'sacrament of language' and this latter in a 'sacrament of power'. The 'force of law' that supports human societies, the idea of linguistic enunciations that stably obligate living beings, that can be observed and transgressed, derive from this attempt to nail down the originary performative force of the anthropogenic experience"[128].

Concrete manifestations, in and through law, of the logic of exceptionality are *paradigms* of a language which historically has communicated its own communicability in exceptional terms. The state of exception, for example, produces a suspension of law which founds its own being in force *like* language performatively "suspends its denotation precisely and solely to found its existential connection [*il nesso esistentivo*] with things"[129]. This existential connection, as already mentioned, is not properly a relation between linguistic and a non-linguistic being: it stands instead for 'the pure existence [*darsi*] of language'[130], language's own communicability. In and through a series of legal paradigms this communicability is re-presented instead as an articulation of a before and an after of language, of human and non-human, of society and nature, and so forth.

These paradigms are all expressions of a signature of life that defines (at level of its onto-methodological existence) its governability, its ability to become an object and a subject of government: life as such as something that *governs* itself and has to be *governed*. Life, from this point of view, is provided with an enunciative function, the constitution and the preservation of sociality as (with Foucault) a form of governmentality: in spite of the historical specificity that the concept has in Foucault's lectures, it could be suggested that it has the methodological function of making intelligible, in the present, all the processes through which a subjectivity (in both its

[128] Agamben, 2017:354.
[129] Ibid:343.
[130] 2005:36.

individual and collective dimensions[131]) is constituted as a space of governability, the space in which a power to govern manifests itself[132].

It is interesting, in this respect, to consider briefly Agamben's archeological inquiry into the notion of liturgy in the catholic Church (*Opus Dei*), as precisely, a paradigm of this governmental function of sociality or, better, as a paradigm which makes possible a redefinition of the concept of sociality precisely in terms of governability. First of all, the liturgy, Agamben suggests, exemplifies a kind of action whose efficacy derives from the function it represents, a function which, at the same time, constitutes the subject who performs it: specifically, the liturgy can be made intelligible as the articulation of an *opus operatum* – 'the objective effectiveness and validity of the sacrament' – and an *opus operantis* – 'the subject who concretely administers it'[133]. Crucially, this innovation represents a fundamental step in the process of *juridification* of the church which, in its primitive form was instead to be thought as 'a charismatic community within which no properly juridical organization was possible'[134]. For this reason, the 'passage from a charismatic community to an organization of a juridical type', is considered by Agamben as a paradigmatic 'breaking of the ethical connection between the subject and his action'[135]. That is because, while in order to be effective the sacrament "does not depend on the subject who sets it to work", nevertheless, the subject is needed merely as an 'animate instrument' that will actualise it[136]. Along these lines, Agamben continues, the word *officium* (duty), which was used by the Romans to describe the liturgy, will then be re-appropriated by Pufendorf to construct a notion of human office grounded on the principle that "every man ought to do as much as he can to cultivate and preserve sociality"[137]. For man to become a social being means, self-reflectively, to adhere to "the

[131] Foucault, in his lectures, uses the notion of governmentality to describe State's ability, since the eighteenth century, to function as an apparatus for the conduct or government of a *population* of *individuals* (Foucault, 2009:144). The first theorists of population, Foucault further stresses, think it as "a group of live individuals [whose] characteristics were those of all the individuals belonging to the same species, living side by side" (1990:82).
[132] Foucault, to this prupose, speaks describes governmentality as a 'conduct of conduct', namely, the government of practices of self-government (Simons and Masscheleein, 2006:419) through which "human beings are made subjects" (Foucault, 1982:777).
[133] 2017:668.
[134] Ibid:659.
[135] Ibid:665-671.
[136] Ibid:674.
[137] Ibid:694.

behaviour that is expected among persons who are bound by a relation that is socially codified", to "what causes an individual to comport himself in a consistent way" [138].

As a result, according to Agamben, the idea of sociality produces a conception of life "between morality and law (…) in which what is in question is the distinctively human capacity to govern one's own life and those of others"[139]. Specifically, social life and action can be thought as an *efficium*, namely a function (a duty) which consists in 'making life effective': "each must render his social condition effective" ('*quia unusquisque debet efficere suum officium*')[140]. That 'each must render his social condition effective' implies, from a philosophical perspective, the constitution of what Agamben, in accordance with his reflections on the liturgy, calls '*a circular relation between being and praxis*'[141], of subject and action, such that both can only be defined by the *function* that they serve. That which is rendered effective ('*efficere*') through action is, in fact, always a certain function, a quality which exceeds the action and, at the same time, makes it possible. The verb '*efficere*' like the verb '*gerere*', which comes from the 'politico-juridical language' designates "the activity of the one who is invested with a public function of governance" (such as the *imperator*, 'the magistrate invested by an imperium'). In opposition to a mere '*facere*' ('doing or making'), here the action "is not defined (…) by an external result (the work), nor does it have its end in itself" (as in the case of the slave, it is neither *poiesis* nor '*praxis*'). On the contrary it is defined by the function that it represents[142].

The possibility to separate, on one side, the subject and its actions, and on the other, their function (as that which renders both indistinguishable), is exemplified at best by law and, specifically, by 'the imperative as the verbal mood of law'. A legal norm, in fact, "has as its object the behaviour or action of an individual external to it" and this is

---

[138] Ibid:708.
[139] Ibid:710.
[140] Ibid:713.
[141] Ibid:715.
[142] The action "*is defined by its very exercise, by the magistrate's assuming and fulfilling a function or an office*" (ibid:717). The English translation here misses the point in that what is crucial is not only that the magistrate assumes a function but also that the action itself can be reduced to the fulfilment of a function and that, in turn, this is precisely what defines the subjectivity of the magistrate. There is, in other words, an ambiguous relation between the subject and the action in that, for both, the only content is the fulfilment of a function. The Italian sentence is, in this respect, more sophisticated in that it reflects stylistically this ambiguity by omitting any explicit reference to the magistrate, so as to make it impossible to determine whether 'assuming and fulfilling' refers to the action or to the magistrate: "essa [l'azione] si definisce attraverso il suo stesso esercizio, attraverso il *suo* assumere ed espletare una funzione o un ufficio" (2018b:720). The office, as a function of governance, stands above the subject and the action ("l'azione coincide con l'effettuazione di una funzione che è essa stessa a definire", Ibid.), in that it constitutes itself as their end and, for this very reason, as that which pre-determines (by making it possible) their concrete meaning (the potentiality of signification of both the subject and the action).

possible precisely because it determines the content of the action and the nature of the subject to which it refers by presupposing a function, namely, the execution of an order or, more generally, the institution of a 'sphere of command': "the goal of an action carried out in order to execute an order is not only that which results from the nature of the act, but it is (or claims to be) also and above all the execution of the order"[143]. As soon as '*efficere*' is understood as a form of '*gerere*', sociability itself can be framed as the expression of a function of government: subjects become social subjects insofar as they govern themselves and each other through a command, insofar as their (social) actions are commanded actions of government.

The institutionalisation of veridiction (as exemplified by the passage from a charismatic community to an institutionalised Church) represents, in philosophical terms, the decay of *ethos* into what Agamben calls an 'ontology of command' – "[t]he transformation of being into having-to-be" – in which every subject is 'a being of command', namely, "is what he has to do and has to do what he is". This transformation, which "defines ethics as much as the ontology and politics of modernity", produces a form of veridiction in which the subject is separated from himself in accordance with a function, and this very term, '*funzione*', means in fact "to act *as if* one were another, in the capacity of someone's *alter ego*, either an individual person or a community"[144]. The performativity of language decays into an 'ontology of command' which is exemplified, precisely, by the 'imperative verbal mood of law' that – through a norm which "has as its object the behaviour or action of an individual external to it" – separates within the action itself its natural ends from the legal ends (the execution of an order)[145]. Agamben, ultimately, radicalises these observations and suggest that the contemporary situation is one where the 'speaking being' is left speechless, in the sense of "more and more reduced to a purely biological reality and to bare life" on one side, and, on the other, absorbed into a series of 'technico-mediatic and legislative apparatuses' "that seek obstinately to legislate on every aspect of that life on which they seem no longer to have any hold"[146].

Whether one agrees or disagree with this pessimistic take on our contemporary situation, what matters to the purpose of this work is that law's performativity can be

[143] 2017:717-718.
[144] Ibid:719.
[145] "[T]he goal of an action carried out in order to execute an order is not only that which results from the nature of the act, but it is (or claims to be) also and above all the execution of the order" (ibid:717-718).
[146] Ibid:354.

interpreted as an epiphenomenon of the 'originary performative force of the anthropogenetic experience'[147] and, more specifically, as the technicalisation[148] (or instrumentalization) of what Benjamin calls 'the originary force of the word', the decay of communicability. The performativity of law, from this perspective, can be read as the experimental constitution of threshold in which the human and the animal sides, society and nature, are articulated into a before and after in which the before, the 'pre-legal' is always already abandoned to a process of juridification or, more broadly, of government. Nature and animality are, from this point of view, always already included into law. The (legal) history of the relation between law and nature can therefore be read as the history of a series of experiments of organisation of man's potentiality: an endless experimentation which consists in the exceptional re-articulation of an inside and an outside of law.

From a methodological point of view, the point of view of study, these experiments are forms of organisation, or technicalisation, of language's own self-referentiality as generic communicability, the idea that language communicates itself in every communication, the encounter, in speech (or with Benjamin, in *conversation*), of man with man as the fundamental anthropogenetic experience. From this perspective, the constitution of an outside of man (nature, God, animality, chaos and so forth) does not result from an encounter with something that absolutely transcends him: rather it occurs when men form a community which means, in other words, that the relation between man and nature is always "mediate[d] (…) through the relation with another human being" and, overall, that "I can constitute myself as ethical subject of my relationship with nature solely because this relationship is mediated by the relationship with other human beings"[149].

Study, as another experiment (*experimentum studi*), is the attempt to deal with tradition as the virtual space in which this fundamental experience of communicability – the co-originarity or indistinction, in the encounter of man with man, of language and world – has been presupposed and represented through a series of articulation that fictionalises and governs it. Communicability, from the perspective of study, becomes the experience of history as a tradition of powerful articulations and, equally, the experience of the present as the product or the *end* of that tradition, as well as the (only) place in

---

[147] Agamben, 2017:354.
[148] Ibid:353-354.
[149] Ibid:1040.

which such experience can *begin* in the form of, precisely, a pre-historical inquiry, an inquiry into the historical emergence of a distinction. Agamben's ontology of the performativity of language is therefore, quite explicitly, constructed as being, at the same time, (or perhaps only) a methodology. It is exposed as made through an act of study which takes place in the present and, from the present, makes the past – and therefore, insofar it follows from the past, the present itself too – intelligible[150].

From Institutional Nature to Natural Institutions

In the western tradition society and nature are articulated exceptionally, in the sense that society has been constituted on the presupposition of nature which, at the same time, is both included and excluded, or better, included through an exclusion. This articulation, if observed from the present, is not stable but evolves in time: generally speaking, it rests on a process of institutionalisation that makes nature and society indistinguishable while, at the same time, re-articulating – each time differently – their (in)distinction. For example, while the Roman experience is one of 'institutionalisation of nature'[151], in Medieval times the fundamental experience is one of 'naturalisation' of already established social institutions.

Within the Roman model of the legal institutionalisation of nature, it can be argued, nature, acts as a threshold between society and reality. For the Romans, in fact, law presupposes a nature which is distinguished from the existing socio-juridical institutions, but at the same time this presupposition acts as a form of institutionalisation of nature itself which, on one side, is only defined negatively as that which has not yet been organised into a set of '*status*, properties and exchanges'[152], and which, on the other, functions as a 'terrain for the extension of norms beyond the limits of existing laws'[153].

[150] In this sense, there is a crucial methodological distinction between Agamben and Lévi-Strauss which, perhaps, exemplifies the distinction between post-structuralism and structuralism. While for the former '*mana*' indicates the possibility to suspend, at any time (above all, in the present) the semantic-denotative connection between words and things, for the latter '*mana*' refers to the possibility to imagine a time, to be located in a remote and unreachable past, in which such connection had not yet been established, a time in which the world began to signify *despite* people being unaware of what it signified (Lévi-Strauss 1987:61). In any case, what matters here is that the performativity of language refers to the force of language understood as a floating signifier which can carry what Lévi-Strauss calls a 'surplus of signification' only because signification has been suspended (or not yet established).
[151] Thomas, 2020.
[152] 2020:16.
[153] Ibid:22.

Nature is, in other words, fully instrumentalised by law: it constitutes a system with it, so that, Thomas suggests, natural law, *ius gentium* and *ius civile* are understood as 'concentric circles'[154]. No precise hierarchy exists between these three circles[155] and the circle of nature ultimately constitutes a mere 'pre-juridical enclosure' in which things are represented as 'primitive goods' that exist in a 'fossil state' of the either collective or private (legal) appropriation[156]. Nature is therefore represented as a sort of pre-legal institution which "foreshadows institutions while being defined by them"[157]. In general, as noted by Chiffoleau, nature is turned into a 'model institution', not a limit but a means for the development of institutional fictions[158].

The limits of sociality are constantly re-defined through a self-referential re-organisation of law itself into primary (nature) and secondary (social) institutions[159]. Nature is turned into a liminal institution whose *force* can be activated in order to intervene on the *form* of law (the secondary institution), so as to adjust it to the concrete contingencies of administration of sociality. From this perspective, the institutionalisation of nature becomes "an economic tool to transform the law" without contradicting older juridical norms and categories[160]. This makes possible the conservation of the systematic integrity of the law, but also its use as a tool for the exercise of what Thomas calls a 'power to rule over the real'[161] [my translation]. Crucially the institutionalisation of nature is achieved through a particular legal technique, namely, the *fictio legis*[162], with its '*as if-(not)*' kind of logic[163], that allows to either treat natural things as existing or as non-existing within the sphere of sociality. The *fictio* can be used to imagine the existence

[154] The first circle includes all living species, the middle one the nations and the third one the cities (ibid: 17).
[155] Ibid:23.
[156] Things can either be common to everyone (air, sea, shores, etc.) – quasi-public – or be subjected to individual appropriation (wild animals) – quasi-private (ibid).
[157] Ibid:26 [my translation].
[158] Thomas, 2020:52-53.
[159] 2016:62.
[160] Ibid:20-21 [my translation].
[161] "[P]otere di dominare il reale" (ibid:23).
[162] Thomas, 2016.
[163] In simple terms, this technique allows to produce juridical consequences (in matters as different as property, testament, adoption, access to public lands, etc.) on the premise that a certain event (at times natural, at times legal) occurred, despite the fact that it did not ('as if') or, vice versa, that it did not occur, despite the fact that it did ('as if not').

natural contingencies[164] so that, rather than of instrumentalization of nature, one could speak of juridical re-imagination of nature (de-naturalisation[165]).

This is possible because the institutional integration of nature presupposes what Thomas refers to as a 'gap between law and reality'[166], which is achieved, precisely, through the *fictio* that a word could count *as if* it were law, thus producing a reality of its own, an institutional reality autonomous from reality[167]. In this sense, one could read the the formula '*uti lingua nuncupassit, ita ius esto*' ("*as* the tongue has said—has taken the name, *nomen capere*—so the law is") in the Law of the Twelve Tables – which Agamben considers a fundamental paradigm of the "performative potentiality of speech in law"[168] – as the most fundamental expression of law's fictionality, which makes of the *dictum* a *factum* in itself[169]. The law is able to generate its own factuality (in a way similar to how society will be considered – by sociology – able to generate its own – social – facts[170]), which means that it has the force of a fact. And yet, on the other side, it should also be stressed again that this factuality is the product of a process of abstraction that produces what might be described a '*solco*'[171], a *gap* between law and reality. Philosophically speaking, it can be suggested that the gap between representation and reality (which is thought by Colli as, precisely, a 'void of representation') is appropriated by the law and performatively turned into the indistinct ground of a process of *realisation*, namely, a process of construction of a social reality made of forms that presuppose a force (of form). Through the law society itself comes to be constituted as an endless process of articulation of form and force.

In this respect, it should be noted that the institutionalisation of nature is followed, since the early Middle Ages, by the inverse process, namely the gradual naturalisation of social institutions. The relation between law and nature is structured hierarchically so as to establish a (fictional) primacy of nature compared to law. This implies that the scholastic interpretation of the *Digest* must limit the use of fiction in accordance with the

---

[164] As when, for example, "unborn babies were considered as if they were born already" " [*pro iam natis… ac si in rebus humani essent*] (ibid:43) the adopted son is considered as if born from adopting parents [*tam iure lege… filius… quam si natus esse*](ibid:46) [my translation].
[165] Ibid:27.
[166] 2016:53.
[167] Ibid.
[168] Agamben, 2017:345
[169] The formula "does not mean that what is said is constatively true but only that the *dictum* is itself the *factum*" (ibid.)
[170] Consider, for example, Berger & Luckmann's (1991) and Searle's (2010) forms of social constructivism.
[171] Thomas, 2016:53.

limits set by the facts of nature[172], that produces the 'absolute natural impossibility'[173] of certain pre-established legal situations[174]. The new interpretative model, in other words, systematises nature so as to constitute it as a second order of truth which remains hierarchically superior to the order of truth of law[175]. Yet it should be stressed that both orders remain orders of the law, instrumental to legal operations that are now increasingly 'externally determined' by issues of birth, reproduction and death[176]. Fictionality does not disappear but rather employs new forms institutionalising nature as instituted as a fixed creation (non-instituted) to which man is, to a certain extent, passively subjected[177] and, vice-versa, institutionalising law as a product of nature. In this sense, what had begun, with the Romans, as a process of fictional legalisation of nature was turned, in medieval times, into a process of fictional naturalisation of law.

Naturalisation occurs in two forms. On one side, it grounds law on (bare) life, understood as the material basis of law, its lower outside[178]. This implies the institutionalisation of the legal subject as, first of all, a biological and psychological body: the institutionalisation of the body as such as the ground of law and politics. On the other side, law itself is interpreted as a natural manifestation, with nature itself being interpreted as a manifestation of reason. The law, in other words, is represented as a formalisation of a natural reason which transcends it and bounds it: specifically, law imitates and reproduces on earth 'divine omnipotence' – God's *potentia absoluta* – as, precisely, the power which is able to order and limit itself, that is to say, to constitute itself as a *potentia ordinata*[179]. Chiffoleau has spoken, in this respect, of a bound between Nature and Omnipotence[180], such that nature itself is institutionalised as, at the same time, *natura naturans* – Nature as Creator – and *natura naturata* – the nature as creation. The

[172] Ibid:65-67. For example, the *Lex Cornelia* is now interpreted in the sense that a son born from two Roman citizens *after* they were made prisoners, once back in Rome, cannot, in order to become a citizen again, be subjected the doctrine of *postliminium* – which would establish that the son had to be treated 'as if' the father died before being enslaved: the reason why the norm cannot be applied to this particular case, according to the medieval interpreters, is that this would only be possible on the condition of fictionally considering the son 'as if' he were generated by a dead person, namely, by accepting as possible a natural impossibility (ibid:83).

[173] Ibid.

[174] The general principle, Thomas argues, is that "the authority of law cannot abolish nature" (ibid:87) [my translation].

[175] Thomas speaks of 'a hierarchy of two zones of truth' (ibid:89) [my translation].

[176] Spanò & Vallerani, 2016:108.

[177] Ibid:109.

[178] Chiffoleau, for example, argues that law is grounded on "blood relationships that can be considered 'natural' insofar they refer to a reality beyond the law" (Chiffoleau, 2020:53) [my translation].

[179] Ibid:69.

[180] Ibid:100.

articulation of *natura* in *naturans* and *naturata* provides a useful paradigm of modern law's thinkability as grounded, at the same time, on the transcendence of absolute principles (Will, Right, Justice, etc.) and on the immanent practice of government of a population of bodies: in other words, the idea of a constituted power which is, at the same time, originated by a constituent, transcendental, power and yet, immanently administered through acts of government.

As a result, the conceptualisation of *ius naturale* begins to change at least since the sixth century when it is placed in a position of hierarchical superiority over *ius gentium* and *ius civile*[181]. And yet, for this very reason, *ius civile* itself tends to be interpreted as a manifestation of *ius naturale*[182] producing what, at a later stage, will be defined the 'naturalness of the State'[183]. Moreover, this pseudo-naturalisation of law – which is, equally, a juridification of nature – is accompanied with a broader process of naturalisation of society, which further strengthen the conflation of law and society. To the emerging idea of the State as 'natural' and 'self-sufficient' – and therefore, as a 'good in itself', 'a *moral* end in itself'[184] – corresponds the idea of the 'naturalness of society'[185]. Already in St. Augustine, for example, the 'social instinct' is framed as an expression of *reason* (with *reason*, in turn, being framed as the expression of human nature) and the way in which this instinct is made manifest is, precisely, through 'associated life' in the form of the Secular State[186]. The order of sociality is fictionalised, at the same time, as a natural order *and* as the order of the State.

The fiction of 'naturalness of the state', however, is ambiguous because it fictionalises itself: the State, in fact, is thought as the *imitation* of '*summa natura*', 'the nature of God's perfect will[187]. Law and the State are still understood as fictional

[181] Post, 1964:508.
[182] Post, for example, mentions a commentary to the *Decretum Gratiani* where it is argued that "the same law can be called natural with respect to its origin, civil with respect to its form (…), and *ius gentium* with respect to its common observance among peoples" (ibid:526). In a similar passage, another glossator argues that "the civil law (…) is everything that the *civitas* uses, and as such it can be called both *ius naturale* and *ius gentium*" (Ibid:542).
[183] Ibid: 509.
[184] Ibid:497-498.
[185] The idea, obtained through a re-interpretation of Aristotle's *Politics*, that man is '*by nature*' a social and political animal (ibid:496-498)
[186] Reason is, for St. Augustine, 'the participation of rational man in eternal law', but the most concrete manifestation of this participation is the association of men into the state through, precisely, the fulfilment of "the duty of all men to obey the commands of the [its] ruler" (ibid:500).
[187] Ibid:511. In a similar fashion, it can be argued that the Church since at least the 1150 had already rendered ambiguous the distinction, in the rite of the Eucharist, between *corpus mysticum* and *corpus verum*, mystical and real body. More precisely, the *corpus mysticum*, which originally was used to indicate the body of the consecrated host, "gradually los[ed] its sacramental associations in order to acquire

operations, '*artes*', by means of which men are able to 'imitate' and 'follow' nature[188] and the fiction consists in constituting individual states as adapting to the contingencies of lower nature[189]. States are thought as the decaying form of a higher nature – and therefore, as 'relatively natural and good' due to the need to adapt to the contingencies and changes of man's lower nature[190] – and yet, for this very reason, as originating in it[191]. To the extent that nature continually 'brings forth new forms' ('*varia natura*'), individual sovereigns are also entitled to the production of new forms to address the new contingencies that each State is confronted with[192]. In late medieval jurisprudence then the 'body politic' comes to be thought as a form (of law), a universal whole that transcends the time and space of its inhabitants[193] which, nevertheless, is 'inscribed into a domain of change and contingency'[194]. Sovereignty then increasingly comes to represent a principle of *articulation*, such that the law is imagined, on one side, as an 'inanimate prince' which requires an 'animate Law' – namely, the prince(s)[195] who 'infuses' the social body with the spirit of the law[196] – and, on the other side, as grounded on an earthly community, which provides it with an immanent a force from below[197] which the ruler must embody[198].

An analogy here can be drawn with what Agamben calls the signature of *oikonomia*, a form of politico-theological discourse which, during the Middle Ages,

---

political and juridical meanings, so that, by the early-fourteenth century the *corpus mysticum* and the *corpus morale et politicum* become interrelated and interchangeable conceptions" (Zartaloudis, 2008:9).

[188] Law's fictional power becomes therefore assimilated to an art of imitation – with John of Salinsbury, an '*ars naturam imitans*' (Post, 1964:517).

[189] Ibid:545,552.

[190] For example, for many medieval commentators, including Azo and Irnerius, a distinction was to be drawn between "the old, higher naturalness of primitive society and the new, lower naturalness of societies made into States" (Post, 1964:545). It was generally held by medieval canonists and legists that nature works as 'a principle of change' from "the higher naturalness of the primitive society common to all men" to "the lower naturalness of separate societies of peoples living in a state of sinfulness (…) organized into States" (ibid:552).

[191] Ibid:519.

[192] Ibid:554. The lower nature legitimates the practice of legislation ("demands new laws to take care of new kinds of situations" (Ibid:535) and grounds the "theory of the right of the ruler to make laws for the necessity and utility of people and State, and to make new laws when new kinds of cases emerged" (Ibid:557).

[193] Bartelson, 1995:98.

[194] Ibid:134.

[195] The prince as the embodiment of the principle of the spirit of the law (1995:93).

[196] Ibid:94.

[197] Ibid:101.

[198] This, it might be argued, is an earlier manifestation of the problem, in modern legal theory, of the differentiation, and thus of the articulation, of validity and efficacy and thus of the different theoretical solutions provided to solve it, including Kelsen's positivism and institutionalism (particularly in its Schmittian, decisionist, declination).

characterises much of the debate concerning, precisely, "the divine and its relations with all creation"[199]. This discourse, in fact, implies that "God, who is both one and triune at the same time, can—while remaining transcendent—take charge of the world and found an immanent praxis of government whose supermundane mystery coincides with the history of humanity"[200]. Interestingly, one of the many manifestations (paradigms) of this signature comes from canon law and concerns the idea of *oikonomia* as, at the same time, 'the incarnation of the Logos' and an 'exception', in the sense, of "the occasional restriction or the suspension of the efficacy of the rigor of the laws and the introduction of extenuating circumstances, which 'economizes' [*dioikonomountos*] the command of law"[201]. From this perspective, Agamben notices, "the salvific activity of the government of the world acquires the meaning of 'exception'"[202] to the law. The analogy (*natura naturans* : *natura naturata* = law : exception) in other words, constitutes an anticipation of the modern (*oikonomic*) paradigm of (bio-)power as (di-polarly) organised into a sovereign law and acts of (natural) life's government, the institution, with Zartaloudis, of "a now permanent virtual economy of violence that aims to manage *life* as such" through various (legal and non-legal) means or apparatuses[203].

In this respect, it could be further stressed that the term *oikonomia*, at least since Aristotle, is used to describe a 'managerial and non-epistemic' practice of arrangement[204]. It has been suggested that *oikonomia* functions as a 'signature of operativity' in the sense that it indicates in quite vague terms "a practice and a non-epistemic knowledge that should be assessed only in the context of the aims that they pursue"[205], a "praxis for a purpose"[206]. Whatever the purpose might be this is achieved *oikonomically* when it consists in an 'ordered arrangement or administration', so that Agamben can argue that 'the semantic sphere of the term' is defined, in general, by a functional-administrative paradigm[207]. It can be further suggested then that *oikonomia* epitomises from quite early in the history of western thought the idea of instrumental thinking and action as such, which, as Benjamin suggests, is crucial also for a proper understanding of (bourgeois)

---

[199] 2017:417.
[200] Ibid.
[201] Ibid:415.
[202] 2008:133.
[203] Zartaloudis mentions, among others, disciplinary mechanisms of security, economic deregulation, reason of state, public policy, and emergency powers (Ibid:169).
[204] Agamben, 2017:430.
[205] Ibid:389.
[206] Watkin, 2013:218.
[207] 2017:387-388.

conceptions of both law and language. In this sense, the law as a means could be understood as, precisely, a kind of highly technical episteme, which alone does not cover the entirety of the governmental purposes of a state or other similar institutions and, therefore, is supported by managerial, non-epistemic acts of government that exceeds the legal sphere, properly understood. Or, alternatively, the law as a means could also be interpreted, from the perspective of governmental management, as one among many practices that can only be assessed in the context of the ends that it serves. In any case, the legal and the managerial, law and government, together constitute the two poles through which the world is constituted as an order of governability.

In any case, to my purposes, it is worth mentioning another distinction, which like the one between the two natures – *naturans* and *naturata* – is also paradigmatic of the *oikonomic* signature, namely, the Christological distinction between Father and Son. Its function, in the context of the debates in which it emerged was both theological – namely to avoid through, precisely, *oikonomic* arguments, the fracture of monotheism potentially caused by the introduction of the Trinitarian dogma – and political – to legitimate the power of the Church through an *oikonomia* of two kingdoms, 'the Kingdom of God and the Earthly Kingdom'[208]. Crucially, the distinction between Father and Son has also been represented as a distinction between nature (*physis*) and operation (*energeia*)[209] as, respectively, the two spheres of (God's) being and (God's) action. From this perspective, action, the government of the world, is thought as radically separated from his essence which, in fact, does not say anything about God's relation to the world[210]. Action or *praxis*, has no foundation in being and this is reflected in the idea of Christ, the Son, as, paradoxically, 'generated *an-archos*', ungrounded, without principle[211]. To be without principle means, as the etymology of the term '*arché*' suggests, to be without 'command' and in this respect Agamben argues that Christian theology introduces in Western thought the fundamental distinction between being and action as a distinction between being and will[212], the idea of a "praxis [which] does not necessarily depend on being, and nor is it

[208] Zartaloudis, 2008:55.
[209] Agamben, 2017:425.
[210] Ibid:419-420.
[211] Agamben quotes Eunomius decisive words about the Son as the one who "reigns together with the Father absolutely, anarchically, and infinitely [*pantote, anarchōs kai ateleutētōs*]" (Ibid:423).
[212] Agamben suggests in this respect that the threshold between ancient and modern is represented by the passage from Greek philosophy's focus was on potency and possibility to – through Christian theology – modern philosophy's focus on will (2017c:108).

founded on it, but is the result of a free and gratuitous act of the will"[213]. Paradoxically though, Agamben further suggests, "the fracture (…) between being and action, insofar as it makes the praxis free and 'anarchic' opens in fact, at the same time, the possibility and *necessity* of its government"[214]. In other words, to claim that action is anarchic, in the sense of 'willed', does not mean that it is un-commanded: it means, rather, that it is self-commanded[215] and thus necessary[216]. In other words, the *oikonomic* signature introduces in the West a fracture between being and action – ontology and praxis – which is at the same time also fracture between two ontologies, an ontology of *esti* ('is' in Greek) in which things simply 'are' and an ontology of *esto* ('be!' as an imperative injuction) in which things 'have-to-be'[217].

This distinction can be used to inform the separation between two natures as a distinction between two powers, an absolute power, *potentia absoluta*, and an ordained power, *potentia ordinata*, in which the former willingly commands its own self-limitation, so that, with Agamben, "*de potentia absoluta*, (…) in the abstract, God can do everything, however scandalous it may seem to us; but *de potentia ordinata*, that is, according to the order and the command that he has imposed on his potential with his will, God can do only what he has decided to do" [218]. The Christological analogy, in other words, can be used to construct the notion of a power which "*can* will and, once *has willed*, *must* act according to its will"[219]. This is, precisely, the idea of law as a constituted power[220], a form of law which emerges from the willed-command of a self-limiting constituent power.

More generally, the idea of law as a product of self-limitation has an influence beyond constitutionalism and makes intelligible many of the modern foundational theoretical approaches to the law-question including, for example, Ehrlich's idea of a self-

---

[213] Ibid:421.
[214] Ibid:431.
[215] Agamben can thus argue that there is no archè of command, because "command itself is the archè, the origin or, at least, that which is in the place of the origin" (2017d:95) [my translation].
[216] Command itself, paraphrasing from Hobbes, can be understood as 'an expression of appetite and will'. Agamben quotes Hobbes in 'Creazione e Anarchia', where he addresses specifically Nietzsche's claim that "to will means nothing but to command" (2017d:107) [my translation].
[217] Ibid:103
[218] Ibid:112.
[219] Ibid.
[220] For example, Eulau argues that modern constitutionalism emerges from a process of depersonalisation of sovereignty, that begun in the 16th century, and that relies on the 'natural law' conviction that there is a 'natural order of reason' which allows to transform political will into a constitutional form (1942:6-7).

ordering society[221] or Kelsen's concept of a *Grundorm*. Kelsen's theoy of law, in particular, can be interpreted as anarchic, in the sense that law here is founded on the anarchic command of a '*Grundnorm*' which means, ultimately, self-reflexively. The analogy is not absurd insofar as, in general, the medieval problem of the distinction and the articulation of being and action, if re-interpreted through Agamben's lens of the two ontologies, can be said to ground modern (post-Kantian) ethics, as well as modern (post-Kelsenian) legal thought on, at the same time, command and will. Kelsen, for example, grounds his pure theory of law on Kant's ethical distinction between *Sein* and *Sollen* and thus speaks of law as a command ('having-to-be') and command as "a *will* directed at a certain behavior of another (…) [a will] that he *ought* to [*soll*] behave in that way"[222]. Kant's normative ethics, similarly, rests on the collapse of three fundamental modalities of being, 'possibility, contingency and necessity' – and therefore of its three modal verbal forms, 'being-able-to, a willing-to, a having-to' – into each other, a collapse which, Agamben notices, is expressed by Kant through the paradoxical formula '*man muss wollen können*', "we must be able to will" [223].

Along similar lines, it can also be suggested that the principle of a 'conditioned necessity' which emerges in the context of medieval speculation, has striking resemblances with another modern paradigm of law and power, namely, the ideology of 'contingent necessity' that characterises modern 'Raison d'État'[224]. In both cases, necessity is grounded on an anarchic contingency: in the first instance the anarchy of a willed-command, in the second, of society itself[225]. In both instances, the outcome is the necessity of the constituted form.

What emerges from these analyses is a reflection on the very principle of *oikonomic* articulation which characterises every attempt to think the *factum communitatis* as a coupling together of a universalist framework and an immanent sphere populated by political *animals* ('*zoon politikon*')[226]. The naturalisation of law produces

---

[221] Ehrlich's idea of the living law resembles, in this respect, the medieval idea of nature which, according to Porter (1996) grounds as a general principle of rational order(ing) rather than a particular set of defined principles.

[222] Agamben, 2019.

[223] 2019:109.

[224] For a detailed analysis see Hvidbak, 2008.

[225] Whereas in medieval times the necessity of the State derives from God and nature, in modernity the State grounds self-referentially its own necessity by presupposing the chaotic contingency of society so that, it can be argued, (alleged) contingency produces necessity (ibid:135).

[226] The essential (natural) qualities of this animal change depending on what each theory aims to achieve but, as Bartelson notices, since at least the late Middle Ages – and Bartelson also hints at the fact that Moerbeke's translation of Aristotle's politics might represent a turning point in this respect – to zoon

the transformation of what Bartelson call mytho-sovereignty – ‘descending theory of government’ – into proto-sovereignty – ‘ascending theory of government’ – but the *oikonomia* of theory, namely, with Zartaloudis, its addressing the problem of government by positing *archai*, i.e. ‘principles and ends’[227], remains intact. In this respect, Bartleson notices that the claims to universality are not made ‘redundant or unwanted’: on the contrary, since, with the demise of the Ecclesia, it does not have to be embodied by a political overarching authority anymore[228], universality comes to represent the ‘universalist framework of reasoning, the ‘big inside’ which contains the outside of the state[229]. With a series of detours that cannot be investigated in detail here, this will lead to the constitution of the State as the fundamental abstract unity of modern politico-juridical knowledge[230] and therefore to a re-conceptualisation of sovereignty as “a principle of organising our political reality as well as our understanding of it”[231] (and, relatedly, of studying it).

Despite the nuances of this process, what remains sovereign is, in general terms, the thinkability of the *factum communitatis* through a bipolar structure of the state[232] or of the law. To be sovereign, from a methodological perspective, is the *oikonomic* signature that makes law and life intelligible through an articulation of two orders (two natures) . The order of law and the order of nature, which in the Greek experience were somehow still distinguished into, respectively, *nomos* and *physis* enter into a long process of fictional re-articulation which leads, with modernity, to their indistinguishability. The naturalisation of law implies that the gap between law and reality – which was implicit in the Roman experience of legality – is filled and that reality itself becomes something to has-to-be realised (through legal and non-legal means). The medieval process of ‘naturalisation of human relations’[233] is, from this perspective, already a process of

---

politikon was ‘characterised by reason, sociability and adaptability to change and (…) capacity for deliberate transformation of politica predicament” (1995:102).

[227] 2008:120.

[228] Bartelson stresses in particular that “that “nominalism opened up a logical void inside the universal whole of theological knowledge” (ibid:134).

[229] Ibid:105.

[230] A general theory of the state appears in late Middle Ages and develops during the Classical Age into a theory of the systematic analysis and comparison of states’ interests in order to finally consolidate (ibid:240-241), with modernity into a theory of the state abstracted from both ruler and ruled, a whole that assimilates “all prior social and cultural differences (…) by nationalising them” and, at the same time, transposing them into the inter-national system (ibid:242-243).

[231] Ibid:189.

[232] For a similar but more detailed argument see Zartaloudis’ analysis of modern ‘government by consent’ (2010:110-125).

[233] Spanò & Vallerani, 2016:109.

juridification, one which anticipates modern form of biopoliticisation. The naturalisation of law – originally a form of self-limitation of law's fictional ability to manipulate reality[234]– by grounding law on nature, can equally be understood, with Agamben, as a process of 'juridification of life'[235] which instead makes of law a fundamental constituent of reality[236].

The Body of Law

Neo-Foucaultian inquiries into *modern* law can be read as attempts to draw a series of dipolar distinctions within power[237] that are *analogous* to the distinction drawn, in medieval times, between the two Natures of law. In this sense, Foucault's idea of power as a 'net-like organisation' which constitutes subjects[238] is rooted in the medieval speculations on law's body and his characterisation of modern power in terms of what he calls "the perpetual exchange or encounter of mechanisms of discipline with the principle of right" or, in other words, as an interplay of 'juridical rules and natural norms'[239] is made intelligible by the medieval split between law's two natures.

Crucially, the collective entities invented during the Middle Ages, in spite of their fictional character, ground their fictionality on the corporeality of the bodies they presuppose[240]. Not only the state, but the sovereign and the legal person, in order to function as fictions, have to presuppose a minimum degree of corporeality[241] which, in turn, is represented through a series of physiological metaphors of power[242], including, for example, the idea of a 'health and obedience of Kingdom's natural body'[243], and

---

[234] Ibid.
[235] On this see for example, Agamben (2020) and Thomas (1998).
[236] This is, I think one of the arguments that can be derived from Bartelson's genealogy of sovereignty.
[237] Including, for example, that between macro/micro-powers, sovereignty/domination (Foucault, 1980:96), legalisation/normalisation (ibid:106), sovereign-power/(self-)disciplinary power or, with Hunt and Wickham, laws and regulations (1994:22), State/Government(ality), and so forth.
[238] Foucault, 1980:97-98.
[239] 1980:106-197.
[240] Thomas, 2016:78-79.
[241] This corporeality, it should be stressed, is nevertheless still fictionally organised, for example through the fiction of a juridified time. Thomas in this respect quotes a scholastic interpreter who argues that "when all the members of a people have died and have been replaced, it is nevertheless still the same people" [my translation]. As a result Thomas further argues that "the fiction of unity of the person is not at all grounded on a true nature of time, but presupposes a juridical organisation, in the form of accessory surrogacy" [my translation].
[242] Chiffoleau, 2020:65.
[243] Chiffoleau, 2020:100.

therefore, of the 'the prince and his counsellors' protecting the members of the state, like, in a body "certain parts are arranged for the protection of the intestines"[244]. Accordingly, the state is thought as the space in which human needs are 'naturally cared for'[245] and the king as the one who cares for the welfare of the community[246].The exercise of a centralised control over the welfare of the community implies, at the same time, the production of a series of representations of a legal corporeality of individuals. One critical aspect of this corporeality is represented by (or as) its killability, and thus, it is used to ground a fundamental right to self-defence against violence force[247] which, more concretely, implies the institution of new judicial techniques to protect the rights of the defendant in a criminal procedure[248].

Along these lines, for example, the historical evolution of the *Habeas Corpus* – the right to have a body, in the form of "freedom from unlawful imprisonment of any kind"[249] – can be re-interpreted as, precisely, a history of 'competition for jurisdiction' between different authorities[250]. It has been noted that when the expression *habeas corpus* appears for the first time, in the medieval pleas gathered by Bracton's in his notebook, its use concerns not so much the right of a subject but rather the "power of judicial command to force the appearance of an unwilling defendant"[251] and, in this sense, Cohen notes that throughout the 12th century the institute represented a tool for "the rise of a centralized and powerful monarchical order"[252]. From this perspective, it is easy to understand why

---

[244] Post, 1964:518.
[245] Post, 1964:530.
[246] With Post, "the king is given his public power to govern for the public welfare of the community as a whole and for the common welfare of all its members" (ibid:515). He does "what is necessary for the *salus subiectorum*" (ibid:517).
[247] The argument is, specifically, that "all *leges* and *iura,* permit repulsing force with force", in accordance with the general principle that "what anyone has done for the protection of his body, he is said to have done by right" (ibid:528).
[248] Chiffoleau, 2020:70. As noted by Post, nature sanctions "the private right of defending oneself against bodily harm and (…) moreover not only binds men in a kind of social contract, but also stands behind the public law in the form of courts and trials to protect society from the harm that would result from private vengeance, not to mention the harm from giving no man the right, according to the law, to defend himself" (1964:530). Moreover, the argument is strategically used to claim for the State a similar natural right to self-defence. With Post's own words: "if every individual man can by natural reason defend himself, the State should also, as a community of men, receive from nature the same right" (ibid:527).
[249] Cohen, 1938:93. From the examples provided by Bracton, Cohen concludes "that habeas corpus in the middle 13th century was a familiar command issued as a mesne process in actions seemingly where force was-not alleged', but where every method save distraint and outlawry had failed to compel the party's appearance to the summons" (Ibid.).
[250] Including common law courts, the court of Chancery, and the Royal authority, with its executive prerogatives. For an overview of this history, see McFeely (1976).
[251] Cohen, 1938:106.
[252] Ibid:116.

Agamben argues that the famous 1679 *writ*, constitutes the legal subject not so much a 'free man' to be protected but rather as a body, (*corpus*) to be shown by the sheriff before the law, in accordance with the formula "you will have to have a body to show" ('*habeas corpus ad subjiciendum*')[253]. An outcome of the late medieval process of naturalisation of the subject of law is, from this perspective, the constitution of the new subject of politics, the subject of democracy, as a mere body and, from this perspective, Agamben argues, "democracy is born precisely as the assertion and presentation of this body"[254].

It is worth mentioning that the formula '*habeas corpus*' is exemplary of "the structure of the legal language itself", namely, 'the imperative mode' ('have the body')[255] and, more precisely, of the performative dimension of the imperative mode. The performance consists in constituting the subject of law as a 'body' taken 'under a power'[256], the human body *as* a body of the law. This performance is, in other words, a modern act of sacralisation, that is to say, of constitution of a zero-degree of life as, precisely, a zero-degree of juridification. It is worth considering that for Agamben also the medieval separation of the King into two bodies, a material body and a perpetual royal dignity that never dies, represents not only a fiction through which a material body is separated and yet held in relation with a divine or juridical form but also, at the same time, an act of sacralisation. Specifically, the sovereign's two bodies are rather to be considered as "two lives within one single body: a natural life and a *sacred* life" [italic mine], namely, a "bare life that has been separated from its context and that, so to speak surviving its death, is for this very reason incompatible with the human world"[257]. Paradoxically then, the presupposition, in the *habeas corpus*, of a zero-degree of corporeal life related to law, and the projection, from within the body of the King of a juridical, sovereign, life, are considered by Agamben as two entirely specular operations[258]. Both represent ultimately, the introduction into life of a 'supplement' or 'excess' of signification that separates life from itself and makes its constitution as, precisely, either a bare or sovereign, possible.

With the advent of modernity, these two figures, body and sovereign, become definitively indistinguishable when, with the *Déclaration des droits de l'homme et du*

---

[253] Agamben, 2017:103.
[254] Ibid.
[255] McFeely, 1976:586.
[256] Cohen, 1938:112.
[257] 2017:85.
[258] For a similar argument, in the context of a more detailed analysis of Agamben's re-interpretation of Kantorowicz's work on the King's two bodies as a form of devotion, see Parsley (2010:20-24).

citoyen, "birth—which is to say, bare natural life as such— (…) becomes (…) the immediate bearer of sovereignty"[259]. To be the bearer of sovereignty is an ambiguous condition, insofar as it also means that man, as a citizen, is subjected to the (bio)power of the state now turned into a nation, the state-nation an institution whose power begins at birth. To the birth of free men to which art. 1 refers – "men are born and remain free and equal in rights" –corresponds in art. 3 the birth of State sovereignty, i.e. the Nation – "the principle of any sovereignty resides essentially in the Nation". The ultimate consequence is that rights can be "attributed to the human being only to the degree to which he or she is the immediately vanishing presupposition (and, in fact, the presupposition that must never come to light as such) of the citizen"[260]. This vanishing point is still, according to Agamben, a bare-killable life and the paradox of this new articulation of *zoe* (birth) and *bios* (rights) is that its presupposition, i.e. bareness, comes to be reconstituted as nothing else but the lack of the State[261].

Bare and juridical life, in the form of, respectively, birth and citizenship, subjected ('suddito') and sovereign, are made indistinguishable, that is to say, rendered as the two poles of a biopolitical field in which a decision on their articulation can be taken. Both circumstances, the *Habeas Corpus* and the Declaration, provide fundamental paradigms of the articulation of the two lives of the (modern) subject, namely bare and sovereign[262]. By articulating together 'corpus' and sheriff, birth and nation, these historical landmarks mark, first of all, the institution of a field of both subjectification and subjection, the field of (modern) biopolitics in which the same man is, at the very same time, *both sacer* and sovereign.

In other words, while it is possible to claim that modern biopolitics turns potentially all *zoe* into *bios*, at the same time, neither *zoe* nor *bios* have actually disappeared. On the contrary, they can be exposed as they actually appear, namely indistinguishable, which means that study shows them as the object of a decision which concerns (and has always concerned) their ambiguous, unstable, relationability. The modern experience of anthropogenesis is or can be that of its study (experimentation) as

[259] Agamben, 2017:106.
[260] Agamben, 2000:20.
[261] With Agamben's words: "in the system of the nation-state, so-called sacred and inalienable human rights are revealed to be without any protection precisely when it is no longer possible to conceive of them as rights of the citizens of a state" (Ibid:19-20).
[262] On one side in fact, "*corpus* is a two-faced being, the bearer both of subjection to sovereign power and of individual liberties" and on the other, "simple birth [that] as such is, in the passage from subject to citizen, invested with the principle of sovereignty" (Agamben, 2017:103).

an *oikonomy* of government, an economy of articulation of inside and outside (of law and life) that produces *both* politicisation (from *zoe* to *bios*) and depoliticisation (from *bios* to *zoe*), maintaining therefore the power to decide on both through the fiction of their indistinction. Both movements are inscribed within a logic of government, a logic of articulation, and address the same fundamental bio-thanato-political question: "when does a person become a body?"[263], or vice-versa, 'when does a body becomes a person?'. Similarly, but from the perspective of the body politics, to depoliticise means to turn the city into an *oikonomic* machine while, on the other side, to politicise is to recognise that all life's manifestations have a political element that can be mobilised as a threat to law, order and life itself. That today the entire world has been turned into an 'absolute space of global economic management' is an example of depoliticisation while, global terrorism (and to that I would also add, the current pandemic crisis) is an example of how every aspect of life can, in turn, be remobilised and politicised. This will always produce a series of representation of life that will make it governable and coherent with the legal order – in spite of its many internal inconsistencies (casualties).

Modernity can be experience as the institution of a threshold of indifferentiation between *zoe* and *bios*, *oikos* and *polis*, a threshold through which the unpolitical is politicised and the political is 'economised'"[264]. Both law and life, if rendered indistinguishable, describe a threshold of inclusive exclusion, which "distinguishes and separates what is inside from what is outside"[265] but this also imply that law, being thought as the gesture which re-draws the limits between law and nature, is turned into a new kind of ontology, namely, a kind of thought which "rule[s] out the existence of a sphere of human action that is entirely removed from law"[266]. It is possible, in this respect, to speak of an ontology or potentiality of law whose main characteristic is that the existence of a sphere of human praxis beyond the possibility of legal scrutiny becomes unimaginable.

To this purpose, it is worth mentioning that Agamben locates in the Middle Ages one possible point of emergence of this particular ontology. Specifically, he provides a paradigmatic reading of the attempts of some monastic orders (the Franciscan in particular) at theorising the existence of a sphere of a factual use of things, i.e *usus facti*,

---

[263] Gorney, 1968:322
[264] Ibid:265.
[265] Ibid:109.
[266] Ibid.

(and therefore of the body[267]) situated beyond the legal regime of property rights, which the Church inherited from the tradition of roman law (*proprietas*, *possession* and *usufructus*)[268]. To this purpose, Agamben suggests, Franciscan theorists were the first, in the history of legal thought, to systematically advance the idea that the legal regime of property was grounded on 'a will to posses' (*animus possidendi*) which had, instead, to be renounced by the monk through what was technically described as an '*abdicatio juris*'[269]. As suggested by Grossi then, the attempts, by Franciscan theorists, to expose this psychological character of law provided the "foundations of a modern theory of subjective law and a pure theory of ownership understood as *actus voluntatis*"[270]. Crucially, Grossi adds, the law came to be constituted as dominion ('dominium'), namely, 'act of volition' and, in turn, the very notion of 'dominion', through the juridical category of propriety – "the paradigm of all of man's dominions" – became (if it was not already) something like "a general interpretative category of man in the world"[271].

It is precisely in consideration of the strict link between law and this new emerging onto-hermeneutical paradigm, i.e. 'volition', that the Franciscan's attempt at institutionalizing a form of life beyond the law failed. In fact, while at the beginning Pope Nicholas III conceded that any praxis of *use* could be distinguished into a 'right of using' (*usus iuris* or *ius utendi*) and 'simple de facto use' (*usus facti*)[272], almost a century later, Pope John XXII issued a bull where, on the ground of what appears a juridico-ontological argumentation, he formally dismissed the possibility to establish a purely factual relation between the monk and the thing and, with it, of the existence of a factual use absolutely beyond the law. Specifically, applying the doctrine of *quasi-usufruct* which establishes that consumable things "become property of the one to whom they are left in use"[273], he claimed that no *usus facti* beyond the law was possible because the use of a consumable thing (such as a dress or food) – which by definition is always an abuse, in that it coincides

---

[267] Agamben's reflections on the monastic rule as the expression of an endless praxis of use of the monk's body (2017:893-911) are particularly instructive but, unfortunately, due to space constraints they cannot be explored in detail here.

[268] According to a modern commentator the *usus facti* constituted "a species of the relation between objects which suspends all kinds of individual and collective domains as well as all juridical determinations", the configuration of poverty as "a space of juridical neutrality" (Coccia, 2013:174) [my translation]. Similarly, Grossi argues that "poverty ends up being non-property" (1972:292) [my translation].

[269] Bonaventure speaks of monks '*parvuli*' and '*filii familias*' of the Pope (Agamben, 2017:977).

[270] Ibid:993.

[271] Grossi, 1972:327.

[272] Agamben, 2017:975.

[273] Ibid:990.

with the destruction of the thing – constitutes an 'instantaneous being'[274] with no autonomous factual existence beyond the *intention* to use it. As a result, Pope John XXII claimed that to possess, a (consumable) thing is possible only by means of the law (of dominion, i.e. property). The use of body that the Franciscans were trying to isolate from the law was then turned into a *dominion*, an act of volition (of, at the same time, the subject and the law), as the ground of man's (sovereign) experience of the world.

Interestignly enough, Foucault too reflected on the problem of will in relation to medieval monasticicism and, specifically, on the practice of confession, i.e. *exagoreusis*, – which he describes as a particular kind of "truth-technology oriented toward the discursive and permanent analysis of the thought"[275] – as a paradigm of modern normalizing power. Specifically, Foucault suggests that confession constituted a form of (willed) "sacrificial verbalization of thought" of the monk before the spiritual father, a two-sided regime of examination, exercised from within (between the monk and himself) and from the outside (between the monk and his spiritual father)[276]. The result was a regime of "a permanent discipline with no end of autonomy in sight" and, therefore, *exagoreusis* exemplifies "the apparition of a new kind of relationship to ourselves"[277] characterised by the constant exposition of the deeper self to a disciplinary and normalising mechanism or, with Foucault, by "the constitution of thought as a field of subjective data which are to be interpreted"[278]. *Exagoreusis* is thus paradigmatic of the modern development of practices of normalisation of the individual that are not (necessarily) aimed at his sacrifice – in the name of a transcendental principle – but rather at his active fostering and expansion: the affirmation of life as a fragmented field of production of (both biological and psychological) norms.

These reflections can be further extended in the context of the modern, technical, conceptualisation of legal personality which, in fact, might be said to reproduce this ambiguous threshold of indistinction of law, body and will from within the limits of its

---

[274] Namely, "[a]n act in becoming (*in fieri*), insofar as a part of it has already passed and another is still to come, does not exist properly in nature, but only in memory or expectation (ibid:991).
[275] 1993:222.
[276] The purpose of *exagoreusis* was to scrutinize the object of thoughts according to a value-based judgement that would have determined the specific origin of the thought, namely whether it derived from God or from the Devil. This operation presupposed a separation between self and God, inside and outside, immanence and transcendence, and, accordingly, constituted an attempt at reintegrating the two dimensions through the sacrifice of the self, to be realized through the "complete obedience to the will of the spiritual father" (ibid:221).
[277] Ibid:221.
[278] Ibid:222.

specifically (legal) episteme. As noted by Pottage, today the legal person consists in a process of 'self-narration' through which law "invents and machines both law and fact, while still preserving the fiction of external reference"[279]. The legal person is thus composed of "two individuals (legal and biological/psychological)", that "are matched as close as role and role-player can be"[280]. Suspended in between these two dimensions is, in Pottage's interpretation, the body, that acts as a sort of "party-wall between law and biology"[281], a threshold of both indifferentiation and separation[282]. The medium of the body establishes an exceptional relation between the legal and the biological/psychological individual, such that (from the perspective of the law) the latter is at the same time both included and excluded in and from the former. The result is that there is no proper distinction between person and thing but only between techniques of either personification or reification that are used to make what Pottage calls 'incisions in a continuum that is neither person nor thing'[283]. To this purpose, and specifically in the context of bio-ethics, Pottage continues, 'the consenting subject' is constituted as "an artefactual role to which law (…) delegate[s] the function of deciding on the distinction between person and body"[284]. In other words, volition manifests itself in 'the device' of the consenting subject as, precisely, a means "to absorb or defuse the uncertainties generated by law's difficult relation to biology"[285]. The body acts as a sort of zero degree of individuality, which is presupposed by both the legal and the biological/psychological individuals. By presupposing the body these two individualities articulate each other in and through the law. The legal person is thus constituted through this double presupposition which allows to include the body as external by framing it as a particular biological/psychological entity which is in turn, also (legally) constructed as bio/psycho-logical[286]. The legal person from this perspective is a fundamental *fictio iuris* that is produced by law through a process of 'self-narration', namely, through the ongoing suspension and re-articulation of the relation between biological, psychological and legal individuality.

---

[279] 2002:289.
[280] Ibid.
[281] Ibid:290.
[282] In Pottage's own words, "body (life, vitality, organic process) has become the medium within which norm and biology are distinguished by law's self-narration" (Ibid:293).
[283] Ibid:293.
[284] Ibid.300.
[285] Ibid.
[286] Pottage argues that "that law machines the distinction between itself and biology, fictionalising a (socialised) biology so as to secure or advance particular expectations (Ibid:292).

In very similar terms, Parsley interprets Hobbes' Leviathan, the ruler(s) authorised to act on behalf of the commonwealth, as presupposing a general understanding of *persona*, literally mask, as the indistinction of natural and artificial personhood, such that to personate is always to wear a mask and therefore to re-present, either oneself or another[287]. The mask makes the 'Fiction of political appearance' possible by juridically "mediating between an abstract, political metaphor of organisation on the one hand, and a notion of nature and the natural person on the other — thus enabling the former on the basis of the latter"[288]. It does so, however, constructing the natural person as already artificial, in that the individual is not only conceived as a self-interested pre-social being but – following the medieval speculations on the nature of nature – also able to imitate nature and therefore to constitute himself as 'an artificial animal'[289]. Man, in other words, is naturally artificial because he is able to imitate nature and thus to constitute himself as natural[290]. And it is precisely on the exercise of this alleged capacity that Hobbes will ground his own formulation of the Commonwealth as legitimated through the presupposition an artificial State of Nature, a re-presentation of nature within the State (and therefore a Nature *of* the State!). The fundamental ability of modern men (and, with different results, of ancient men too, when their tradition is studied in the present) is thus to constitute themselves and their own communities by re-presenting the nature which will (and has) always-already ground(ed) them. In this manner, nature is basically excluded through an artifice of representation (the State, legal personhood, and so forth) and, at the same time, included into this form as a force that animates it and makes it possible to endlessly re-draw their limits. But this ultimately imply that the force and the form of law are, ontologically speaking, indistinguishable.

[287] 2010:14. Interestingly, Parsley notices that for Hobbes the stage and a conversation are alike, both spaces of re-presentation. This is vey distant from Benjamin's reflections on 'conversation' which seems rather to become possible only through a destitution of all representations.

[288] Ibid:15.

[289] Which is why Parsley suggests that "[o]ffering nature itself as species of art, Hobbes prepares the ground for the feat of politically natural representation he was about to unfold" (ibid:17).

[290] In Hobbes's own words "Nature (the Art whereby God hath made and governes the World) is by the *Art* of man, as in many other things, so in this also imitated, that it can make an Artificial Animal" (ibid:18).

Threshold (or 'The Other Side of Law')

One of the arguments advanced in this thesis is that Agamben's work does not provide a theory of law but rather the methodological tools for a critique (i.e., study) of the very act of theorising which, at least when it comes to law, is represented as caught between two poles of law's thinkability, namely force and form. A similar argument is made by Zartaloudis when he speaks of the structure of 'Law of law' as "the shared *apparatus* of theological and legal discourse in their attempt to fuse the legal and the extra-legal realms"[1]. An inside and an outside of law are held together so as to constitute a dipolar apparatus in which the two poles are, at the same time, articulated and made indistinguishable – or better, made indistinguishable in order to be articulated. This is what structures, in general, an inquiry into the problem of the relation between law and life. The dipolarity of form and force (inside and outside) is what makes law and its relation with life thinkable and, therefore, also theorisable. Legal theory is, from this perspective, the organisation of law's thinkability in dipolar terms and thus polarities such as means and ends, form and force, validity and efficacy, legality and sovereignty, rule and decision, rule of decision and rule of conduct, represent just few among the many possible re-articulations of this organisation. A theory, it could be further argued, offers *lato sensu* a *decision* on how to articulate the two poles of law and life and, therefore, also a paradigm of sovereign indistinction: this is how, for example, one can interpret Kelsen's *Grundnorm*, Schmitt's account of decision, Hart's Rule of Recognition and Erhlich's living law. Not only these theories construct their own dipolarity: they do so by also constituting themselves as one pole of a field in which the other pole is represented by another theory or theoretical approach which is presented as weaker and less recommendable. In this respect, Schütz has suggested that "the question to be asked is about what theorists are really doing, whenever they are doing what so many of them never stop doing, namely 'recommending' some view at the expense of some other view"[2]. Benjamin's argument about how the dipolar apparatus of means and ends grounds a dialectic between natural and positive theories of law can be read along these lines too.

[1] 2008:3-4.
[2] Ibid:133.

Schütz, speaking of Agamben's potential contribution to the development of a reflection on law, has suggested that "the field of legal theory is now open to receive a range of more complex, less universalist, less politicised, but also more personally shaped, more fragile suggestions"[3]. What is fragile about Agamben's contribution is, specifically, the fact that it does not provide a theory of law, or better, that, in the process of being formulated as a theory, his theory of law *destitutes* itself from the position of theory, and thus is exposed as a method, a form of study. One could even go as far as to argue that there is no theory at all in his work, not at least if theory is conceived, in accordance with the dominant paradigm of research, as an element separated from method. As a theory, Agamben's reflection on exceptionality is, so to speak, powerless (*destituted* of its own power) and, in this sense, it is fragile: it exposes its own fragility. In doing so, it also destitutes the power of other theories, in the sense that it provides the tools to expose the way in which, each theory, provides for an articulation of law and life: in this sense, it disarticulates law and life, it destitutes the power (of thought) which grounds their articulation.

Given its mixed nature (both critique and theory) it is interesting, in this respect, to question, on one side, where so-called *critical legal theory* stands with respect to Schütz's remarks and, on the other, where Agamben's critique stands with respect to critical legal theory. This, however, cannot be done in any definitive sense for at least two reasons. The first is that there is no reason to limit the potential use of Agamben's work in any particular sense and, therefore, the thesis provides here only one possible interpretation of its relevance in the context of critical legal theory. The second, perhaps most important, reason is that critical legal theory itself, as it has often been suggested, does not have well-defined boundaries that would make it possible to develop a coherent and systematic critique of its purposes and methodology[4]. The present discussion is therefore not meant to question the nature of critical legal theory as a whole, but only to point at how certain instances of what might legitimately be called critical legal theory provide further material for a reflection on the notion of study as a form of critique of theory itself.

[3] 2000:107.
[4] Davies, 2017:30.

To this purpose, my position is that if legal theory might be said to represent the outer limit of law as a formal discipline[5], then critical legal theory might equally be said to represent the critique of every previous attempt at limiting the form of law[6] and, ultimately, the *crisis* of the very concept of a legal limit[7]. The way in which critical legal theory deals with this crisis, however, can be further problematised (represented) so as to suggest that critical legal theory instrumentalises the crisis of the legal form, in the sense that it uses as a means to the development of a '*legal* ethics' beyond the legal form[8], one which, it could be argued, has the function to make legal *decisions* possible[9]. From this perspective, it could be suggested that critical legal theory represents (or, more simply, could be interpreted as representing) an attempt at appropriating the force of law (as opposed to the attempt at mastering its form). In this sense, it is not possible to include Agamben's project into the existing literature on critical legal theory if not by suggesting that his project makes the *study* of critical legal theory – as the study of the appropriation of the force of law – possible.

In what follows I will, at first, consider a series of paradigmatic examples of critique of the form of law where critique is used as a means to ground law's decidability in new terms, thus reproducing the logic of articulation of form and force which represents the signature of law's intelligibility. These examples include, among others, Goodrich's theory of legal discourse as well as the more ethically oriented approaches of Douzinas & Warrington and Cornell.

Then I will focus more in detail on one of the main sources of inspiration of these different critical approaches, namely, Derrida's take on law as developed in two seminal texts, 'The Force of Law' and 'Before the Law', where Derrida analyses, respectively,

---

[5] As it seems, for example, implicit in McLeod's argument that "the study of legal theory takes you beyond *laws* and into *law*" and, relatedly, that "the value of a knowledge of legal theory lies in the fact that it provides a principled overview of law as a whole, which enables practitioners to relate a large number of individualized statements of legal doctrine to, and evaluate them in the light of, each other" (2003:15).

[6] Critical legal theory's first aim, as been suggested, is to "retake legal theory and resituate it within a larger political enterprise" (Ward, 2004:145).

[7] Douzinas and Warrington have spoken of "a crisis of legal form and a [related] demand for an ethics" (1994:1). Similarly, Cornell has re-interpreted deconstruction as a 'philosophy of the limit' which embodies a form of "justice as the limit to any system of positive law" (1992:2). More recently, Davies has developed the concept of an 'unlimited law'.

[8] Ward, for example, suggests "[t]he jurisprudence of the 'limit' is defined as the unending 'search for a principle' of legal ethics" (2004:172).

[9] This is what, for example, Douzinas and Warrington seem to suggest when they speak of the "attempts to 're-moralise' the operations of the legal system" and how "[c]risis in this context indicates a *krinein*, a turning to new directions in both law and jurisprudence, rather than a pending and prophesied catastrophe" (1994:1).

Benjamin's critique of violence and Kafka's short novel (also called 'Before the Law'). Derrida's analysis will be considered as aimed at reproducing the signature of decidability and, following Agamben's take on Derrida's interpretation of Kafka's novel, a methodological re-interpretation of the latter will be proposed.

Then I will consider some of the sources that have had a major influence on the emergence of critical legal scholarship, particularly Pound and Cohen's sociological jurisprudence, reinterpreting them in biopolitical terms through Ewald's account of 'social law'. Similarly, I will discuss the notion of legal pluralism in Falk Moore and Griffiths from a biopolitical perspective. I will also take into account Golder and Fitzpatrick and Davies' theories of law evidencing how they reproduce the signature of exceptionaility.

Finally, I will consider the general ontology of governability which characterises the modern approach to the law question from the perspective of Agamben's reinterpretation of Plato and Aristotle's theories of signification suggesting that modern theories provide, in their own terms, what Agamben would define an essentialisation of existence, an actualisation of the general potentiality of language, communicability, into (legal) communication. This will allow me to make some final remarks on the function of study, as a method, in relation to theory.

Other Than Form

The modern critical approach to legal theorisation coincides with a *crisis* of legal theorisation and particularly of the theory of the *form of law*. Douzinas and Gearey, in this respect, have attacked both continental and Anglo-American forms of positivism – including approaches inspired by both Kelsen's and Hart's theories – questioning their emphasis on criteria of validity (such as coherence and self-referentiality) as a failed attempt at 'keeping at bay the Trojan horse of moralistic naturalism'[10]. In general, the strategy of the critic has been to radicalise the problem of legal intedeterminacy – the ambiguity of the legal form – in order to stress, first, that the law is an interpretative enterprise and, therefore, "not just a system of rules [but also] a huge depository of values

[10] 2005:7.

and principles" and, ultimately, that these values "represent the dominant ideology of society (…) the canonical expression of its social and political power"[11].

Goodrich, with his 'theory of law as social discourse'[12], has framed this problem as a problem of language, arguing in particular that legal theory came to constitute itself through what, with a linguistic analogy, can be defined as a 'formalistic exclusion of semantics'[13]: in other words, the law as a *langue*, a grammar of signs which is produced through the exclusion of "diachronic facts [as, precisely,] the blind *forces* set against the organisation of the system of signs"[14] [italic mine]. Both Kelsen and Hart's theories of law are presented by Goodrich as representation of the legal order as a grammar of norms which pre-emptively corrupts any proper engagement with the problem of legal semantics and, specifically, of 'the semantics of rule application'[15]. In simple terms, Goodrich's critique is, again, a critique of the form of law as a form of dismissal of "the necessary *semantic indeterminacy* of many if not all key legal terms or categories of law"[16] [italic mine]. In this respect, it can be suggested that what seems to be unquestionable and therefore beyond the reach of critique is the fact that, despite its indeterminacy, legal semantics are semantics of rule application, and therefore always instrumental to a decision. It is only by presupposing decidability, and therefore the logic of instrumentality, as the limit of legal thought that critique seems to be possible. The convergence between legal theory and structural linguistics is therefore countered by Goodrich with a 'critical linguistics' which treats language and therefore law as "an *instrument of communication* (…) determined by the institutional and ideological processes in which it functions" [italic mine], such that, "legality would be nothing if it were not supported by a network of institutions, a tradition of ideas which always encloses and delineates the domain within which legal discourse can exercise it textual *power*"[17] [italic mine].

Critical legal theory, in this sense, appears to be founded on the critique of a form of jurisprudence which "has *remembered* the linguistic *form* of legal enunciation (…) in

[11] Ibid:7-8.
[12] 1990:205.
[13] Ibid:27.
[14] Ibid:22.
[15] In both authors, according to Goodrich, "the problems raised by the semantics of rule application are raised merely to be summarily dismissed by means of a linguistically naive assertion of a thoroughly artificial distinction between the univocality of the legal lexicon and the occasional indeterminacy of its application" (Ibid:57).
[16] Ibid:58.
[17] Ibid:77-78.

terms of a determinate logic of legal signification" and therefore, "abandoned any *substantive* engagement with the *politics* of legal interpretation"[18] [italic mine]. In the attempt to frame "the concept of legal discourse as pre-eminently the discourse of power", critical legal theory, therefore, constitutes itself as a *jurisprudence of force* as opposed to a *jurisprudence of form*, namely, "the formalist project of applying the categories of logical philosophy to the linguistic produce of the law, for the purpose of inserting the newly born norms of legal judgement into the sterility and safety of a systemic normative justificatory framework"[19]. If, therefore, such jurisprudence of form is (said to be) concerned with the 'remembrance' of a form which provides for the 'safety' of the legal edifice, on the other side, a jurisprudence of force would be concerned with the production of 'a materialist rhetoric of law' meant to understand the past for the sake of "the possibility of an alternative future"[20], that is to say, the possibility of alternative *decisions*.

In a similar fashion, for Cornell, deconstruction as 'the philosophy of the limit' – where the limit is represented, first of all, by '*positive* law' – can and should be *instrumentalised* for the creation of a 'legitimate legal and political order' and thus as an 'emancipatory ideal of legal transformation'[21]. The challenge, for the legal scholar, is to use the problem of legal indeterminacy – which Cornell interprets (in a way which is reminiscent of Schmitt's argumentation) as the fact that "interpretation gives us the rule and not the other way around"[22] – as a means "to remain open to the invitation to create new worlds"[23]. Douzinas and Warrington have similarly spoken of the critical legal scholar as someone who is in search of 'universal solutions' that would allow him "to reconstruct the practice of moral evaluation, and to reinvent the art of *political judgement*"[24] [italic mine] and, in this respect, they also advocate for the use of new hermeneutical strategies (including deconstruction) as a means to provide "immediate practical ethical reconstructive readings" and, more precisely, "to re-establish an ethical element for law and justice"[25].

Two points are, to my purposes, worth stressing. On one side, the critical project seems to be concerned with a critique of the *past* as a *form*, and more specifically, with

---

[18] Ibid:88.
[19] Ibid.
[20] Ibid.
[21] 1992:7-8.
[22] Ibid:101.
[23] Ibid:109.
[24] 1994:15.
[25] Ibid:17.

legal theory as the attempt to *formalise* the *past*, so as to give to it a monolithic structure. This is achieved, in turn, by emphasising that there is an-*other* side of such form, one which the very process of legal formalisation must constitutively neglect in order to constitute itself as a form. The second point is that critical legal theory is concerned with the theorisation of this other-side of form as a force that would ground the possibility of a re-articulation of the very distinction between form and force. To be a critic, from this perspective, would still mean to be defined the signature of exceptionality that defines the task or the enunciative function of what can generally be defined the 'jurist', namely, the articulation of the indistinguishability of form and force (of law).

In Goodrich's juridico-linguistic analysis the other side of the form of law, the force-of-~~law~~ is represented by 'the social base' and its 'socio-political or ideological features' that constitute both language and law as *heteroglot* entities in which, in fact, 'the unitary concept' of form or system represents only "one among the many forces which actually diffuse or subjugate meaning to its heteroglot context"[26]. The form of law represents, from this perspective, one of its forces, that is to say, a particular ideological manifestation of "an intersection of differently oriented social interests within one and the same sign community", which means, more generally, that the law as a form functions as an 'ideological sign' which presupposes "the life force of the sign", i.e. 'class struggle[27]'. From this perspective, the form of law does not disappear in Goodrich's analysis: on one side, it is made indistinguishable from the forces that produce it, in the sense that the form of law is presented as a social force (a 'semantic mechanism') which "allow[s] legal discourse to deny its historical and social genesis"[28]; on the other, such *forиa* is turned again into a form (a 'legal text') separated from other forces, namely, "the order of discourse or social and political context which ['the legal text'] systematically endeavours to deny or obscure"[29]. The dialectic between form and force is, in other words, articulated in terms of a dialectic between the inside of the legal text and its outside, an '*hors-texte*' "which is present, even if it is presented as an absence, by omission"[30]: included through an exclusion.

These hermeneutical considerations have their ontological counterpart in the work of authors such as Cornell and Douzinas, who re-construct the *hors-texte*, the 'other-side-

---

[26] 1990:140.
[27] Ibid:141.
[28] Ibid:204.
[29] Ibid:206.
[30] Ibid.

of-law', in ethical terms and, more precisely, as the ground of an ethics of the 'Other' which is, crucially, also always an 'ethics of the future'. Critical legal theory becomes critical legal *interpretation* of "the Other within the *nomos* that invites us to new worlds", in the sense that the object of interpretation, the rule, is 'an origin' that is evoked as a 'representation of the future', of 'what might be': critical "[l]egal interpretation demands that we remember the future"[31]. To this purpose, the critical legal scholar has to formulate a 'theory of otherness'[32] which would thematise the 'Other' in order to use it as a means to ground a more legitimate legal interpretation, that is to say, still, to adopt a legal decision. The Other, from this perspective, *represents* an 'unknowable' – 'an expression without essence' – whose 'unknowability' "calls upon us to consider her before ethical or legal decisions are taken"[33]: in other words it represents a lack of essence, a negativity, which is thematised so as to ground, on one side, the possibility to take 'ethical or legal decisions' and, therefore, on the other, an account of ethics as a form of decision-making. The 'Other' is, therefore, pseudo-legalised and represented as always-already belonging to the law: with Cornell, the Other is 'infinite *right*'[34]. Its lack of essence seems to be, in this respect, essentialised for legal purposes. In Douzinas and Warrington's terms, the Other, as exemplified in particular by their reading of Antigone, represents a *force* ("the force of the demand to bury the irreplaceable brother") which, crucially, "is not a violation of the [form of] law but, on the contrary, the ground upon which all law arises"[35]. An ethical theory of law, in this sense, makes form and force ultimately indistinguishable (*forиa*) from each other, in order to, at the same time, perform their radical separation.

More recently, Loizidou's re-adaption of Butler's theory of performativity and Levinas' ethics produced, in this respect, a similar outcome: the formulation of what she refers to as a "future non-violent law"[36] through a practice of resistance that is inscribed within the law as a form of "resignification of the ideality of the norm".[37] Her analysis of Butler's treatment of Antigone as an exemplary ethical figure suggests that Antigone defies the laws of the State not in the name of a divine law, 'a rule of Law based in Kinship', as other strands of feminism would argue, but rather in the name of the singularity of her brother, a law of the other, and in doing so, she "introduces promiscuity

---

[31] Cornell, 1992:111.
[32] Douzinas & Warrington, 1994:18.
[33] Cornell, 1992:
[34] Ibid:152.
[35] 1994:56.
[36] Loizidou, 2007:127.
[37] Ibid:155.

within the normative parameters", thus creating "the possibility of redrawing both legitimate and illegitimate norms of kinship"[38]. In a similar vein, Davies, with respect to Antigone, has spoken of a 'women's law' that would point further, in direction of a "gender-diverse normativity being reflected in law or, alternatively, a *truly* ungendered law"[39]. In general, critique appears as integrated within the horizon of the law's operativity (included) with the purpose of reinscribing it into a normativity that exceeds (excluded) that horizon, an *excess of (legal) signification* that Loizidou refers to as a 'force of law'[40] to be appropriated[41]. The idea(l) is thus represented in normative terms, an ideal normativity, which, with Motha and Zartaloudis, is used as an 'horizon to come' that allows to both 'adjust reality to the ideal' and 'the ideal to reality' thus articulating essence (of law) and existence (of singularities) in transcendental terms or, with Douzinas, in terms of an 'immanent-transcendence' unity[42].

These different critical views, it can be argued, produce – each one in its own terms – the indistinguishability of form and force. Moreover, it can be suggested that this operation is *instrumental* to some kind of institutional reform of the law and, specifically, to a reform of its interpretation, which means that – each one in its own terms – is instrumental to the re-formulation of a process of decision-making. In Goodrich's case to be reformed is, at first, the institution of legal academia – he speaks of a "reformulation of the appropriate mode of legal education"[43] – and, by means of this first reform, of the law itself. More precisely, legal education would still be concerned with the interpretation of legal texts, of the form of law, and its purpose would be the production of more complex interpretations, driven by a deeper awareness of both the dominant legal ideology and of the competing, silenced, ones ('the ideological role of the oppositional reading of law'[44]). The ultimate result would be the practical realisation of new

[38] Ibid:84.
[39] Davies, 2017b:79.
[40] Crucially, such force is represented by Loizidou as a twofold 'nuclear power', "which in the form of a bomb can destroy life but in the form of energy holds within it the possibility of sustaining life" (Loizidou, 2007:102).
[41] This, interestingly, leads Loizidou to an interpretation of Benjamin's pure violence, i.e. the violence that halts the articulability of (legal) means and ends, as, precisely, an act of *appropriation of the force of law*, as exemplified by "the cases of insane individuals who attempted to kill figures of political significance", whose acts "can be seen as practices by which they mimic the sovereign power that brings them into being, in an attempt to both resist it but also attain their own agency and survival (…) acts of pure violence, in the Benjaminian sense, of unsanctioned violence" (Ibid:117).
[42] Motha and Zartaloudis, 261-262.
[43] 1990:208.
[44] Ibid:210.

organisational forms of legality – Goodrich's list of examples include "socialist legality, popular justice, informal law or communitarian anarchism" – to be achieved, though, through the formulation of new 'rhetorically effective goals' for pre-existing legal concepts[45], that is to say, through better legal interpretation. In a similar vein, Cornell is concerned with "the possibility of radical legal transformation"[46] through a theory of legal *interpretation* in which "remembrance of the precedent cannot just be reduced to calculation"[47]. In other words, she is concerned with a re-configuration of the role of judging – in what appears a quasi-Schmittian fashion – as a kind of practice which "involve[s] the justification, not merely the perpetuation, of the norms embodied in past decisions"[48]. To be reformed, from her perspective, is the understanding, as well as the outcome of judicial praxis which is not mere calculation of the past, but rather the remembrance of the "*ought to be* implicit in the not yet of the never has been" [italic mine], which is to say, responsibility "to heed the call of Justice" which, in turn, is understood, "not as an external norm, but as the *embodied* good of the nomos"[49] [italic mine].

From this perspective, the Other-side-of-law is Justice itself which, however, is always-already internalised ('embodied') by the law and, in fact, is represented by Cornell – in a quasi-Kelsenian fashion – with the formula of a yet-to-come '*ought-to-be*' ('the future of justice') that is said to be non-underminable (and therefore radically separated) by any 'is', including the present social reality that the existing constitutional system frames and sustains. In fact, every judicial decision, according to Cornell, "raises the issue of whether the constitutional system is acceptable"[50] and, in this sense, when 'Justice' is said to represent 'the limit of the legal system'[51], this should not be taken as a limit to decidability: quite the contrary, beyond the limit of the legal system (legal) decisions are still possible, in the form of an ascertainment on "whether the established nomos of the law is reconcilable with its own projection of communal good"[52]. Such projection functions as a 'force of law' which grounds and legitimates decisions even when the form of law alone does not provide any legitimate ground for the decision. The 'philosophy of

[45] Ibid.
[46] 1992:156.
[47] Ibid:147.
[48] Ibid:148.
[49] Ibid:153.
[50] Ibid.
[51] Ibid:143.
[52] Ibid:153.

the limit' is, in this sense, a theory of legal adjudication, one which does not pretend to know in advance whether the decision *will be just*[53], and yet, one which grounds on such possibility the legitimacy, not to say the necessity, of the decision. This philosophy constitutes literally a "force of justice against the law"[54] which, however, has to be activated from within a process of legal interpretation. Justice, with Cornell, produces the "responsibility of the judge not only to state the [form of] law but to judge it[s force]"[55]. Along these lines, Douzinas has suggested that the legal critics "confronts the law with a different legality (…) a transcendent justice that challenges the extant legality"[56].

Zartaloudis has criticised this account of 'Justice' arguing, specifically, that, more or less explicitly, it reproduces the pseudo-dialectic ('bipolarity') of immanence and transcendence, law and Law, that has characterised the Western tradition of legal thought in general and that, therefore, it could be argued, still informs even its more critical manifestations. Justice here is 'posited', in his own words, as "yet another unparticipated transcendent realm, a negative *echo* of 'another' (postmodern) form of justice 'to come'"[57]. In more simple terms, it can be suggested that these accounts of critique participate to the pseudo-dialectic of form and force that, in general, informs the articulation of law's thinkability. From the methodological perspective which interests me here, they reproduce, in their own terms, this articulation, without, at the same time, reflecting on the fact that they do so: in other words, they fail to exhibit the fact that theory itself is the performance of an articulation of law's thinkability which, *lato sensu*, represents a form of decision-making, the adoption of a pseudo-legal decision on either the means or the just ends of law. Theory functions, in this sense, as a form of *sovereign* act which produces the indistinguishability of law's form and force in order to use it as the ground for a decision on the nature of law's instrumentality.

Specifically, when it comes to critical legal theory, the focus seems to be on the ends of law, as opposed to its means. More precisely, critical legal theory addresses the crisis of legal theory itself, as a theory of legal means, in order to stress that such crisis – represented as a problem of constitutive intederminacy of legal means – is what opens law to the possibility of justice as, precisely, the future realisation of law's just ends. When, for example, Davies argues that legal theory "has lost its sense of subjectivity, and

---

[53] Ibid.169.
[54] Ibid:158.
[55] Ibid:166.
[56] 2019:226.
[57] 2008:279.

its focus upon the essential nature, spirit, or rationale of law"[58] and that this has not lead to the disappearance of the discipline but to its proliferation into many different forms, this suggestion is to be read as an assessment of the crisis of the form – the means – of law, which makes an inquiry into its many forces possible[59]. The crisis of legal theory, as a discipline, is therefore reflected in the constitution of critical legal theory as a fragmented field of inter-disciplinary practices and theories that explore and re-articulate the crisis of the form of law. To the extent that these remain bound to the crisis of the form of law, it might be suggested that they equally remain bound to the form of law and, therefore, they might reproduce, each one in its own terms, the circularity of means and ends questioned by Benjamin in his critique or, in other words, to the structure of a dialectical oscillation between legality and justice, inside and outside of law, form and force and so forth.

This holds certainly true for the legal critic who, according to Douzinas, is "caught in a dance between the justice of the institution and the dream of a higher justice, which transcends the injustice of the present" to the point that between critique and law seems to exist some kind of symbiotic or teleological relation: "if law finds its destiny in its contestation, *critique is bound constantly to become law*"[60]. Critique, when organised into a legal theory (i.e. critical legal theory), is inclined to reproduce, in the form of a re-articulation, the distinction between legality and justice in terms of a dialectic between tradition (a past) and a (present or future) *force* which exceeds tradition, *an excess of tradition* to be somehow grasped, i.e. to be thought[61]. Tradition then, in the form of by now old and crystallised theories of law (both positive and natural), remains crucially relevant for critique, even when such relevance adopts the shape of a total rejection.

---

[58] Davies, 2017b:30.
[59] Ibid:31.
[60] 2019:223-224.
[61] "We can imagine the tradition as a river in which the debris of the past are borne along by different currents; or we can think of the past as a conversation in which many voices are drowned out. But the sensitive ear can choose to listen to different tones, murmurings a whisperings. (…) History as the predetermined working out of a pattern, or as something to which we have access through a central narrative, must be rejected. We are forced to create our own histories out of the materials that become available always with an eye and an ear to the fact that what appears to be the dominant or licensed view is only so because other voices have been erased; but nothing is completely forgotten. Only from this perspective can our historical sense be actively engaged. We are always grappling with a dilemma, with a specific task that appears historically located. But we cannot rely on the principles, the values, the essences that characterise historicism and reduce the different to the same. Otherwise, we risk remaining within the interpretations authorised by the tradition and resolving every conflict according to the terms that authority allows. The encounter with the strange should be preserved. The forgotten and the repressed are the sources of authentic thought, and the unhomeliness of home" (Douzinas & Gearey, 2005:246-247)

Critical legal studies, for example, is said to represent a "body of thought that has set its face against tradition"[62], but I would argue that this strategic facing needs tradition as its dialectical counterpart: it is instrumental to a search for something that would exceed tradition, in a way similar to how justice, as an end, would exceed the legality (to be turned into illegality) of legal means. From this perspective, critical theory would provide for the most radical counterpart to a legalistic conception of justice, which is to say, for a (*post*-)modern form of natural theory of law. This is what Douzinas seems to suggest when he argues that the scope of critical legal studies has now become "to imagine *a new type of natural law* for which justice is both a part and always still to come"[63]. The search for a new type of (natural) law, i.e. Law, is framed as the answer to 'a demand for a revived ethics'[64]: it is, in other words, the ethical task of the legal scholar, for whom ultimately Ethics becomes a Law which, at the same time, exceeds law and is internal to it as some kind of potentiality yet to be actualises.

Very recently Douzinas himself has addressed these themes, claiming in fact that for the most part the 1990's and the 2000's have been a period of 'defence and introspection', with an emphasis on the 'utopian moment of law and legality' characterised by a 'strong ethical position' that "mobilised the quasi-transcendental or transcendent concept of the 'Other' and the associated gambits of incalculable justice, infinite hospitality or the democracy to come"[65]. Interestingly, this strategy is framed as a *reaction* to the legalistic moral philosophy of liberal jurisprudence, which still represents the dominant paradigm within what Douzinas himself defines the 'global ethical turn' of the new post-1989 world order[66]. In this sense both forms of jurisprudence emerge and constitute themselves as poles of a new ethical turn of legal thought in which a pure tradition of positivistic thought tends to disappear. Utopian ethics and moral normativism are, in this sense, functionally related in their appeal to a force that exceeds the law and yet would make it possible, in the form of a just law. This however puts the theorist in "the position of the legislator who speaks in the place, or, better, in the name of the 'Other'", according to the idea that "justice proper, both inside and outside the law, *judges* the whole of legality in the name of a transcendent other-based order" [italic

[62]Douzinas, 2019:229.
[63] Douzinas & Gearey, 2005:245.
[64] Ibid.
[65] Douzinas, 2019:231.
[66] Ibid:230.

mine].[67] Justice, at this point, seems to coincide with decidability and the critic is the 'jurist' who makes sure that decisions remain possible by articulating the inside and the outside of law.

Force: The Countryman and the Doorkeeper

Motha and Zartaloudis have suggested that Douzinas' critical (and political) project is grounded on the claim that it is "by a new (ethical) normativity informed by the primacy of the other and given form through a genealogy of radical human rights that freedom and equality will flower"[68]. Crucially what is at stake here is a new form of ethical *normativity* and, even more crucially, ethics seems bound to fall within the domain of the *normative* (and therefore, *lato sensu*, of law). A critique of critique (a self-critique) suggests instead that this manoeuvre re-instantiates the metaphysical distinction between transcendence and immanence, by delivering an 'immanent-transcendence' in which transcendence refers precisely to "the move towards a new ethical normativity"[69] (an end) and its immanent aspect refers to law (a means). Zartaloudis therefore suggests that a different account of justice should, or rather could, be derived from a different 'use of criticism' which would rather point towards a really 'non-normative realm', not one to be realised, but one which is already here, always *beside* the law rather than *before* it[70]: the realm of what Zartaloudis calls 'social *praxis*' and that, to avoid the risks associated with the use of the word 'social', could be perhaps simply termed the realm of a shared or communal *praxis*.

From the perspective of a critique of legal theory this realm represents therefore the limit of law, the point where law and life touch each other and encounter their own limit – "a mutual exposition before their limits"[71] – rather than a threshold of inclusive exclusion. This realm is non-normative in the sense that it has no *necessary* relation with the law, nor with its normativity. Zartaloudis argues, in this respect, that a use of criticism which is concerned with the non-fusion of the juridical and the non-juridical "suggest[s] that the legal and procedural notion of justice does not exhaust the *idea* of justice in the

[67] Ibid:232.
[68] Motha & Zartaloudis, 2003:255.
[69] Ibid.
[70] 2008:280.
[71] Ibid:282.

actuality of case-processing, legislation and legal judgement"[72]. As Zartaloudis further suggests, this does not mean that legal judgement and the positing of legal principles are unnecessary[73] but, I would add, it does not imply that they are necessary either. If 'reconceived philosophically' justice "is not the mere end of the law (its decision-making *telos*) or its imperfect messianic aporia (its deferral) [but rather a] plane of pure potentiality (where the law *can both be and not be*)"[74] [italic mine].

Interestingly, this is precisely what Derrida – in a brilliant text on the 'Force of Law', which, crucially, represented a cornerstone for the ethical turn in critical legal studies – is seemingly not willing to accept. As with Cornell, whose account of justice is in fact shaped by this text, even in Derrida justice seems to take inevitably the form of a decision, one which, in fact, *deconstructs* the law from within: an act of pseudo-judicial interpretation that interprets the force of law from within and against the form law. In Derrida's own words, for example, justice is "a *law* that not only exceeds the or contradicts [the form of] 'law' (*droit*) but also, perhaps, has no relation to law, or maintains such a strange relation to it that it may just as well command the '*droit*' that excludes it"[75]. Justice is both included and excluded by law (*droit*), included through an exclusion, and therefore it is 'law' (*loi*, as, precisely, the 'non-droit' *of* 'droit'). That is why, justice *needs* judgement, a 'fresh' decision – "[n]o exercise of justice as law can be just unless there is a fresh judgement"[76]. In general, as observed by Gasché too, deconstruction itself – which according to Derrida *is* justice – represents a "transformation (…) of the classical syllogistic form of judgement in order to reshape it in such a way that makes possible a decisional judgement"[77].

For this reason, Derrida develops an account of justice which resembles a form of legal hermeneutics in which the aporia of law – the fact that law concerns both the calculability of *droit* and the incalculability of justice – must be made the object of a decision, of a calculation: "law is the element of calculation (…) but justice is incalculable, *it requires us to calculate with the incalculable*"[78]. Derrida's account of justice resembles in this sense Schmitt's account of decision-making where it is not the rule that, so to speak, rules but rather the decision itself which, therefore, performs as a

[72] Ibid:290.
[73] Ibid.
[74] Ibid:291-301
[75] Derrida, 1992:5.
[76] Ibid:23.
[77] 2016:100.
[78] 1992:28.

temporary suspension of the rule. The experience of justice, in fact, is for Derrida the necessary experience of "moments in which the decision is never insured by a rule"[79]. Along these lines he also argues that deconstruction is the moment when 'an axiom is suspended' (the form of law) in the name of an *excess*, a demand for "an increase in or supplement to justice" (a force of law): a 'moment of suspense', "which is also the interval of spacing in which transformations, indeed *juridico-political* revolutions take place"[80]. In its most radical manifestations, then, deconstruction resembles a sovereign decision in which a juridical framework is established anew. In its more modest manifestations instead, it takes the form of a 'fresh judgement', which is to say, of a decision which is "both regulated and without regulation"[81] and, for this reason, undecidable, and yet, made the object of a decision. This is because for Derrida "[j]ustice, as law, is never exercised without a decision that *cuts*, that divides" and, to put it simply, "only a decision is just"[82], there is no justice without a decision.

As a result, though, justice is also always deferred, lost in the very moment in which the decision, which is necessary, is taken. Justice is the aporetic experience of an undecidable which "though heterogeneous, foreign to the order of the calculable and the rule, is still obliged (…) to give itself up to the impossible decision, while taking account of law and rules"[83]. Along these lines, Gasché has observed that deconstruction consists, ultimately, not in a renounce to judgement, but rather in "a hyperbolic demand for judgment not to satisfy itself with remaining a calculable performance, but, by liberating itself from itself, to open itself to the heterogeneous element of the impossible decision"[84]. Justice is the trace of undecidability – the memory of undecidability – which leaves a mark on the decision[85] and therefore the undecidable is said by Derrida to remain "*caught*, lodged, at least as a ghost – but an essential ghost – in every decision, in every event of decision"[86] [italic mine]. Justice is a ghost because it is both included and excluded,

---

[79] Ibid.
[80] Ibid:20.
[81] Ibid:23.
[82] Ibid:24.
[83] Ibid.
[84] 2016:107.
[85] For reasons unknown to me the italian version contains a sentence (here in italic) which is missing in the original, English, version: "Dopo aver superato la prova dell'indecidibile (se ciò è possibile *ma questa possibilità non è mai pura, non è mai una possibilità come un'altra: la memoria dell'indecidibilità deve conservare una traccia vivente che segna per sempre una decisione come tale*), essa ha di nuovo seguito una regola, una regola data, inventata o reinventata, riaffermata: essa non è più *al presente* giusta, *pienamente* giusta" (2010:78).
[86] Derrida, 1992:24.

excluded through inclusion, and, therefore, still functional to the operativity of the pure form law (‘law without significance’). It functions as a *force* (of law), in the sense that it represents the ‘*avenir*’ (future), the ‘*a-venir*’ (to-come) (of law) which, at the same time, must always occur in the immediate present, insofar as, according to Derrida, “a just decision is always required *immediately*”[87]. As a force (of law), it is an excess of law, ‘an event which exceeds the law’ and “opens up for l’*avenir* the transformation, the recasting or refounding of law and politics”[88].

As the other side of law, its force, justice resembles, to the point of indistinguishability, a quasi-Kelsenian pure form which commands nothing but calculation, nothing but itself: “incalculable justice *requires* us to calculate” and, as Derrida is willing to admit, it “is always very close to the bad, even to the worst for it can always be reappropriated by the most perverse calculation”[89]. It is striking, in this respect, that Derrida’s argumentation reaches a point where it almost seems as if a *Grundnorm* were posited, in the form of what Derrida calls a ‘*must*-requirement’ which represents a zone of indistinction as well as a point of articulation of law and justice (inside and outside of law) and which, in fact, it is said, “belongs to either of these two domains by exceeding each one in the direction of the other”[90]. The ‘must-requirement’ makes the form and the force of law indistinguishable and, at the same time, infinitely separated in what, however, resembles an impossible articulation, an *aporia* (of law and justice). The ‘must-requirement’ implies that justice is what Gasché, writing about deconstruction, refers to as “a power (…) that can always (and even must) find its way into actualisation”[91]. And yet this is impossible, because, with Derrida, the thematization or objectivization of justice is a betrayal of justice and, interestingly, for Derrida, a betrayal of law too[92]. What seems therefore at stake here is the exposure of an impossible and yet necessary co-implication of a force and a form of law, of a force which exceeds the form of law and renders both ultimately unthematizable, indeterminate, and for this very reason, open to a process of transformation (i.e. interpretation) in which the only thing which remains stable is the structure of co-implication, the capture of form by force and, equally, the capture of force by form: in other words, the ‘*forиa*’ of law.

[87] Ibid:26-27.
[88] Ibid:27.
[89] Ibid:28.
[90] Ibid:28.
[91] 2016:28.
[92] “[O]ne cannot speak *directly* about justice, thematise or objectivise justice, say ‘this is just’ and even less ‘I am just’, without immediately betraying justice, if not law (*droit*)” (Derrida, 1992:10).

It can, in general, be suggested that 'The Force of Law' represents, more or less consciously, an attempt to constitute deconstruction itself as law, namely, as a form of pseudo-legal hermeneutics and, therefore, as a kind of law-making. It is also not by chance that for Derrida a *critique* of the force of law, as the one developed by Benjamin in his *Kritik*, following the etymology of the term (from the Greek '*krinein*'), must take the form of a final judgement, a final decision[93]. Something similar occurs with deconstruction, but in a reversed form: whereas Benjamin's critique is presented by Derrida as the last decision which makes all the previous ones impossible, deconstruction resembles a first decision (a 'pre-judgement') which makes all the following ones possible. Gasché has suggested that the force of Derrida's deconstruction is not that 'it does away with judgement', but rather that it questions the premises of judgement ('it complicates them') in order "to make such insightful fruitful for judgement as a performance"[94]. More precisely, it produces what Derrida, in another crucial text, i.e. 'Before the Law', has called a judgement of judgement itself ("before 'Before the Law'"[95]), a pre-judgement, whose aim is not to make judgement impossible or unnecessary but, rather, to make it *indeterminate*, that is to say, devoid of an essence[96], and yet, for this reason, always possible. With a trajectory which resembles modern legal theory – where the question 'what is law?' is in fact replaced by the question 'how it functions?' – Derrida, in 'Before the Law', replaces the traditional question 'what is judgement?', with the question 'how to judge?', so as to "suspend the classical *prerogative* of judgment, an ontological prerogative requiring that one first say or think the being, that one first of all *affirm* the essence, for example, of a function, before asking oneself *how* it functions"[97]. By asking 'how the law functions?', rather than 'what it is?', the questioner produces the indeterminacy of law, the exposition of its lack of clear premises, and yet, this question becomes itself the law, insofar as "the absence of a criterion is, one might say, the law": "[i]f the criteria were simply available, if the law

[93] Ibid:31.
[94] 2016:99.
[95] Derrida, 2018:40.
[96] In Derrida's own words: "…the man of nature not merely the subject of the law outside the law, he is also, to infinity, but finitely, the prejudged [*le préjugé*]. Not in the sense of being judged in advance, but of being in advance of a judgment that is always in preparation and always delayed. Prejudged as though of necessity having to be judged [*devant être jugé*], preceding the law [*devaçant la loi*] that signifies, that (for him) signifies only "later." And if that has to do with the essence of the law, it is because the law has no essence. It escapes from that essence of being that would consist in presence" (ibid:54-55).
[97] Ibid:13.

was present, there, in front of us (…) [t]here would be no reason to judge or to be anxious about judgment, one would no longer ask oneself 'How to judge?'"[98].

As a result, Derrida's reading of Kafka's 'Before the Law' cannot but claim for both its characters – the "man from the country" who "prays for admittance to the Law" and the doorkeeper who guards the law's (first) gate – a *legal function*. Both are, in their own terms – that remains indeterminate and can only be subjected to interpretation – "attendant before the law", which is to say, captured in "a topographical system of law that prescribes the two inverse and adverse positions, the antagonisms of two characters equally concerned with it"[99]. The law is negated to, deferred for, both: the countryman, despite the door being open, is not allowed to enter yet[100], and the doorkeeper, despite representing the law, is just the first of many doorkeepers ('the lowest in hierarchy') that also separate him from the law[101]. The doorkeepers are, in fact, organised into what appears to be a formal chain of authorisation (or, with Kelsen, validation) in which, Kafka says, "each is more powerful than the last"[102]. Both the doorkeeper and the countryman are represented by Derrida as exposed to a form of law of which they know nothing and which, yet, they enforce: the doorkeeper "does not interpose himself by force[, i]t is his words that are effective at this border" because they enforce the order of the law which says "[d]o not come to me, I order you not yet to come as far as me"; similarly, the countryman, who has "the natural or physical freedom to enter (…) into the law (…) forbid[s] himself from entering[, h]e must force himself, give himself the order (…) to not access the law"[103]. Both are exposed to a pure form of law without significance that, nevertheless, gives them force, a function.

For both the law is far, indeterminate[104] and, in this sense, both the doorkeeper and the countryman are, together 'before the law', sharing its absence[105], and, from this

[98] Ibid:15.
[99] Ibid:49.
[100] Derrida suggests that "permission was refused only in the form of a postponement" (2018:42).
[101] Ibid:49-50.
[102] Kafka, 2018:23.
[103] Derrida, 2018:51.
[104] "The law is silent, and of it nothing is said to us. Nothing, only its name, its common name and nothing else. In German it is capitalized, like a proper name. We do not know what it is, who it is, where it is. Is it a thing, a person, a discourse, a voice, a document, or simply a nothing that incessantly defers access to itself, thus forbidding itself in order thereby to become something or someone?" (ibid:58).
[105] "The entitling sentence describes the one who turns his back on the law (to turn one's back is also to ignore, to refuse to acknowledge, even to transgress) not in order that the law might present itself or in order to be presented to it but on the contrary to forbid any presentation. And the one who faces sees no more than the one who turns his back. Neither of them is in the presence of the law. The only two

perspective, they themselves become indeterminate, indistinguishable from each other. Both could be representations of either the form or the force of law (we do not know whether the countryman has been formally summonsed or whether he is looking for justice, and, similarly, we do not know in what measure the doorkeeper is formally legitimated to enforce the law) but what they actually represent in the economy of the text remains ambiguous precisely because for both the law is indeterminate, deferred, absent. But precisely insofar both, indistinctively, represent the form and the force of law, its *forиa*, and precisely insofar as this *forиa* is produced by the absence of law, both hold, according to Derrida, "the authority to dictate the law"[106] from "a place that is always open to a sort of subversive juridicity"[107]. To be *before* the law – and, according to Derrida, that is the only possible and necessary relation one can entertain with the law – means to be provided with a subversive juridicity, which is to say, a "power to produce performatively statements made by the law" and eventually, to "make use of the legislative power of linguistic performativity in order to circumvent the existing laws [form] from which it [force] nevertheless obtains the safeguards and the conditions"[108]. Deconstruction is, in this sense, the exercise of a function – subversive juridicity – with and against the form of law. But this is, ultimately, a legal function, one that has to be performed *before* the law.

On the contrary, Zartaloudis develops an idea of justice which, in my interpretation, would place the countryman *beside*[109], rather than *before*, the law, which is to say, in a position that, I think, cannot be *reduced* to any legal performance, not even a subversive one. Being 'beside the law' means – or better, might also mean – to develop a form of 'perfect antinomianism' in which nothing can generally be expected from the law – neither that it would be an end in itself, nor that it would be a means (to an end): that is why neither positivist nor natural approaches are, for Benjamin, sufficient to the task of a proper criticism. Both approaches (and to a certain extent deconstruction too) account for the operativity of law, whereas beside the law the law is always inoperative, ineffective, inexecutable, which is to say 'returned to its generic uses', to a pure potentiality, not of law, but of social praxis[110]. In a crucial passage, Zartaloudis further

---

characters in the narrative are blind and separated, separated from each other and separated from the law". (Ibid:49).

[106] Ibid:67.

[107] Ibid:70.

[108] Ibid.

[109] 2008:300.

[110] Ibid.

argues that "to be *in* the law means to be animated continuously by two opposed tensions that can never coincide and which are co-temporary: the first attempts to encapsulate the generic potentiality from which a law arises by articulating it in semantic contents and precepts; the second is oriented, on the contrary, towards maintaining a law open beyond any determinate signification and remembering its original belonging to the domain of common use, to social praxis"[111]. These two tensions might well be described as the form and the force of law, and they define what Zartaloudis calls the 'originary structure' of law[112]. From this perspective, it can be suggested that to be *beside* the law could also mean to expose the co-originarity of force and form (*forиa*) by making of it an object of study. To study the law, from this perspective, does not mean to provide an account of *what* the law *is* or of *how* it *functions*. It means, more simply, to observe how within the tradition of legal thinking, the law has been given an essence or a function: in other words, how these two questions have been articulated, which is to say, how the force and the form of law have been articulated together. Beside the law there is, according to Zartaloudis, a "non-juridical realm of common use [which] resists its fusion with the legal realm"[113]: here the law is neither appropriated nor destroyed, but simply used. One of these uses – by any means not the only possible one – is precisely *study* as the study of the way in which the form and the force of law have been made indistinguishable in order to be articulated in, for example, legal theory.

In this respect, it is interesting to stress that for Zartaloudis this 'para-form' is the expression of a temporal dimension too, one which Zartaloudis assimilates to the messianic time of *kairos*, 'the time of the now'[114]. This time, crucially, does not imply, in his own words, an 'infinite deferral of a new denotation', as for example, Derrida's account of the before of law would seem to imply, but rather means that "contemporary to the law (and to linguistic beings) lies a generic potentiality (…) which is not identical to the form and content of a posited law but which finds its para-form in the operational time it takes to conceive it as such: *it is the time it takes to legislate* (that is another way of saying that normativity does not arise out of a transcendental domain of meta-normativity, but in social *praxis*)"[115]. Along these lines it can be suggested that to study the law can also imply a reflection on the time it takes to theorise the law (in itself, a form

[111] Ibid:302.
[112] Ibid.
[113] Ibid:306.
[114] Ibid:300.
[115] Ibid:301.

of pseudo-ontological legislation), which is to say, a reflection on the very process of formation of a (legal) theory, on legal theory as a kind of *praxis* which organises itself into a theory. Considered from the perspective of force and form, theory is a manifestation of power, that is to say, the organisation of the potentiality of law into a *forиa*, a zone of indistinction of form and force that is, at the same time, articulated to a certain purpose – no matter how indefinite – or as a means (to an end). Study is the exposure of the communicability of law, that is to say, not of a particular act of communication, i.e. a certain legal theory, but of the possibility to communicate about the law which every theory exemplifies. *Forиa*, on the other side, represents a particular signature, produced in and through study itself, that makes the experience of this communicability temporarily possible.

It is worth, from this perspective, considering how Agamben reads Kafka's short story and how his reading differs from Derrida's. Whereas, in Derrida's own words, the novel describes the countryman as someone who "arrives there but does not arrive at entering there, [who] does not arrive at arriving there" and therefore provides "the narrative of an event that happens *not* to happen [*qui arrive à ne pas arrive*]"[116], Agamben suggests instead that "the story tells how something has really happened in seeming not to happen"[117], namely, that the countryman has managed, through "a complicated and patient strategy[,] to have the door closed in order to interrupt the Law's being in force"[118]. At the end of the story, in fact, when "the doorkeeper recognizes that the [country]man has reached his end", he finally says: "[n]o one else could ever be admitted here, since this gate was made only for you. *I am now going to shut it*"[119] [italic mine]. The closing of the door, for Agamben, represents what has been, since the beginning, the task of the countryman, namely, to produce the end of the infinite deferral of law (and justice), the closure of law's openness, namely, its being in force without significance as a pure form.

This kind of closure seems rather impossible from the perspective offered by Derrida, who in fact argues that the closing of the door 'closes on nothing', and therefore represents only the closure of the text itself as the closure of the law: "a text [that] guards itself, like the law", a text that "speaks only of itself, but then only of its nonidentity with

[116] 2018:62.
[117] 2017:50.
[118] Ibid:49.
[119] Kafka, 2018:25.

itself', a text that "does not arrive or allow itself to be arrived at"[120]. Such closure is then the extreme representation of the deferral of law and justice, of its intangibility, of the being in force of law as a pure form without significance, which makes of every text, including the text of the critic, a law, an act of law-making charged with a subversive juridicity, a form of auto-referential referentiality. That is why, for example, Derrida's own conclusions in the text 'Before the Law' are presented as a kind of judgement: "…as I conclude, I will begin with this sentence (ruling or judgment)…"[121]. Interestingly this would also allow to re-interpret the opening of 'The Force of Law' where, famously, Derrida expressed, first, in French his *duty* to address his – 'American' – audience in English ('je dois m'addresser à vous en anglais'), and then repeated the same statement in English ('I must address myself to you in English')[122]. Both moments, in fact, could be interpreted as Derrida's attempts to, mimic, embody and ultimately appropriate the self-referential structure of law which can only (must) refer to life (referentiality) by referring to itself (self-referentiality).

Agamben's critique of deconstructionism, on the other side, is precisely a critique of the desire, as well as the urgency or need, to appropriate the force of law, to become the law[123]. In his own words, the result of this strategy would in fact be a thought "condemned to infinite negotiations with the doorkeeper or, even worse, that it might end by itself assuming the role of the doorkeeper"[124], in other words, a thought condemned to either negotiate with the form of law or to appropriate its force: a thought condemned to become theory, and a theory condemned to become legal interpretation. In a similar fashion, Schütz has recently proposed an interpretation of Agamben's reading of Kafka's story, in which he suggests that:

> "[t]he role that the man from the countryside assigns to the law has been to provide the unique topic of an extended, indeed life-long, conversation with the guardian at the open gate of the law. The point here is of course the man's steadfast

[120] 2018:62.
[121] Ibid.
[122] The full sentence is: "*[c]'est ici un devoir, je dois m'adresser à vous en anglais*. This is an obligation, I must *address* myself to you in English" (1992:3).
[123] A similar, more detailed, interpretation is, I think, provided by Watkin (2013:107-133) who ultimately argues that "Derrida always says yes to yes, while Agamben believes before one can say yes, one has to say no[, and that, therefore,] Derrida remains in a paradise of affirmation, while Agamben has to leave nirvana and wend his weary way down the grey defiles of a purgatorial indifference" (Ibid:133).
[124] 2017:48.

refusal to give the law any *other* role in his life, apart from that of being the topic of his conversation with the guardian. To be that topic is the *only* role the man from the countryside assigns to the law. And it is in virtue of this unapparent restriction that Kafka's story about the man from the countryside offers Agamben (…) the occasion of distancing himself from any hyperbolic interpretation of the law, and especially from any prematurely tragic interpretation of the man's failure to penetrate into the law"[125].

The countryman, from this perspective, is not interested in becoming the law. He is rather interested in studying it, or better, in making of it the object of a conversation with the *representative* of law, the doorkeeper, who might therefore symbolise here the text of the (legal) tradition, of a tradition which, in some way or another, has tried (and continues to try) to master the form of law or to appropriate its force, which is to say, of *representing* it. The countryman is in conversation with the text(s) in which the questions 'how the law functions?', or 'what is the law?', have been *directly* addressed and, in this sense, he is not interested in finding out what the law is or how it functions, but only in how this functioning or essence of law have been depicted by its doorkeeper(s), the 'jurists'. His interest is more in the doorkeeper[126] than in the law *per se*. The conversation with the doorkeeper concerns the communicability of law, the potentiality that the law has as to be an object of *conversation*, which is to say, of *a means without ends*. And yet, to the extent that the doorkeeper represents the law, he also represents the organisation of this communicability into a particular form of communication, a particular articulation of form and force.

If, as Kafka's story seems to imply, there is not one but many doorkeepers, each one situated deeper into the structure of law then the previous one[127], then one possible interpretation is that each doorkeeper represents a paradigmatic form of articulation of law's *forиa*, a form of organisation of its potentiality. The concept of *forиa* represents (in the context of this thesis) a (legal) *signature* that describes the communicability of law – its potentiality as an object of communication – which is to say, 'the manner in which

[125] 2008:127.
[126] Of the countryman, who spent most of his life at the gates of the law, Kafka says: "[d]uring these many years the man fixes his attention almost continuously on the doorkeeper" (2018:24).
[127] "…take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him" (Kafka, 2018:23).

[legal] things are allowed to be understood' and communicated[128]. Theoretical constructions such as Kelsen's *Grundnorm*, Schmitt's account of sovereignty, Ehrlich's living law, the Other of critique, etc. (and their related dipolarities, such as validity and efficacy, legality and sovereignty, rule of conduct and rule of decision, same and other, etc.), are, in this sense, all paradigms or doorkeepers of legal communicability, that is to say, paradigms of the *forma* of law. The first doorkeeper, the one the countryman is really concerned with, represents the outer limit of law, the point where the problem of legal communicability becomes the problem of the relation between law and life, the juridical and the non-juridical realm, i.e. the problem of the jurist. By lingering on the first gate the countryman 'provokes'[129] the closure of the door or, with Zartaloudis, he "safeguard[s] the non-fusion of the juridical and the non-juridical, life and law"[130]. For this reason, the countryman cannot be a doorkeeper, a jurist, but only the one who studies the doorkeeper as the embodiment of law's enunciative function.

Sociological Jurisprudence

It might be argued that the critical problematisation of the relation between law and life, as performed specifically by critical legal studies through, for example, the institution of life, the non-juridical, as a kind of force of law, has its roots in sociological jurisprudence, itself understood as a kind of pseudo-natural attack on the formalist approach of traditional jurisprudence. This is what Douzinas and Gearey suggest when they trace back the origins of the critical legal movement to Cohen and Pound's American realism[131] (which in turn, was highly influenced by Ehrlich's foundational work on sociological jurisprudence), while at the same time also arguing that the intellectual and political obligation of critique is, precisely, "to imagine a type of natural law"[132]. It is

[128] Watkin, 2014:22.
[129] The term is used by Agamben in order, precisely, to describe the countryman's strategy: "[i]f one gives the name "provocation'' to the strategy that compels the potentiality of Law to translate itself into actuality, then his [the countryman] is a paradoxical form of provocation, the only form adequate to a law that is in force without signifying and a door that allows no one to enter on account of being too open. The messianic task of the man from the country (and of the youth who stands before the door in the miniature) might then be precisely that of making the virtual state of exception real, of compelling the doorkeeper to close the door of the Law" (Agamben, 2017: 49-50).
[130] 2008:3.
[131] Douzinas & Gearey, 2005:229-258.
[132] Ibid:245.

interesting, in this respect, to reflect briefly on the (juridified) use that the concept of life has had in the socio-legal tradition which anticipates the emergence of a critical-legal enterprise.

Cohen's sociological jurisprudence, for example, was openly grounded on the assumption that law and legal criticism alike have "no valid end or purpose other than the maintenance of the good life"[133] and that previous forms of jurisprudence had to be questioned precisely because they were "freed from all entangling alliances with human life"[134]. This, in turn, turn Cohen's understanding of ethics into a form of 'ethical judgement' and, relatedly, of law as, potentially, unlimited: "[t]here is no realm of human conduct that we can hold eternally absolved from the possibility of judicial control and the need of juristic attention"[135]. Furthermore, with a line of reasoning which resembles the one of many critical legal scholars, Cohen suggests that ethics represents an excess of signification which makes the law and its functions, indeterminate, unknown[136] and that, for this very reason, ethics can be used as a tool for the critical 'illumination of social engineering', as performed by law[137]. It is precisely at the level of social engineering, then, that Pound's sociological jurisprudence situates the problem of the relation between law and life. Specifically, his jurisprudence rests on a re-articulation of Ehrlich's theory of the 'living law' (*lebendes recht*) as well as of Jhering's utilitarianism ('law as a means to an end'), such that 'life' becomes the tripartite realm of ends, individual life's interests, public life interests and social life interests[138].

As suggested by Gardner, for Pound "the purpose of law is to secure the conditions of social life"[139] in accordance with a utilitarian logic which is derived not only from Jhering's work, but also from Kohler and James' teleological understanding of law as "a means to and a product of civilisation" and, therefore, of their normative understanding of history as "the story of men's struggle (…) to find more and more inclusive order"[140]. James' ethical philosophy is particularly interesting in this regard because it is founded on a particular form of essentialisation of 'the sentient life' as a life that desires and has

[133] Cohen, 1931:201
[134] Cohen, 1935:809.
[135] 1931:205-206.
[136] "And it is equally obvious that our knowledge of ethics and of human nature is not great enough to permit us to describe completely and in detail what constitutes the good life for each person or even for the abstract man. (…) (Ibid:207).
[137] Ibid.
[138] 1943:1-2.
[139] Gardner, 1961:3.
[140] James, 1891:346.

to *realise* what desires[141]. As a result, for James, "the essence of good is to satisfy demand", desires, but, "[S]ince every good which is demanded is *eo ipso* really good (…) [t]hat act must be the best act, accordingly, which makes for the best whole, in the sense of awakening the least sum of dissatisfactions"[142]. This is both 'the guiding principle for ethical philosophy' and a principle of legislation, in so far as "laws and usages of the law are what yield the maximum of satisfaction to the thinkers taken all together"[143]. From this perspective, the task of the philosopher is to act as a 'judicial investigator' who should find a 'casuistic scale' to 'weave' competing ideals (i.e. the problem of moral intederminacy) "into the unity of a stable system"[144]. In order to do that, the philosopher will 'judge' every concrete attempt to 'realise' a new order, "by actually finding after the fact of their making, how much more outcry or how much appeasement comes about"[145]. The 'ethical science' thus is said to be – in a manner which anticipates Schmitt's theory of judgement – not "deducible all at once from abstract principles" and always "ready to revise its conclusions from day to day"[146]. More generally, the 'ethical life' for James "consists at all times in the breaking of rules which have grown too narrow for the actual case"[147] and, therefore, with respect to the rule, it represents an excess of rule.

Pound's sociological jurisprudence turns this quasi-judicial understanding of ethical life into the theoretical foundation of the 'legal order', whose purpose is, accordingly, "to satisfy human claims and demands and desires"[148]. Sociological jurisprudence, according to Pound, does what the common law does under the name of 'public policy' – which, in fact, is presented as the legal formulation of the fundamental sociological category of 'social interest' – namely, producing "adjustments or compromises of conflicting individual interests (…) to determine the limits of a reasonable adjustment"[149]. The concept of 'policy' becomes, in this respect, of central importance in Pound's jurisprudence so that, it might be argued, it defines both the limit of law and the limit of its theorisation, and therefore, the ultimate ground of jurisprudence. In law, 'policy' is, in fact, a 'vague'[150] concept which provides ground for substantial

[141] Ibid:335.
[142] Ibid:346.
[143] Ibid:347.
[144] Ibid:330-331.
[145] Ibid:348.
[146] Ibid:349.
[147] Ibid.
[148] Pound, 1943:9.
[149] 1943:4.
[150] Ibid:12.

exceptions to what are traditionally considered the foundational schemes of judicial interpretation, namely, the idea of application of a 'perfect code', 'a method of mechanical logical deduction from fixed legal conceptions' and 'universal definitions of absolute rights'[151]. In its most fundamental form, public policy is described as "social interest in the general security – the claim or want or demand, asserted in title of social life in civilized society and through the social group, to be secure against those forms of action and courses of conduct which threaten its existence"[152]. Within this broad conceptualisation of social interest as public policy are included interests as different as the general security of the social body[153] – which further includes, for example, health, peace and order, security of transactions, etc. –, the security of social institutions[154] – domestic, religious and political – and the security of individual life itself, the idea that "each individual [should] be able to live a human life therein according to the standards of the society"[155]. The reference to public policy justifies then the extension of the prerogatives of administrative, judicial and legislative bodies beyond the limits set conventionally by the law and, therefore, provides a (immanent) meta-source for the re-articulation of the fundamental constituents of 'the precept element in law', namely, rules[156], principles[157], legal conceptions[158] and legal standards[159].

Interestingly, Pound's account of the legal order as founded on a general theory of (and, relatedly, of a legal hermeneutics of) interests resembles what Ewald, inspired by the Foucaultian critique of sovereignty, has called 'social law, namely, a 'law of interests' in which the will of the subject is protected only insofar as it represents one of the specific interests that the State has made 'worthy of protection'[160]. In this respect, 'social existence', becomes a synonym for 'social legitimacy', namely, legal recognition

---

[151] Ibid:9.
[152] Ibid:17.
[153] Ibid.
[154] Ibid:20.
[155] Ibid:33.
[156] Pound defines rules as "precepts attaching a definite detailed legal consequence to a definite detailed state of facts or situation of fact" (1947:82).
[157] Principles are "authoritative starting points for legal reasoning [that] furnish a basis for reasoning when a situation not governed by a precise rule comes up for consideration as to what provision should be made for it" (Ibid:83).
[158] These are "authoritatively defined categories into which cases might be put with the result that certain rules and principles and standards become applicable" (Ibid).
[159] Namely, "defined measures of conduct, to be applied according to the circumstances of each case, entailing liability to respond for resulting injury in case the limits of the standard are departed from. (…) Examples are the standard of due care, the standard of fair conduct of a fiduciary, the standard of reasonable facilities imposed on a public utility" (Ibid).
[160] Ewald, 1986:51.

of the interests that the individual represents[161]. But such recognition, in turn, always presupposes some kind of grouping of interests, in the sense that in order for interests to be recognised, each individual has "to identify his personal interest with some collective interest, and therefore to group and to unionise"[162]. In simple terms, with Ewald, "a law of interests is unavoidably a law of groups" and therefore, an individual interest "no longer has social existence except as the individualisation of a collective interest"[163]. The collective interest of a group defines what Foucault, in order to distinguish it from the (legal) rules, calls norms, that is to say, normative conceptualisations of facts, or better, a mixture of fact and value[164] which, at the same time, describes what certain groups do and what they prescribe as doable, in other words, what they are interested in doing as a group[165]. The norm refers, in other words, to a normalised realm of interests which grounds legal judgement[166] by providing an extra-legal foundation for legal precepts. Legal precepts, in their various forms, remain the fundamental devices that the law has to contain and formalise existing processes of extra-legal normalisation and, from this perspective, the form of law does not disappear: it is rather sustained by extra-legal sources of interpretation[167].

In this respect, the notion of policy functions as a hermeneutical category that can be used to include within the framework of existing law "new social interests struggling for recognition"[168], which is to say, normative forces that exist beyond the form of law and yet can exist only if they maintain themselves in relation with the law. In this sense, for example, Ewald speaks of "group interests jockeying to assert themselves as being the general interest"[169]. The general interest represents the idea of society if considered from the perspective of 'social law', the idea of a legal society which brings together different, often competing 'collective interests' into the same framework. In this respect, the idea of 'general interest' has no specific content and should rather be thought as "a *form*, a goal, namely the maintenance of the interplay of solidarities"[170]. Solidarities define

[161] Ibid.
[162] Ibid:52.
[163] Ibid.
[164] Ibid:70.
[165] "The wonder of the norm is that it allows the passage from is to ought, from *Sein* to *Sollen*, from the descriptive to the prescriptive" (Ibid).
[166] Ibid:71.
[167] In this sense, for example, Golder and Fitzpatrick speak of a 'mutual constitution and relationality' between law and a particular form of normativity, namely that of disciplinary powers (2007:71).
[168] Gardner, 1961:22.
[169] Ewald, 1986:59.
[170] Ibid:53.

groups of interests (collective interests) and groups of interests define the normativities (in the sense of groups of norms as opposed to groups of rules) that the law must hold together in the name of the general interest. But this latter is nothing but the interplay of normativities – the idea of society as "a network of solidarity on which [men] depend and from which they draw their identity"[171] – or better, the maintenance of the power to decide on the form of such interplay. General interest is the idea of society itself as an entity which "will be able to judge itself in continual adjustment to itself"[172]. It is important to stress that this understanding of society grounds also Ewald's theory of modern law. Ewald, in this regard has in fact spoken of 'the rule of judgement' as the law of law that, in an epoque (modernity) where no transcendental (extra-legal) foundation for law can be found, grounds law only on itself ('the reflexivity' or self-referentiality of law)[173]. For Ewald, legislation, doctrine and case law are all practices of 'legal judgement': they express the rule of judgement as "a sort of necessary ideal on the basis of which [each of them] reflect the constraint that binds them, their unity and their systematicity"[174]. As a result, not only society is represented as an interplay of solidarities but it is law itself that is represented as 'a solidarity among norms'[175], in accordance with the positivist principle of law's self-referentiality. This is the same principle which grounds Kelsen's theory of law and, in fact, paradoxically enough, Ewald argues that Kelsen's Pure Theory is "the theory of law in the epoch of social law"[176]. To think society as the realm of the general interest means, in this respect, to transfer the structure of self-referentiality from law to society. In Pound this is reflected, on one side, in the pseudo-juridical idea of society as an order – an idea which he draws from Ehrlich – and, on the other, in the idea of order and 'social control' as the ultimate ends of law[177].

The idea of 'general interest' takes in Pound the form of a normative ethics which equates social control and civilisation (the end of social control is civilisation and the end of civilisation is social control): civilisation is therefore something to be *realised* – rather than merely real – by means of social engineering: it is a mixture of fact and value, law and nature, a zone of indistinguishability to be articulated. As a result, the end of the legal order cannot be achieved, and it has to remain open to a "continually closer practical

---

[171] Ewald, 1987:44.
[172] 1986:70.
[173] 1987:38.
[174] Ibid.
[175] Ibid:40.
[176] Ibid:45.
[177] Pound, 1947:78.

approximation"[178]. The indeterminacy of the system is again used as a means to a (deferred) end. This operation rests on a form 'sociological idealism' or a 'positive natural law', which is "an idealized version of the positive law of the time and place, in which the jurist, postulat[es] that it is declaratory of natural law, and that it derives its force from conformity to the ideal precepts"[179]. Social interests, as defined by public policies, transcends the form of law while, at the same time, remaining immanent to the society in which they emerge. What remains absolutely transcendent, in this respect, is the perfectibility of the system, its potential (infinitely deferred or, with Pound, 'continually approximated') to realise civilisation, as expressed by the power to organise, i.e. articulate together, law and society, rights and interests, form and force of law.

This, of course, has specific consequences for the role of the sociologist. Sociological jurisprudence constitutes itself as "a method which attempts to use the various social sciences to study the role of the *law as a living force in society* and seeks to control this force for the social betterment"[180]. The sociologist-jurist contributes to the "effort to render the law a more effective instrument of social control"[181] and, in this respect, not only law-makers, tribunals and jurists, but philosophers too ought to "order the activities of men in their endeavour to satisfy their demands so as to enable satisfaction of as much of the whole scheme of demands with the least friction and waste"[182]. Jurisprudence partakes to the process of social engineering by producing a theory of interests, that is to say, a systematisation of interests according to jural postulates, "ideas of rights to be made effective by legal institutions and legal precepts"[183]. In other words, sociological jurisprudence partakes to the redefinition of public policies by systematising social interests that exceed the limits of the law, that is to say, introducing new 'norms' into the system and, therefore, making it open to change from within or, with Pound, to an endless 'progress towards civilisation'.

The possibility of a critical attitude towards law rests on the inclusion of life into a juridified sociological discourse which then presupposes an 'ethical science'[184] and, more precisely, a normative theory of life. This methodological approach on one side relativizes law's essence in that, through the functional link between law and society,

---

[178] Ibid.
[179] Gardner, 1961:14.
[180] Ibid, 1961:9.
[181] Ibid:23.
[182] Pound, 1947:79.
[183] Ibid:20.
[184] Cohen, 1931.

"definitions of law change with social circumstances, and no final answer to the question about the nature of law is possible"[185] while, on the other, this relativization grants to (the study of) law a much stronger normative grasp on life. Not only life itself is normativised but (the study of) law is turned into a tool to normativize it: life is decided upon, it *is* the space of a decision. Through sociological jurisprudence life is realised, and therefore, situated within a logic, even an ontology, of the 'having-to-be', which is why, for example, Ewald stresses that the 'norm' "allows the passage from is to ought, from *Sein* to *Sollen*, from the descriptive to the prescriptive"[186]. Life becomes norm, a threshold of inclusion/exclusion in and from law and, therefore, a fertile methodological space of *functional interdisciplinarity* which includes among others "ethics, economics, political science, sociology, social psychology, history, psychology, and philosophy"[187]. These disciplines make possible the normativisation of life to the purpose of its articulation with law.

The emergence of a critical legal scholarship rests on the development of a series of methodological techniques to understand the way in which traditional jurisprudence had hidden the capture of life (i.e. the outside or the non-legal) behind its formalism or what Cohen, already in 1935, had defined its *transcendental nonsense*[188]. What is nonsensical according to Cohen is the belief that "one may give an account of the law by means of the law itself"[189] without recognising that for the jurist the "handling of materials hitherto considered '*non-legal*' assumes increasing importance"[190]. Paradoxically, it could even be argued that it is the law itself, as conventionally understood, that is turned into a non-legal object in the sense that it becomes "an instrument [among others] for the sociological administration of society"[191]. That is why, for example, in Discipline and Punish, Foucault famously spoke of the emergence, throughout modernity, of a society of judges, and specifically of a process of 'dislocation of judicial power' from courts to new normative contexts beyond the law[192]. And yet, this

[185] Gardner, 1961:12.
[186] 1986:70.
[187] Gardner, 1961:13.
[188] Cohen, 1935.
[189] Ibid:814.
[190] Ibid:834.
[191] Ewald, 1986:53.
[192] "The judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the 'social worker'-judge; it is on them that the universal reign of the normative is based; and each individual, wherever he may find himself, subjects to it his body, his gestures, his behaviour, his aptitudes, his achievements" (Foucault, 1991:304).

same process could equally be interpreted, with Zartaloudis, as a process of juridification of life, namely, the self-organisation through a legal form (rather than through law as such) of many extra-juridical contexts of social life[193]. The result is, in other words, the production at the level of both practice and theory of a zone of indistinguishability between law and life or with an always-already normative language, of rule and norm[194], which, however, must be articulated in order to maintain the power of society operative[195]. The relation between rule and norm is, at the same time, one of 'integral combining' and 'mutual incompletedness'[196] and, for this very reason, it can and must constantly be made the object of a decision.

If you look at it retrospectively, it is then possible to imagine critical scholarship as emerging and growing its branches on the premise of a well-established need for a methodological cross-fertilisation between law and life. This produces the need to internalise life as a (legal) negativity, i.e. the non-legal as constituted by the legal, which can be objectified only through a further engagement with an immense plethora of disciplines and methods. Interdisciplinarity becomes the driving force of a methodological problematisation of the tradition of law, of its form, which is functional to the expansions of the limits of what law is allowed to contain. The critique of tradition is, in this sense, functional to the process of juridification of life. Actually, it is through the development of a discourse on the other side of law that a critique of the tradition becomes possible and it is through the critique of the tradition that law's negativity is internalised into the study of law which, *lato sensu*, resembles a form of application of law, a form of law-making.

---

[193] "At a time when the legal form is engaged in a society-wide triumphal march, and in which, not 'law', but adopting a legal form and a law-like proceeding, is becoming a universal asset of fields as far from law as are political and academic life, philosophy itself, and increasingly also, personal relationships, how can philosophical theory think law?" (2018:1).

[194] Foucault speaks, with respect to modern disciplinary forms of society, of "the emergence of a new form of 'law': a mixture of legality and nature, prescription and constitution, the norm" (1991:304).

[195] In a similar fashion, focusing on the case of disciplinary powers, Golder and Fitzpatrick, following Foucault, have argued that, on one side, "'[i]n appearance, the disciplines constitute nothing more than an infra-law", and, on the other, that "the judicial form is constantly inscribed within the disciplinary technology of power" (2007:70).

[196] Ibid.

Legal Pluralism

In the context of his analysis of the so-called 'technologies of the self' Foucault refers to 'police' as "the specific techniques by which a government in the framework of the state was able to govern people as individuals significantly useful for the world"[197]. It has been noted then that the term 'police', as used by Foucault, characterises what today is considered 'public policy' or social administration[198]. Police, in Foucault's use, is, in fact, an "administrative agency which, through the use of extensive regulations and decrees, aimed to ensure not just adherence to the law, but also: public order; hygiene and public health; social, physical, moral and religious well-being; economic and material prosperity"[199]: in other words, the same categories already identified by Pound in his socio-legal account of public policy. Foucault, in this respect, shows that the recognition of social interests through the development of public policies is historically bound to the emergence of the modern State which administers such interests in accordance with what, at least since the 17th century, comes to be known as 'Reason of State', a "rationality specific to the art of governing states"[200], or better, people, insofar as they are organised into states[201]. Crucially, this means that, in its first manifestation, public policy and therefore social interests are organised and managed in accordance with the principle that "the individual exists insofar as what he does is able to introduce even a minimal change in the strength of the state"[202]. What makes certain interests 'social' is the fact that they are relevant to the purposes of the State. For this very reason though, the power of the modern state, as exemplified by the first conceptualisations of 'police', concerns, without mediations, the life of men – Foucault argues, quoting Turquet, that "[t]he police true object is man" and that "the new police state (…) deal[s] with individuals, not only according to their juridical status but as men, as working, trading, living beings" [203]. In this sense, the emergence of the modern state coincides with the emergence of a new form of power, which famously Foucault called bio-power, "the power to foster life or to

---

[197] 2002:410.
[198] Fitzpatrick & Golder, 2007:48.
[199] Ibid.
[200] Foucault, 2002:406.
[201] Foucault in fact argues that "the art of governing people is rational on the condition that it observes the nature of what is governed" (Ibid.).
[202] Ibid:409.
[203] Ibid:412.

disallow it to the point of death"[204]. In this respect, it is possible to argue, on one side, that Pound's sociological jurisprudence – considering the importance that the concept of life has in this context – is, fundamentally, a biopolitical theory of law and, on the other, that the concept of social interest, as formalised in sociological jurisprudence, if considered from the perspective offered by Foucault, cannot really be separated from the interest of the State, reason of State. The development of a conceptuality of sociality is, in this respect, bound to the development of a rationality of the State.

From this perspective, and especially considering that sociological jurisprudence is originally framed as a form of 'social control', life, the object of public policy, is not simply known: it is known in order to be governed. Hunt and Wickham have argued in this respect that a fundamental aspect of biopolitical governance concerns its instrumentalization of knowledge as a means to and end, so that it is not necessary, for example, to know the origins of an object in order to govern it. In their own terms, "governance is always more important in social life than the known objects governed and hence than the knowledge of the objects"[205]. As a result, they suggest, control requires, in order to be effective, a certain amount of incompleteness of knowledge (and, eventually, the total failure of knowledge) which would then legitimate further control[206]. In this respect, the (ethical) model of 'continued approximation' which Pound situates at the core of his sociological jurisprudence resembles Hunt and Wickham's account of biopolitical governance, insofar as it makes life knowable only to the extent that it can be ordered. Hunt and Wickham further suggest that a similar understanding of governance makes of society an object of governance and, therefore, an 'invented category of the government of nation-states in the nineteenth century'[207]. In other words, the fact that society is 'always-already there before the individuals', as Hunt and Wickham suggest (and Pound's focus on social interests as opposed to individual rights seem to run along similar lines), "is boosted by the emergence of a new field of government around 'the social'"[208]. This crucially means that "while sociology (…) is based on the productive tautology of society as always-already, it owes its emergence and continuation to as a social science to the invention [by governance] of the 'social'"[209].

[204] Foucault, 1978:138.
[205] Hunt and Wickham, 1994:88.
[206] Ibid.
[207] Ibid:93.
[208] Ibid.
[209] Ibid.

If, as it has often been observed in the secondary literature that deals with Foucault's conceptualisation of law[210], the emergence of the modern state implied not only a demise of sovereignty (the so-called 'expulsion thesis'[211]), but also a re-conceptualisation of law itself (for example, 'law as governance'[212]), then the development – at least since the end of the 19th century – of a legal interdisciplinarity which embraces, among others, both sociology and anthropology, can itself be interpreted as an expression of the multi-faceted aspect of state's power and, specifically, of its capacity to include into its operation various non-legal normativities as, in itself, a process of governance of the social. In his analysis of legal pluralism, for example, Fitzpatrick has stressed that often "the apparent shift from state law to informal ordering can mask an extension of state control through the state's supervision or constitution of these other orders", and that, in general, the formal recognition of non-legal normativities is a strategy for the "containment by the state of potentially disruptive elements"[213]. It is always Fitzpatrick who, interestingly, suggests that, in an almost paradoxical manner, Foucault's suggestion that the analysis of power should "escape from the system of Law-and-Sovereign"[214], had, long before Foucault, already be put in practice by Ehrlich's theory of legal pluralism[215], which, it should be added, provides the foundation for the development, at a later stage, and yet still before Foucault's critique, of Pound's sociological jurisprudence. Law itself, in other words, had ceased to be sovereign long before its sovereign structure was questioned by Foucault's critique of power. In this respect, Ehrlich's theory of the living law and many other forms of legal pluralism offer, according to Fitzpatrick, the ground for a re-configuration of power along Foucaultian lines which begins with the recognition that associations that cannot be fully reduced to the totality of the state have "a life, a reality of their own" and, because of that, a 'social law' of their own[216]. A similar argument is developed by Davies, who claims that the Ehrlich "recognised that normativity and feelings of obligation cannot be reduced to official positive law having direct power over a citizenry", while Foucault "saw power as a discursive force which circulates through socio-political spheres" and "differentiated

[210] The most systematic work to cover Foucault's treatment of law, together with the already mentioned book by Golder and Fitzpatrick (2007), is provided by Hunt and Wickham (1994).
[211] Hunt and Wickham, 1994:59-74.
[212] Ibid:99-116.
[213] 1983:47.
[214] 1978:97.
[215] Fitzpatrick, 1983:46.
[216] Ibid.

this view of power from more traditional theories which located power in hierarchical and politically sovereign institutions"[217]. It is nevertheless worth asking whether the recognition, in legal scholarship, of the existence of non-legal normativities and, more precisely, the recognition of these forms of ordering as 'law' is not, in itself, a manifestation of the centripetal power of the state as an institution which, with Foucault, structures its own power into a plurality of normativities[218]. To my purposes it is, more precisely, worth asking whether the development of a legal interdisciplinarity is not, in itself, manifestation of a process of juridification of life, of the fusion of the juridical and the non-juridical.

If, in other words, Fitzpatrick, following Ehrlich's suggestion, can speak of social orders provided with an autonomous 'social law' that is because it was law itself – the law of the state – that, at least since the end of the nineteenth century, was becoming a 'social law' in the sense proposed by Ewald. More precisely, it is from that time onwards that the "rule of law began to be mixed up along with social norms", in the sense that, for example, every interpretation of the law had to be grounded on some kind of evaluation of normality, namely, an assessment of the "customs and habits which at a certain moment are those of a given group"[219]. From this perspective, legal judgement is, or at least presupposes, always also a judgement on the conditions of normality, that is to say, a judgement concerning the threshold which distinguishes normality from abnormality within a given group[220]. In general, it can be argued that normality always implies some kind of decision(ism): this might occur in many forms and at different levels[221], but whatever form the decision takes it implies an evaluation of the whole to which the conditions of normality apply. This is particularly evident only when the decision reaches a certain 'institutional' level. As stressed by Fusco, in his analysis of (Schmitt's) 'institutionalist decisionism', the decision on the conditions of 'normality' concerns "essentially to the whole set of forms of life that have been established institutionally and

[217] Davies, 2008:282.

[218] As, for example, suggested by Hunt and Wickham when they argue that 'law as governance involves knowledge in the form, also, of non-legal governance' (94:108). For a similar argument see also Ewald on the role of norms, as opposed to rules and, more generally, on the interactions between processes of legalisation and processes of normalisation (1991). On this see also, Golder and Fitzpatrick (2007), as well as Rose and Valverde (1998).

[219] Ewald, 1986:68.

[220] The norm, in general, is always held in relation with the rule in such a way that, as Golder and Fitzpatrick suggest, "the scientificity of the observed norm gives way to the enforceable juridicism of the law" (2007:70).

[221] Including judicial or pseudo-judicial decisions (the ones performed by what Foucalt called 'judges of normality').

are not simply reducible to technical and functional regulation"[222] in a given group. In this respect, it could be argued that it is legal pluralism itself – the idea that the (social) reality is composed of "organised bod[ies] in which there are rules and roles"[223] – which intrinsically demands some kind of decision: there cannot be legal pluralism without decisionism. This is, for example, reflected in what, in the work of Croce and Salvatore, is presented as a dialectic between two forms of legal pluralism, namely, pluralist institutionalism – "there is no centre and no institution can claim to have any legitimate supremacy over the others" – and decisionist institutionalism – there is "a distinction between official law and unofficial law (both seen as genuine instances of law)" and "the law of the state [is regarded] as wielding a supreme power over the other types of law located in its jurisdiction"[224]. Decisionist institutionalism is actually presented as the attempt to resolve an impasse produced by pluralist institutionalism, namely its inability to explain why *de facto* certain orders are tolerated while others are banned[225], and therefore, to provide some qualitative criterion of differentiation among institution. Decisionism provides this criterion: social reality is made of a potentially infinite 'jural relationships' provided with 'jural value' but only some of these relationships and values are 'selected and collected' by particular institutions, such as the state, that function as a 'jurisdictional device' which 'promotes and enforces' certain ways of life as opposed to others[226]. In other words, it is possible to speak of 'jural' orders beyond the state not only because the law itself is socialised – it becomes a kind of norm, an order of normality – but, vice-versa, also because such jural orders must always aspire to become law through a decision.

In general, it can be argued that society – if considered from the perspective offered by legal pluralism –seems comprised of what Agamben would call force(s)-of-~~law~~, namely, a 'force of law that is separate from (the form of) law', a 'being-in-force without application (formal decision)', a 'degree-zero of (the form of) law' which, in turn, represent "fictions through which the law attempts to encompass its own absence and to appropriate the state of exception" [227] (i.e. the space in which the form of law is suspended). The term 'fiction', in this context, applies also to the theoretical constructions

[222] 2017:137.
[223] Croce & Salvatore, 2014:49.
[224] Ibid:48.
[225] Ibid:49.
[226] Ibid:50.
[227] Agamben, 2017:2010.

of legal theory – of which, for example, the idea of 'jural value' is just one among many possible examples. But this implies that the attempt of law to appropriate its own absence is, also, the attempt of (legal) theory to appropriate the force of law, that is to say, that which exceeds the form of law. If, as Agamben argues, the force of law is an element that "both the ruling power and its adversaries seek to appropriate", then, it is possible to argue that theorists too, in the attempt to define the non-juridical from the perspective (no matter how broad) of the juridical, are, in some way (to be, each time, carefully examined), appropriating the force of law.

Few more examples can be provided in this respect. In a ground-breaking text, Sally Falk Moore, legal anthropologist[228], has tried to expand the sociological critique of conventional jurisprudence arguing that Pound's jurisprudence, despite its advancements[229], provides an account of law which is still "abstracted from the social context in which it exists"[230]. As a result, separation between law and society is still maintained and thus a study of law's 'normal locus', i.e. 'ordinary social life', is prevented[231]. As classical anthropological studies, such as Malinowski's, showed, the law can be studied at the level of the 'ordinary', and this is "particularly appropriate to the study of law and social change in complex societies"[232]. Modern societies are full of so called 'semi-autonomous social fields', spaces whose "boundaries [are] identified (…) by a processual characteristic, the fact that [they] can generate rules and coerce or induce compliance to them"[233]. More precisely, a semi-autonomous social field is characterised by the co-existence of legal and non-legal agencies provided with the power to enforce both legal and non-legal rules[234]. Normality within this field results always from an interplay of legal and non-legal obligations, to the point that it becomes almost impossible to distinguish whether a certain action is conducted in the name of the law or of other kind of obligations: "[t]he operative 'rules of the game' include some laws and some other

---

[228] Despite the fact they represent two different traditions, legal anthropology and sociology of law run in parallel and it is the latter that "laid the theoretical foundations of legal pluralism", through the work of authors such as Ehrlich and Gurvitch (Rouland, 1994:48-49).
[229] She argues, in particular, that both sociological jurisprudence and the legislator have understood the law "as a tool for social engineering" and that this understanding derives from an anti-dogmatic account of law, namely law as "a very complex aggregation of principles, norms, ideas, rules, practices, and the activities of agencies of legislation, administration, adjudication and enforcement, backed by political power and legitimacy" (1973:719).
[230] Ibid.
[231] Ibid:720.
[232] Ibid.
[233] Ibid:722.
[234] Ibid:743.

quite effective norms and practices"[235]. A semi-autonomous social field is a zone of indistinction between inside and outside, in which a certain coercive *force* is maintained and methodologically defined as being either legal, illegal or non-legal[236] and thus hold in some kind of relation with the legal order. The juridical and the non-juridical enter, from this perspective, into some kind of symbiotic relationship, such that "areas of autonomy and self-regulation (…) are connected with the larger social setting" and that while "a court or legislature can make custom law (…) a semi-autonomous social field can make law its custom"[237]. The non-juridical, in particular, is defined by the same features that define the juridical, namely, enforceability, sanctionability, regulability: in other, words, 'the capacity to generate effective sanctions and binding rules'[238].

Both spheres, the juridical and the non-juridical share a floating force which makes them, at the same time, indistinguishable and articulable[239]. In this sense, the concept of semi-autonomous field represents a methodological fiction[240] which allows, depending on the circumstances, to either distinguish between "state-enforceable law and socially enforced binding rules" or "melt it all together as law" depending on "what one is trying to emphasize for analysis"[241]. It can be used to emphasize autonomy and isolation or their absence[242]. In other words, it grounds a methodological decision[243]. The 'force' of legal pluralism functions, in this respect, as a 'floating signifier' that can be either used to decide the indistinguishability of law and ordinary life or their separation. This fiction has, however, also an ontological dimension, insofar as it is suggested that neither complete autonomy nor complete lack of it can exist in society and, therefore, that every existing situation is, in some way or another (to be measured for certain purposes), semi-autonomous[244]. This has brought Griffiths, a leading figure in the field, to argue, at

---

[235] Ibid.
[236] Ibid:723.
[237] Ibid:744.
[238] Ibid.
[239] Falk Moore, in fact, argues that "[t]hough the formal legal institution may enjoy a near monopoly on the legitimate use of force, they cannot be said to have a monopoly of any kind of the other various forms of effective coercion or effective inducement" (Ibid:721).
[240] In fact, "the semi-autonomous social field is *par excellence* a suitable way of defining areas for social anthropological study in complex societies" (Ibid:722.): in other words, it is "a way of defining a research problem" (Ibid:742).
[241] Ibid:745.
[242] Ibid:722.
[243] Similarly, Sally Engle Merry, argues that there is a 'social science' view of legal pluralism and a juristic view of legal pluralism (1988:871).
[244] "Obviously, complete autonomy and complete domination are rare, if they exist at all in the world today, and semi-autonomy of various kinds and degrees is an ordinary circumstance. Since the law of sovereign states is hierarchical in form, no social field within a modern polity could be absolutely

first, that law is simply "the self-regulation of a semi-autonomous social field"[245], and at a later stage of his career, to make the paradoxical claim that "the word 'law' could better be abandoned altogether for purposes of theory formation in sociology of law"[246]. This move however produces what appears to me as a pseudo-juridical ontologisation of social life. Specifically, for him sociology of law and legal anthropology[247] must be concerned with what he calls "the elementary 'social cement'[248] presupposed by all social life", namely, 'social control' rather than law[249]. Social control is, for Griffiths, fundamentally what 'human social life' *is* about – it is the force of (social) life as such rather than the force of law (force-of-~~law~~) – and, therefore, sociology of law is not a sub-discipline of sociology but rather its foundation (sociology-of-~~law~~)[250].

The force-of-~~law~~ displays itself as the force of ordering, the production of a "regularized conduct or actual patterns of behaviour in a community, association, or society"[251]. But that, it could be further argued, has been the other side of law since at least Kelsen. The ontologisation of *semi*-autonomy provides ontological consistency to law as well and, in fact, Falk Moore argues that if semi-autonomy exists that is because the hierarchical form of State law exists too[252]. That is also why Rouland has suggested that when it comes to legal pluralism "no theory escapes, to some degree, the taint of statism"[253]. In this respect, it is worth stressing again that a reflection on legal pluralism becomes possible only as a consequence of two, related processes, namely, on one side, colonialism, 'the imposition of a centralised and codified legal system by an imperialist nation'[254] and, on the other, the biopoliticisation of law, its use as a tool for governance and, therefore, the entry into "a period when legislation and other formal measures –

---

autonomous from a legal point of view. Absolute domination is also difficult to conceive, for even in armies and prisons and other rule-run institutions, there is usually an underlife with some autonomy" (Falk Moore, 1973:742-743).

[245] 1986:38.

[246] 2006:63.

[247] According to Griffiths they are "two names for the same thing" (ibid:51).

[248] Griffiths borrows the word 'cement' from Elster, a social and political theorist (ibid:49). Whereas for Elster the cement of social life is 'social order', for Griffiths no sociological explanation of order can be provided. Only a socio-biological explanation of order might, at some point in the future, eventually be attempted (ibid:51).

[249] Social control "refers to the fact that the behaviour of the members of a group in relation to one another is regulated. The regulation resides largely and ultimately in the mutual relationships and interactions of the members" (ibid:52).

[250] Ibid:66.

[251] Tamahana, 1995:503.

[252] 1973:742.

[253] 1994:57.

[254] Merry, 1988:874.

juridical, administrative, and executive – are regularly used to try to change social arrangements"[255]. Both are manifestations of a general process of increasing juridification of life which, if considered from the perspective of legal pluralism, turns life itself into a 'jural force(-of-~~law~~)' that is held in relation with a form of law. The emergence of a discourse on 'jural forces' can be understood, with Foucault, as a process of resistance which is internal to power itself[256]: to the fragmentation of power, as reflected in the biopoliticisation of law (its adopting the form of governance) corresponds a fragmentation of the forces (of law) that resist, by trying to appropriate this power from within[257]. Legal pluralism would not be possible without legal centralism (and vice-versa).

This is, I think, reflected, even in some of the most radical attempts, in critical legal theory, to claim the un-boundlessness of law[258]. Davies, for example, uses legal pluralism to articulate a theory of 'flat law', that is to say, a horizontal conceptualisation of law[259]. The horizontal register is not meant to get rid of the verticality of law, but rather to provide "different angles or perspectives on (…) the law of the nation state"[260]. The point is, in other words, to "blur the boundaries of state law and challenge[s] its status as an object" and thus to "bring[s] into play everything conventionally regarded as not-law"[261]. Theory itself, in this respect, functions as a biopolitical device for the juridification of life. The consequence is, in fact, a radical proliferation of jural forces which however does not suspend, but rather reinforces, the dialectic between form and force. In one of Davies' examples, even walking the dog on the beach becomes an action of the law in which, on one side, the walker is "certainly subscribing to a whole vertical system of by-laws, legislation, and constitutional authorities" and, on the other, is contributing to the meaning of the law by "actively performing, repeating, and constructing legal relationships between [the]self and other beach-users in their own plurality and diversity" (the 'horizontal I-you meeting')[262]. Every singularity is, from this

[255] Falk Moore, 1973:745.
[256] In History of Sexuality (Vol I) Foucault has famously argued that "[w]here there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power (1978:95).
[257] In fact, for Foucault, "[j]ust as networks of power relations ends by forming a dense web that passes through apparatuses and institutions, without being exactly localised in them, so too the swarm of points of resistance traverses social stratifications and individual unities" (ibid:96).
[258] Davies, for example, has recently spoken of an 'law unlimited' (2017).
[259] 2008.
[260] Ibid:288.
[261] Ibid:293.
[262] Ibid:289.

perspective, turned into a legal interpreter provided with a 'jural force' that makes a decision on the form of law possible. Each singularity is fully inscribed into the juridifiying power legal order and the eventual appropriation of the force of law by each body represents a full capture of life into a form of law (verticality) which includes by excluding, that is to say, by constituting what includes as a negativity. From a purely theoretical point of view the result is that law is not properly flattened but rather that its verticality is temporally blurred, which is why Davies ultimately argues that "rather than 'flat law' we could more accurately imagine 'astigmatic law', meaning that the horizontal and vertical lines have different focal points"[263].

The theorisation of law as flat is instrumental to a strategy of appropriation of the verticality of law which means that it represents an act of resistance that is made possible by (the presupposition of) verticality[264]. Its function is, admittedly, the production of a new *legal* space[265] and, accordingly, it presupposes an ontologisation of power as, on one side, inevitable and, on the other, 'legal' (at least to a certain extent)[266]. Davies' description of flat law as the folding of legal structures, "like a mobius strip, an image which brings out the indeterminate nature of the insides and outsides of law"[267], resembles what Agamben has described as a product, or a presupposition, of sovereign legality, namely, indistinction. It is interesting, in this respect, to notice that the horizontal critique of law, meant "to disperse the unidirectional flow of hierarchical power through a more expansive network of relationships"[268] seems, on one side, to mimic the functioning of biopolitical power in modernity and, on the other, with its emphasis on law, to re-produce the sovereign (inclusive-exclusion) structure of legality. In this respect I think it is possible to claim that this critique is not a critique of biopolitics but a biopolitical critique (critique as a form of bio-power in both Foucault and Agamben's terms) which turns law itself into what Foucault, speaking of modern, fragmented, networks of power, has termed 'apparatus', namely, "an essentially heterogeneous ensemble, composed of discourses, institutions, architectural formations, regulatory

[263] Ibid:293.
[264] The vertical register, Davies argues, "*governs* the agendas of critique" [italic mine] (ibid:285).
[265] In her own words, ""the entry-point for feminist legal analysis is constituted by a denial of other possible legal spaces" (ibid:286).
[266] Again, in her own words, "while the flow of power through the system may be altered and decentralised, the operations of power can never be eliminated. This is true whether power is conceived of as emanating from institutional sources (i.e., the 'sovereign' power) or whether it is given a more circulating and discursive form" (ibid:293).
[267] Ibid.
[268] Ibid:286.

decisions, laws, administrative measures, scientific statements, philosophical, moral, and philanthropic arguments"[269].

Agamben, developing Foucault's analysis of apparatuses has noticed that for Foucault singular apparatuses are always networks of various elements through which power as such becomes visible as, precisely, an articulation and, in this respect, an apparatus is an "operative concept with a general character" which, in Foucault's work, "take[s] the place of the universal" (including, for example, the State, Law, Sovereignty, etc.)[270]. Most crucially, in Agamben's analysis, the notion of apparatus, as a general category, is re-interpreted as a *dispositio*[271], Latin term used to translate the Christian notion of *oikonomia*, that is to say, administration of the world through the separation of being and action, ontology and praxis, a separation which is grounded on the dogma of the articulation of God's substance into Father, Son and Holy Spirit (Trinitarian dogma)[272]. The analogy apparatus/*dispositio* allows Agamben to think the apparatus as, generally speaking, the capture of substance(s) – that is to say, life or 'living beings' – into, precisely, an "*oikonomia* of apparatuses that seek to govern and guide them toward the good"[273]. Agamben speaks, literally, of the "partitioning of beings into (…), on the one hand, living beings (or substances), and on the other , apparatuses in which living beings are incessantly captured"[274], which means that, in more general terms, each apparatus is the exemplification (paradigm) of a form of articulation of the life of living beings, which it to say, its very presupposition as a sub-stance, something that 'lies under': its inclusive exclusion. The presupposition of life is what, according to Agamben, grounds the modern dogma of its governability, and in fact, the *oikonomia* of an apparatus "aim[s] to manage, govern, control and orient – in a way that purports to be useful – the behaviours, gestures, and thoughts of human beings" [275]. For the very same reason, the suspension of the mechanisms that regulate an apparatus (Agamben calls this operation 'profanation') "bring[s] to light the Ungovernable, which is the beginning and (…) the vanishing point of every politics"[276].

---

[269] 1980:164.
[270] Agamben, 2009b:7.
[271] As Agamben himself notices, the French term for apparatus, the one originally used by Foucault, namely 'dispositif', comes from the Latin term '*dispositio*' (ibid:11).
[272] Ibid:10.
[273] Ibid:13.
[274] Ibid.
[275] Ibid:12.
[276] Ibid:24.

It is at this point possible to re-interpret the representation, in and through legal pluralism, of (social) life in terms of 'order' and 'control' as a more or less sophisticated capture of life into an apparatus, produced by the theorists themselves, called 'law'. Even the most radical and critical forms of pluralism display a tendency to constitute life as an 'Ungovernable' that, however, can be instrumentalised to the purpose of governability, or better, to the purpose of a better theory *of law*, of *life itself as law*, as the constituent 'cement' of a future law to come.

A final example, in this respect, is provided by Fitzpatrick and Golder's reinterpretation of Foucault's numerous and yet scattered remarks on law as the ground for a theory of (Foucault's) law, a theory of 'the law of sociality', the 'law of our being-together'[277]. For Fitzpatrick and Golder the 'ontological void of modernity'[278], which is to say, the radical separation of being and praxis as reflected in the organisation of power into networks and apparatuses, rather than in the allegedly linear, vertical fashion of pre-modern times, produces a new dialectic between two forms of sociality, close and open: modernity as closure and modernity as rupture. Both forms of modernity are represented by law, or better, by two conceptualisations of law, namely, respectively, a constituted biopolitical law (which is embodied, for example, by Ewald's conceptualisation of 'social law') and law as 'the *constituent* component of the social bond', law as 'the unconditional openness to futurity and alterity', to the 'wholly other'[279]. This move, which resembles the (at this point traditional) Derridean interpretative turn in legal critique, reproduces, in other words, a dialectic between a form of (biopolitical) law and a force of (biopolitical) law. It provides, in other words, another attempt at legitimating (legal) decision-making, a normative instrumentalization of ethics and life, ethics of life as Other, for the purpose of what *lato sensu*, is still a form of legal decision making. The result is that the 'ontological void of modernity' grounds another (legal) essentialisation of the life, the institution of law as "the truth of the social bond"[280]. This results in what Zartaloudis would describe as the attempt to essentialise life's lack of essence, the foundational use of nothingness as an 'absolute universal *norm*'[281] and therefore life's capture into an apparatus of law and life. In a very similar fashion, but from a different perspective,

[277] 2007:124-130.
[278] Ibid:101.
[279] Ibid.
[280] Ibid:126.
[281] 2008:260. For Zartaloudis this strategy, rather than providing "a solution to the enigma of legal foundations, (…) seems more like an opportunity to admit the embarrassment of legal thought in its attempt, each time, to think and ground *itself*" (Ibid.).

Pottage has recently criticised this approach insofar as it reproduces the idea of law as "an abstraction that can be actualised in a number of very different theoretical or pragmatic schematisations, (…) a universal form that awaits realisation one way or another"[282]. Crucially Pottage criticises this approach – which to him represents the 'hallmark of progressive or critical thought' – because it consists in "abstracting laws into 'law', or [in] absorbing legal forms into their animating contexts", with the consequence of ultimately "fail[ing] to get away from an instrumentalist representation of social action"[283].

The Ungovernable

It has been suggested that for Agamben before any process of subjectification, including legal subjectification, there is only life, the 'living being'. The living being, as such, has no essence, in the sense that it is precisely a process of essentialisation (subjectification) that constitutes it as a subject. To be a subject, in this respect, means to become the target of a process of essentialisation which, as suggested by Agamben, has always been, at least in the west, conceived as a process of *gubernatio*, i.e. government. Heron, in this respect, has highlighted the connections between Agamben's treatment of the notion of *gubernatio* in Thomas Aquinas and Foucault's conceptualisation of power as the production of free subjects[284]. Government, as claimed by Foucault, means "to structure the possible field of action of others", but this presupposes the constitution of the other as a free subject so that 'subjective freedom' works as both a pre-condition and a support for the exercise of power[285]. Similarly, for Thomas Aquinas, "divine government appears wholly to coincide with the nature itself of the things that it directs (…) the *necessitas naturalis* that insists in the things themselves", so that "the divine *dispositio* is immanent to the creatures themselves [and] their being wholly coincides with their being governed"[286]. Modern legal means, from this perspective, are always means of government, that is to say, "index[es] of living being's governability" whose function is, in other words, to make life governable by constituting it as a subject free to be

[282] 2011:162.
[283] Ibid:163.
[284] 2011:162-166.
[285] Ibid:162.
[286] Ibid:163-166.

governed, a free-subject[287]. Calarco has suggested that within this framework, beings are defined by the very governmental action that constitutes them as subjects, which also implies that governmental means presuppose a gap between action and being that, at the same time, is *dissimulated* through the process of subjectification[288]. Life appears, from this perspective, a zero-degree of government or, in Agamben's own words, as an 'Ungovernable', "the beginning and the vanishing point of every politics". Being 'ungovernable' is not, in this respect, another essence, but rather the very historical exposure of every living being to a process of government, to a governability. This does not mean that there is no such a thing as an ungovernable life: on the contrary, all life is ungovernable precisely because, historically, it has been exposed to the possibility of being governed: represented as (un)governable.

The issue of representation of life in terms of governability can also be framed as an issue of essentialisation of that which exists and, along the lines of the scholastic distinction between essence (*essentia*) and existence (*existentia*), as a process of abstraction from reality. Essence, in scholasticism, "designates what a thing is known to be, the non-temporal object of knowledge in a temporal and changing thing"[289] and, in this sense, it is to be distinguished from the real as, precisely, the realm of existence:

> "whether a thing is real or not is not implied in its essence: we do not know whether there is such a thing by knowing its 'essence' alone. This must be decided by an existential proposition"[290].

The philosophical tradition has re-shaped this distinction between *essentia* and *existentia* for centuries, re-defining every time the form of their relation but what has remained somehow unaltered is the underlying assumption of an opposition between a mediated (essence) experience – which, in most cases, is referred to as the object of Reason understood as abstract thought – and an immediate (existence) experience[291] of reality. Moreover, within the same tradition the distinction between essence and existence has been understood and framed through the Aristotelian categories of potentiality and actuality (*dynamis* and *energeia*) so that on one side essence, as reason, deals with

[287] Ibid:166.
[288] 2014:102.
[289] Tillich, 1944:47.
[290] Ibid.
[291] Ibid:52-54.

possibilities (‘*essentia est possibiliatis*’[292]) and existence – that which comes before (or after) reason and abstract thought – with actuality which, in turn is understood as a *complementum possibilitatis*[293]. As a result, with Agamben, essence becomes the presupposition of existence *like* potentiality becomes the presupposition of actuality[294]. The problem of existence is, from this perspective, a problem of the ineffability of reality, the idea that there is something that escapes the objective grasp of abstract/essential thinking, something that cannot be known or, better, something that can be problematised in so far as, in some sense, it is not knowable. Heidegger’s critique of metaphysics, and specifically his emphasis on the need to distinguish between an ontological and an ontic dimension, runs along similar lines. Metaphysics has remained blind to the problem of being, the problem of existence, by, basically, essentialising it[295]. It is therefore in this sense that it is possible to argue that “Western thought is characterized by an ‘onticization’ of Being (by the practice of treating Being as a being)”[296]. Being or the world is therefore captured by its representations (beings) or, more generally, by what Abbott calls a ‘representational paradigm’.

Agamben’s work on law can thus be interpreted as the exposure of the *existence* of the living to a process of legal essentialisation – the dissimulation, through a process of legal subjectification, of the gap between being and action – or, more broadly, to an ontology of governability (which employs legal means too), the conceptualisation of the world as a place in which life can be governed. Legal means, theoretical ones too, in this respect, concur to the representation of the *factum* of life in terms of governability. More generally, the western tradition of thinking about law and society has constituted both as the product of a process of abstraction from existence to the point that, today, any attempt at representing existence as such seems to have become, so to speak, superfluous. Existence, more precisely, is replaced by a process of *realisation*. This is reflected, for example, in theories that advocate for the *environmentalisation* of the world, but also in

[292] In order to support this argument Tillich quotes both Schelling (“Reason reaches what can be or will be-but only as an idea, and therefore, in comparison with real Being, only as a possibility”) and Kierkegaard (“Abstract thought can grasp reality only by destroying it, and this destruction of reality consists in transforming it into mere possibility”) (ibid:50).
[293] Esposito, 2010:297.
[294] Agamben, 2018c:9.
[295] According to Wheeler’s interpretation of Heidegger, “western thought has failed to heed the ontological difference, and so has articulated Being precisely as a kind of ultimate being, as evidenced by a series of namings of Being, for example as idea, energeia, substance, monad or will to power” (Wheeler, 2018:9).
[296] Ibid.

the consolidation of a new scientific paradigm of statistical law as a reality in itself, which governs now both natural and social sciences.

Agamben notices in fact that "[w]hile in classical physics [statistical laws] were founded on the decision not to know all the details of the initial conditions of physical systems and did not call into question the determinism of natural laws", with quantum mechanics instead, as Majorana puts it, "the result of any measurement seems (…) to be concerned with the state the system is led to during the experiment rather than with the unknowable state of the system before being perturbed"[297]. Basic laws, in quantum physics, are statistical laws, which means that "[t]hey only allow us to establish the probability that a measurement performed on a system prepared in a given way will give a certain result"[298]. That is why, Agamben notices, Majorana argues that the phenomenon is 'commanded' by the experimenter. This shift represents, in other words, the demise of scientific determinism, so that now, to be real is only 'a deficiency of determinism', the unknowability of the world, or better, its knowability by means of an intervention of the experimenter which modifies what pre-exists it. In general, what is performed here is a 'modification of reality in a statistical sense', 'the representation of the probable as if it were something that exist': in other words, the replacement of an actuality with a potentiality, of existence with essence.

Crucially, an analogy with the social sciences can be drawn. The function of the statistical laws of the social sciences in fact, according to Majorana, "is not only that of empirically establishing the outcome of a great number of unknown causes, but especially that of providing an immediate and concrete testimony of reality [and t]he interpretation of this testimony requires a special art, which is not the least significant support of the art of government"[299]. Agamben radicalises these reflections and argues that "just as the probabilistic laws of quantum mechanics aim not at knowing but at 'commanding' the state of atomic systems, so the laws of social statistics do not aim at the knowledge of social phenomena but at their very "government"[300]. Sociology develops as an art of government, in the broadest possible sense of the term, which is to say, the art of representing and capturing the potentiality of the *factum pluralitatis* by organising it into a system which 'commands' its functioning. In this sense, sociology partakes to the same

[297] 2018d:10
[298] Ibid:61-62.
[299] Majorana (2018).
[300] Agamben, 2018d:14.

process of organisation of the real that characterises law since, at least, its originary Roman formulation. It is worth, in this respect, to quote at length the words of Francesco Carnelutti, an Italian legal theorist who, in 1951, writes about the *function* ('office') of the jurist as a process of realisation (*possibilisation*) of *reality*, to be distinguished from its mere *existence*, by means of legal abstractions:

> "[s]o, the office of abstraction, which is the indispensable means of science, in each of its sectors, is to overcome existence, discovering possibility beyond it. Existence, the real as revealed through our senses, is the object of abstraction; but, to the extent that it loses its concreteness due to this, it gets dissolved. Thought, placing the phenomenon on the anatomical table in order to dissect it, kills it; but this death, like all deaths, is a condition of life. Existence is broken down into pieces in order to study possibility. This, more or less, has always been known even if it has not been expressed in completely happy formulas. In particular, the distinction, which is a true antithesis, between physics and mathematics corresponds precisely to the distinction between existence and possibility: of physics the name itself says that it studies nature, which belongs to existence (quod nascitur or quod existit are the same thing); this is not the case with mathematics but it should be known that it studies the place of what exists, what can exist. (...) But what has not been understood, not even by all mathematicians (…) is that if the possible does not exist, it is nevertheless no less real than the existing. It seems to me that the time has come to stop confusing existence with reality. (...) Therefore, the very problem of God is misplaced if one speaks of his existence, rather than his reality. Existence, by the way, is proper to the part, precisely because it is a part of reality. (...) Thus through this realization of the possible (to be understood not as a translation of the possible into the existing but as a recognition of the real beyond existence) reality has prodigiously expanded. (...) Hence mathematics (...) has finally become an ontology; if not ontology as such, given that being includes, together, the possible and the existing, at least a method to get there. (...) Now it is time to consider that the matter on which law operates is possibility: the law exists, that is to say, a norm, or in any case, a juridical command is formed, in order for something that is possible to change or not to change into existing. But if the jurist did not cross the boundary from existence to possibility, how could he fulfill his *office*? (...) this sector of life too is distinguished into existence and possibility; and the office of the jurist is

basically nothing other than that of increasing its existence with the possibility”[301] [my translation].

The law, as a process of essentialisation, deals with potentiality, the potentiality of existence or reality, which is to say, a *potentiality of realisation*. Carnelutti speaks, in this respect, of a ‘realization of the possible’ which derives from a ‘fragmentation of the existent’, and a ‘recognition of a reality beyond existence’. This operation expands reality (realising it) so that, Carnelutti suggests, existence and reality have to be kept radically distinguished. This can be interpreted as a modern formulation of the principle of separation of being and action which, as already discussed, implies the essentialisation of being, its presupposition in and through a process of subjectification which dissimulates the existence of a gap. From this perspective, as far as law is concerned, no inquiry into existence is possible anymore.

On the contrary, Agamben’s methodology can be described as the attempt to make an inquiry into existence possible again, in the form of an exhibition of its exceptional articulation. This is possible because that ‘thing’ which is articulated though, as already mentioned, is not a pre-linguistic reality, but language’s own self-referentiality, communicability as the reality of man. Agamben’s interpretation of Plato’s theory of signification is particularly instructive in this respect, because it grounds his

[301] Original text: “[o]ra l’ufficio dell’astrazione, che è il mezzo indispensabile della scienza, in ogni suo settore, è quello di superare l’esistenza, scoprendo al di là di essa la possibilità. L’esistenza, realtà rivelata attraverso i nostri sensi, è oggetto dell’astrazione; ma, in quanto per causa di questa perde la concretezza, si dissolve. Il pensiero, collocando il fenomeno sul tavolo anatomico, per sezionarlo, lo uccide; ma questa morte, come tutte le morti, è condizione della vita. Si scompone l’esistenza per studiare la possibilità. Il che, su per giù, si è sempre capito anche se non s’è espresso in formule del tutto felici. In particolare la distinzione, ch’è una vera antitesi, tra *fisica* e *matematica* risponde proprio alla distinzione tra *esistenza* e *possibilità*: della fisica il nome stesso dice che studia la natura, la quale appartiene all’esistenza (*quod nascitur* o *quod existit* sono la stessa cosa); della matematica non è altrettanto ma dovrebb’essere noto che studia il luogo di ciò che *esiste*, ciò che *può esistere*. (...) Ma quel che non s’è capito, neppure da tutti i matematici (..) è che se il possibile non è esistente, è *tuttavia non meno reale dell’esistente*. In ordine a che mi sembra venuta l’ora che si smetta di confondere *esistenza* con *realtà*. (...) Perciò lo stesso problema di Dio è mal posto quando si parla della sua esistenza, anzi che della sua realtà. L’esistenza, del resto, è propria della parte, appunto perché è una parte della realtà. (...) Così con questa realizzazione del possibile (da intendere non come traduzione del possibile in esistente ma come riconoscimento del reale oltre l’esistente) si è prodigiosamente ampliata la realtà. (...) Onde la matematica (...) è diventata finalmente un’ontologia; se non proprio ontologia essa medesima, posto che l’essere comprende, insieme, il possibile e l’esistente, un metodo per arrivarci. (...) Ora è tempo di riflettere che la materia, sulla quale opera il diritto, è la possibilità: non per altro il diritto esiste, cioè una norma, o comunque, un comando giuridico si forma se non affinché *qualcosa che è possibile si muti o non si muti in esistente*. Ma se il giurista non varcasse il confine dall’esistenza alla possibilità, come potrebbe adempiere al suo ufficio? (...) anche questo settore della vita si distingue in esistenza e possibilità; e l’ufficio del giurista non è altro, in fondo, da quello di *accrescerne con la possibilità l’esistenza*” (1951:201-208).

hermeneutical strategy precisely around the concept of communicability. Plato in the seventh letter, using the *circle* as an example, explains that signification (thought) develops in accordance with four elements – name (signifier), definition (signified), image (denotation) and science or knowledge which is 'the understanding that is realised through the first three – plus a fifth element, to which kwowledge 'approaches nearest (than the other three) in affinity and likeness' and which nevertheless remains distinct from it[302]. The first two elements are in the voice (*en phonais*), the third in the perceptible objects (*en somaton schemasin*) and the fourth in souls (*en psychais*) and therefore the fifth element, which is beyond the voice, the perceptible object and the soul would also seem to be beyond language, and yet Agamben suggests that it "is not something that absolutely transcends language and has nothing to do with it"[303]. In another passage from the same letter, in fact, Plato argues that "the thing itself lights up suddenly 'after rubbing one against the other names, logos, visual and others sense perceptions and scrutinizing them in benevolent disputation by the use of question and answer without jealousy'[304]. This image – which is strikingly proximate to Benjamin's notion of '*conversation*' as the absolutely non-violent space of human life – provides according to Agamben a description of the thing itself of thought as situated at the limit of language and therefore as only possible 'in and by virtue of language'[305].

To support this reading Agamben suggests that Plato's statement that "as a fifth one must posit the thing itself, which [*dei ho*] is knowable and truly exists" should be re-interpreted, in accordance with an older transcription of the text as "[one must posit] the fifth, that through which [*di'o*][each being] is knowable and truly exists"[306]. The thing itself, from this perspective, is not a presupposition of language, but rather language itself as the medium of knowability, communicability itself. Language's own *mediality* though is somehow hidden by what appears to be the "necessary presuppositional and objectifying structure of language" which, in fact, "decompose the thing itself (…) into a being about which one speaks"[307]. The communicability of language, in this respect, corresponds to its own structural weakness, "its inability to bring to expression this knowability and this sameness"[308]. This means however that at stake in language is not

[302] Agamben, 1987:20.
[303] Ibid:21.
[304] Ibid.
[305] Ibid.
[306] Ibid:22.
[307] 1999:33.
[308] Ibid.

an entity that remains unsaid and unsayable but rather the very idea of language's own unsayability: language's incapacity to say itself.

Tradition, if considered from the perspective of the paradigmatic method, appears turning this communicability, which ultimately represents "the very openness at issue in language" into the presupposed ground of a 'universal predication'. Aristotle's own theory of signification in fact, reproduces Plato's distinction between 'what is in the voice' (name and definition), what is in perception (the image) and what is in the soul (knowledge)[309] but avoids any mention to the thing itself, which is replaced with the letters (*ta grammata*) that represent the limit of all interpretation, both sign and element of the voice (*index sui*). This operation produces an implicit removal of communicability in the explicit form of a removal of the voice: specifically, while Aristotle concedes that animals might have language – insofar a voice is a signifying sound (σημαντικὸς ψόφος) made by a living creature (ζῴου ψόφος) –he also claims that when it comes to human language voice can signify only through the letters that act as its elements (στοιχεῖα) and signs (πάθεσιν)[310]. Human language is thus the product of, literally, an *articulation* (διάρθρωσις) of affections of the soul, things and letters in place of bare voice and the letter, being both affection and element of a removed voice, acts according to Agamben as the 'first and ultimate hermeneut'. As both affection (sign) and element of language the letter is *index* of itself[311]: it encloses language by externalising a non-linguistic. The letter becomes the 'linguistic cipher' of what, in the Categories, Aristotle defines as '*prote ousia*', the first substance, which in turn represents (following the medieval reinterpretation) an ineffable individuum, '*singular existence*'[312] as "the absolute presupposition on which all discourse and knowledge are founded" and which can therefore enter *linguistic* signification only "by abandoning its status as deixis [*prote*] and becoming universal predication"[313]. Plato's communicability is therefore 'conserved in being removed', namely, presupposed through an inclusive-exclusion[314] which is also

[309] For Aristotle signification 'en te phone' (in the voice), en te psyche (in the soul) and pragmata (written marks). In this respect Aristotle's voice would correspond to Plato's names and definitions, the affections of the soul to knowledge and the written marks to the images. While the second and the third correspondences are easy to grasp, the first correspondence is derived by Agamben from Ammonius, who claims that Aristotle speaks of 'that which is in the voice' (τὰ ἐν τῇ φωνῇ) rather than 'voices' (φωναί) precisely "in order to show that saying 'voice' is not the same as saying 'name and verb'" (Agamben, 2018c:16).

[310] 2018c:17.

[311] Ibid:18.

[312] Agamben speaks of a 'double status' of the *prote ousia* (2018c:6).

[313] Agamben, 1999:37.

[314] For a similar argument, Doussan, 2013:81.

represented as a removal of man's animal or natural voice, its constitution as a zero-degree of universal predication.

This operation makes intelligible the modern articulation, this time internal to (a linguistics understanding of) language, between names and discourse, semiotic and semantic, *langue* and *parole*. This transmission of the experience of language influences the becoming human of man (anthropogenesis) and turns it into an exosomatic process, a history. Agamben describes this process in the following terms:

> "man has access to his own nature—to language, which defines him as ζῷον λόγον ἔχον and animal rationale—only historically (...) This means that in man (...) the human and the inhuman face each other without any natural articulation, and that something like a civilization can originate only starting from the invention and the construction of a historical articulation between them"[315].

This is a reformulation of the problem, highlighted by Benjamin in his essay on language, namely his critique of the instrumentality of language, of the idea of language as a means to an end, a means of communication, rather than as a medium of communicability. It is, in fact, precisely the consolidation of a theory of language as a 'mere sign' that, according to Mills, constitutes "language as a means for communicating something other than itself", rather than, first of all, its own communicability[316]. Paradigmatically, it can be argued that the process of desemanticisation of the '*factum loquendi*' that leads to the formulation of a theory of signs becomes a model of intelligibility for the desemanticisation of the '*factum pluralitatis*' in and through law as a, precisely, an inclusive-exclusion of life. If the human being is defined by his having language (*zoon logon echon*) and his language is always split into two spheres that have to be articulated through an inclusive-exclusion that presupposes an ineffable individuum and a non-human voice, then human life's too is split and articulated into an empty *form* and an ineffable *force* of natural life. To be desemanticised and presupposed, in both contexts though is not life as some kind of pre-linguistic entity, but the communicability of both law and life (and of language more generally). The communicability of life is organised into a communicability of law – in the same way in which language's

[315] 2018c:15

[316] 2008:43.

communicability is captured into a logic of instrumentality – so that life is abandoned to a process of government: its communicability (its language) is defined by a signature of governability/decidability, by an enunciative function whose function is to articulate life into form and force. The modern instrumental view that dominates our understanding of language as communication is a signature that informs also the modern representation of law as a signature of life's governability, the possibility to constitute life as a force-of-~~law~~ that grounds a decision on its form (of law). While both models provide a principle of governability of life (as respectively language and law), the life which is always presupposed as (un)governable is its own communicability which, however, due to its weakness, can only be exhibited in and through the process that tries to govern (articulate) it.

The exposure of life as ungovernable is the exhibition of the existence of language as its own communicability. But this consists, from the perspective of the (law) student, in the exhibition of the conditions that make law intelligible, of the signature that defines, not so much its content, but the possibility of its content. It is also what makes a 'conversation' among 'jurists' possible, or better, the exhibition of what they do as a 'conversation' that, in every concrete articulation of form and force is somehow presupposed and silenced. The self-referential mechanisms through which law defines itself are more than just the sterile object of endless speculation among legal theorists: they are the technicalisation of what, in its originary form (or force, but at this level the two are indistinguishable), is a fundamental anthropogenetic experience, the experience of language's communicability.

Study

Agamben's work on the exception does not provide a theory of law, not even a critical one. It does provide, anyway, for what Zartaloudis would call a 'legal thought', a generic pontentiality of thought whose interest in law is grounded on the principle that "the law cannot tell thought what to do, and thought should have no interest in predetermining what the law or legal thought can do"[317]. This means that legal thought demands from thought a certain *critical* stance with respect to law, one which Zartaloudis

[317] 2018:4.

describes in the following terms: "if thought is not to be narrowed down into one discipline or into the normative or merely positive questions of the legal system, then thought can be reconceived as the experience, for it is an empiricism, of the perpetual temptation in Western thinking to confine itself within 'law' or 'politics' as well as the equally frequent temptation to posit itself as a law a such"[318]. Zartaloudis also suggests that legal thought, as a form of generic potentiality, could eventually be concerned with the question "what *can* the law be?", as opposed to the questions, "what is the law?" or "what should it be?"[319]. My position, in this respect, is that Agamben's work on exceptionality can be interpreted as an answer to the following question: 'what can the *study* of law be?'.

Agamben's use of criticism, and specifically his critical stance on law does not provide a theory of law but rather a form of study as, precisely, the attempt to resist the temptation to theorise the law by studying it and, eventually, by studying what it can mean to theorise the law. To theorise the law, from this perspective, could mean to remain caught into an enunciative function, that of the 'jurist', which turns the generic potentiality of thought into an organised potentiality, a power (of thought), that, in Zartaloudis' words, tends to be driven by a desire "for normative answers to normatively preconceived questions"[320]. Legal theory appears to produce an instrumentalised form of legal thought, legal thought as a means to an end, namely the articulation of a zone of indistinction between law and life, of a *forиa*, into form and force *of law*. Legal thought as such is, in this sense, biopolitical: it concurs to the re-presentation of life and the world as thresholds of governability.

The notion of study (of law), in this respect, plays, in Agamben's thought, a (dis)function which is almost antithetical to that of (legal) theory. His sporadic references to the notion of study are particularly insightful in this respect, because they describe a kind of praxis which embodies, precisely, the idea of 'a means without ends'. In a recent online publication, titled '*Studenti*', Agamben describes the experience of study as one of those few activities that cannot be defined by the scopes that the activity aims to pursue and that is due to the fact that, "unlike 'research' which refers to a kind of 'going around in circles' in search for an object (*circare*), study, whose etymology refers to the highest

[318] 2009:208.
[319] Ibid.
[320] 2005:402.

intensity of desire, has always already found its object" [321] [my translation]. In a similar fashion, in 'The Idea of Prose', Agamben claimed that "[t]hose who are used to long hours spent among books, where every fragment seems to open a new path, immediately left aside at the next encounter (…) know not only that study cannot have rightful end, but also that it does not desire one"[322]. As a result, Agamben also stresses that "research is only a temporary phase of study, which ends once its object has been identified", whereas study, being without ends, "is a permanent condition" and "a form of life: the life of the student"[323] [my translation]. From this point of view, as Lewis observes, to be a student requires standing "before all possibilities with a certain detached indifference to personal gains, outcomes, and ends" and, more generally, questioning what he calls a general 'teleological ontology of action', the idea that "[s]ubjects organize their activities according to intentional content in order to achieve specific goals"[324]. This view has an ontological character in the sense that it represents a sort of signature of subjectivity, that which defines what it means, in general to be a subject, the potentiality of the subject.

Following Benjamin's remarks in the Critique, one can argue that this kind of ontology informs the formation of law's many subjects, including the jurist, the subject of legal theory, who appears caught in a dance between means and ends (of the law), as well as form and force. Similarly, Lewis speaks of the 'learner', as opposed to the student, as someone whose method is "to collect signs and things in order to reproduce them (always in measurable amounts) as evidence of the potentiality to be or do"[325]. The signature of law, (as a biopolitical signature), then, represents the potentiality of the jurist, and therefore his subjectivity, as always already abandoned to a potentiality or power to *decide* the form of life's (un)governability, in terms of an articulation of life's form and force (of law). In this sense study is a critical reflection on the possible limits of law as limits of the law and not of (legal) thought as such[326].

In this respect, Zartaloudis, following MacKenzie's inquiry into the notion of a 'pure critique' has suggested that legal critique often coincides with what can be defined a form of (limited) 'total criticism' which "delimits a totality that transcends critique", thus relying on "justificatory strategies that condition the idea of critique itself *such that*

[321] Original text available online at: https://www.quodlibet.it/giorgio-agamben-studenti [30/10/2021].
[322] 1995:64.
[323] See note 321.
[324] 2013.
[325] Ibid.
[326] Zartaloudis, 2008:ix.

the justificatory bedrock is beyond critique"[327]. For example, MacKenzie stresses, total criticism of democracy would question critically the very idea of democracy but it in a way which remains 'implicated with the total terrain of which the idea of democracy is a part' as (again) for example, when democracy is criticised from 'an oligarchical perspective' which shares with democracy the same 'normative terrain' provided by the general question 'what is the best form of government?' [328]. Zartaloudis thus stresses that this kind of critique stems from an outside of the 'being-criticised' which however constitutes a whole with it[329] and similarly, MacKenzie speaks of "a given totality [which] is delimited as a transcendent element conditioning the immanence of critique such that the totality itself is beyond critique"[330]. Zartaloudis, in his main work on Agamben, has spoken of this 'totality' as a manifestation of "the *nomophilia* of legal theory (…) and of social and political theory in general" and has attempted to question it as the product of a dogmatic "theoretical structure imposed in thinking law and politics (as well as ethics and society) through the form of a Law of law (...) the presupposition of a hyper-normative, supposedly transcendent, structure of the law itself"[331]. While he argues that the word 'dogma' in this context is used 'in a general sense' it seems to me that his main concern is with the ideological use of this *nomophiliac* attitude of legal theory and, particularly, with politico-normative claims grounded on some reference to transcendent, and therefore by definition ambiguous, concepts, such as Nature, Democracy, Human Rights, Justice, and so forth. My (perhaps less rigorous) approach instead – moving from the assumption that it is possible to interpret Agamben's critique as targeting the very (articulating) structure implicit in every use of the law – considers the word 'dogma' in a broader sense such that the 'Law of law' is here represented by the general *decidability* presupposed in every attempt (of thought) to articulate a form and a force of law together: the very idea of that law and life can (and have-to) be articulated as, respectively, form and force (of law) and, therefore, that the indistinguishability of law and life can (and has-to) be *instrumentalised* to that purpose. A legal theory, from this perspective, can only decide how to articulate the indistinction of life and law, form and force: this is the 'enunciative function' of the 'jurist'.

[327] 2005:403.
[328] MacKenzie, 2004:23. Zartaloudis makes a similar point too (2005:403).
[329] 2005:403.
[330] 2004:26.
[331] 2008:1.

Along these lines, it can be suggested that biopolitics, as a signature which constitutes life as (un)governable, is represented by the 'jurist' as the necessity to provide an answer to the question 'how law and life can be articulated together?' and this normative question constitutes the 'total terrain' which legal theories cannot but leave unquestioned, a totality beyond critique. This broadly understood normative function conditions therefore also what MacKenzie calls 'the immanence of critique' which uses theory and, more generally, philosophy as a means to certain normative purposes. In this sense, while for example, according to MacKenzie, in Kant "the idea of critique is [made] immanent to a purpose, an end which transcends critique itself", namely Reason[332], similarly, in legal theory critique is made immanent to the purpose of law, its own self-preservation as a means of governability. The horizontal or indifferent dimension of philosophical or (purely) critical inquiry is therefore inserted into a vertical logic as when, for example, Davies suggests that the vertical register (of law) "*govern*[s] the agendas of critique" [italic mine][333]. This in Davies produces a horizontal account (of law) which is used as a means to provide "different angles or perspectives on (…) the law of the nation state" so as to "blur the boundaries of state law and challenge its status as an object (…) bring[ing] into play everything conventionally regarded as not-law"[334] (including philosophy). The outside of law is framed as that which is not law according to the vertical register of law, which is to say, as 'not-law' or, in other words, as a negativity (of law) that thought can appropriate in order to re-think *law*. Thought itself, from this point of view, is included into law and juridified as juridifiying from the outside. More generally, 'not-law' constitutes another formulation of the excess of (legal) signification, a force-of-~~law~~ which is both excluded and included: excluded from the vertical register (form of law) and, for this very reason, abandoned to the possibility of its inclusion. This approach, in a way, is consistent, or better, *coherent* with Kelsen's idea of an empty form of law which is, itself, always abandoned to a process of *creative* interpretation. To the extent that law constitutes a limit in the form of an empty form it can equally become, with Davies, 'unlimited': living law, which is to say, life as law. In this sense legal theory is biopolitical: it presupposes the indistinguishability of law and life as the ground of a decision on their relation.

[332] 2004:20.
[333] 2008:285
[334] Ibid:288

To study the law then could mean to be confronted with this signature of life and law as a limit of law's unlimitedness. The limit is not to be destroyed but exhibited as such, namely as *made*[335] and, more precisely, made as the *necessary* potentiality of legal thought, as the enunciative function which allows the subject (the jurist) to speak legally and, relatedly, to speak of life (or nature) as the zero-degree of law. To study the law is, in other words, to give expression to a generic potentiality of thought, a communicability, by exhibiting the way in which this generic potentiality is organised and limited by law, turned into power and communication. In this respect, Agamben, speaking about his own general 'desire to write' asks:

> "what does that mean? To write – what? This was, I believe, a desire for possibility in my life. (…) not to 'write', but to 'be able to' write. It is an unconscious philosophical gesture: the search for possibility in your life, which is a good definition of philosophy. Law is, apparently, the contrary: it is a question of necessity, not of possibility. But when I studied law, it was because I could not, of course, have been able to access the possible without passing the test of the necessary"[336].

Generic potentiality, in other words, becomes accessible only through 'the test of the necessary', that which limits and organises potentiality, namely law. That is because in some way desire itself belongs to the law: the law itself reproduces an ontology of both command and will – of command as will and will as command – such that the modern subject is constituted at the same time as both bare (subjected to command) and sovereign (commanding his own will). It is not by chance, from this perspective, that Bartleby the law-copyist, the main character from Melville's novel, is referenced by Agamben as a fundamental paradigm of both potentiality[337] and study[338]. At the beginning of the novel, in fact, Bartleby is confronted by the necessity of the law in the form, precisely, of a duty

[335] As Zartaloudis suggests, the study of law is precisely the exposition of the form of legal and theoretical decisions as *made* (2008:3).
[336] Interview, available online at: https://www.versobooks.com/blogs/1612-thought-is-the-courage-of-hopelessness-an-interview-with-philosopher-giorgio-agamben [30/10/2021].
[337] 2017:728. Whyte's reflections are particularly instructive in this respect (2009).
[338] Agamben, 1995:65.

to write it[339] and, at the same time, his strategy is not to question this necessity through a declaration of will ('I don't want to copy the law' or 'I want to write a different law' or, even, 'my own law'): on the contrary, he recurs to a formula which, theoretically, neutralises both desire and duty, namely the famous 'I would prefer not to'. This formula then actualises a form of study of law which remains suspended in between will and command, contingency and necessity, potentiality and actuality, as the two extremes around which law itself is somehow organised. The law, as organised potentiality is power to decide, decidability, which constitutes at the same time both sovereign's and (bare) life's horizons of existence. As many commentators have observed[340], Agamben's strategy is therefore one of *impotentiality*, that is to say, actualisation (in and through study) of what the law makes impossible, that is to say, of a potentiality not-to-decide, in the same way in which, as suggested by Morgan, Benjamin's critique "arrives at an aporia where the very possibility of human judgement is no longer secure"[341].

This process, the process of study, has for this reason been described by Lewis as a state between subjectification and de-subjectification, possibility and impossibility, contingency and necessity[342]. The impotentiality of study then is achieved via the recognition that "the subject emerges precisely in the gap that separates and binds together opposite forces in the atopic space existing between desubjectification and subjectification"[343]. The subject of law is, in other words, a process, the process of both subjectification and de-subjectification, of a life that, with Foucault, can either be fostered or disallowed to the point of death, politicised or de-politicised. This requires the production of a series of representations, of (legal) fictions that make life (un)governable and the subject, in this respect, represents the space in which these representations are produced, the power to articulate them but, eventually, also to suspend this articulation. To the study the law means to observe how the subject of law has been allowed to speak, how communicability (potentiality) has been articulated (actualised) into legal communication (organised potentiality, i.e. power): it is, with Foucault, the "rationalization of a process which *results* in a subject, or rather in subjects", into a series of enunciative functions of the law. The student is therefore a process, a methodology of

[339] Whyte, in this respect, suggests that Bartleby's 'I would prefer not to' formula should be interpreted, at first, as "a withdrawal from the work of copying that makes up the daily routine of the legal firm in which he is employed" (2009:310).
[340] See in particular de la Durantaye (2009).
[341] 2007:52.
[342] Lewis, 2013.
[343] Ibid.

impotentiality that makes possible the decision to not-decide, the actualisation of communicability via the suspension of (legal) communication.

Legal communication stands not so much for the articulation of legality and illegality but rather of law and non-law[344], with the latter being constituted as a means to the ends of the former, in such a manner that, with Zartaloudis, "law and social *praxis* are conceived as *separable*, but their line of separation is drawn by the law"[345]. Legal communicability then, the one which concerns the student, is the exposure of the limit by law and non-law as the result of a legal or pseudo-legal operation, as 'drawn by the law'. Communicability, more generally, is the experience of the signature of language, of its exceptional structure (inclusive-exclusion) that makes language weak and yet powerful insofar as this structure grounds the power to represent life through a series of devices (paradigms) of inclusive-exclusion of life as the non-linguistic presupposition of language. Language and law become the means to communicate and govern life as the non-linguistic.

Methodologically speaking, the signature is therefore a device to bring together different paradigms of inclusive-exclusion by relating the one to the other *analogically*. Watkin, in this respect, speaks of the signature as a principle which allows the organisation of a series of paradigms and, in fact, most of Agamben's paradigms are organised together in consideration of the general inclusive-exclusive structure of which they are expression. In representing whatever they represent at the (essential) level of their particular content, they are also, with Colli, (existential) *expression* of a representability, which Agamben describes precisely in terms of exceptionality. Crucially, the fact that the *analogy* concerns a signature of exceptionality, namely, inclusive-exclusion, means that what is, for each paradigm, *analogous* is, precisely, the establishment of a certain relation between inside and outside. What makes their relation *analogous* is, then, the fact that to be related are not two elements but rather *two relations*[346]: on the side of the law, one finds a particular representation of the relation between *factum* and *ius* (life and law) and, on the other side, the side of philosophical methodology, the signature of inclusive-exclusion. As a result, the ontological distinction between essence and existence can be related analogically to what in law would then

[344] For a similar argument see De Caroli (2007).
[345] 2008:x.
[346] As observed by Hesse in her brilliant study of Aristotle's analogical thought, an analogy establishes always a relation between two relations. This relation produces similarity as a "third way between univocity and equivocity" (1965:333).

appear as the production of an essence and an existence of law. This operation produces what Hesse describes as a 'metaphysical analogy'[347], which makes knowledge possible *there* where knowledge has become impossible due to the presence of disciplinary boundaries and, in this sense, it has a transdisciplinary or, even better, extra-disciplinary function, representing an attempt at abandoning the discipline[348].

The signature of life's governability, and relatedly also that of language's instrumentality, represents, therefore, 'the normative terrain' that makes a total (as opposed to pure) criticism of law possible. This, of course, does not make total criticism less relevant (eventually it makes it more relevant), but only (potentially) problematic – in the sense of worth problematising – and my point is mainly to suggest that Agamben's work provides the *methodological* tools to do it. Specifically, I think that Agamben's method allows to study the limits of legal theory and thus the very (biopolitical) process of formation of a tradition of legal theory, with legal theory itself being understood in broad terms, as the *praxis* of articulating the inside and the outside of law. The end of this is to make the tradition of legal theorising intelligible in new terms, that is to say, to make its study possible. Theory and method are, in this sense, indistinguishable insofar as the theory of signatures – and thus, of (biopolitical) exceptionality (of the exceptional articulation of law and life) – is a theory only to the extent that it is, at the same time, a method (of study), a praxis and therefore a 'form of life' that cannot be separated – as a theory (theoretically) could – from the context of its own being made. That is why Agamben calls his theory a 'theory of the destituent power': not only because it destitutes the power of thought – namely the organisation of potentiality into an articulating structure, by exhibiting this articulation as made, but also because it can only do so by destituting its own ('sovereign') theoretical structure by exhibiting itself as made, that is to say, as a method.

The theory of exceptionality is in other words a method of the signature and the method of the signature is a form of life, the life of the student. As such this approach makes indistinguishable the three pillars of research in the social sciences – namely, theory, method and standpoint – making, in other words, their organisation for specific ends (of the research) impossible. That is because study is a form of self-reflexive critique

[347] Ibid:334.

[348] Agamben, in this respect, has argued that "*[e]xtra* is the place of thought", which means that thought coincides "with the idea of a movement from within – *ex* – a going out" and, that therefore "[i]t is not possible to find the truth if we do not first leave the situation – or the institution – which prevents us from entering": (Agamben, 2017b:58) [my translation].

which questions its own conditions of possibility and makes of that questioning the very object of the research. The question 'who is the legal subject?' and, more technically, 'which kind of subjectivity is the (legal) theorist?' presupposes the question 'what is the relation between the student and the subject(s) of law?', 'which kind of subjectivity is the student?'. The answer is that the (law) student is the one who encounters processes of legal (de)subjectification, observing and bringing them together (under the thread of a common signature), while at the same time resisting them, that is to say, avoiding producing new articulations of law and life.

In this respect though, Agamben's work provides for what Caffo has defined an 'autoeterography', that is to say, "*un racconto di se attraverso gli altri*"[349] and this is consistent with Agamben's definition of his own authorship as that of an '*epigono*', or more precisely, "*un essere che si genera solo a partire da altri*"[350]. Following the logic of subjectification as a process then, it is only a 'conversation' that makes a disclosure of the self possible. The law student can confront the self only through a series of paradigmatic encounters with law's signature, a series of conversations with the many law's doorkeepers ('jurists'). Kotsko, in this respect, has spoken of Agamben's sources (no matter whether ancient or contemporary) as 'interlocutors'[351] and Kishik has further suggested that Agamben can only "assert[s] his own philosophy by means of synthetising the writing of others"[352]. This kind of practice is what define, at the same time, the life, the method and the theory of the student as a conversation.

This conversation is what makes intelligible the tradition as an anthropogenesis, a coherent (in spite of its many inconsistencies and fundamental discontinuities) organisation of the experience of the two related facts that there is language and that human beings form communities. The self-referentiality of these two experiences, such that it is only the encounter of man with man and therefore of language with itself that makes possible the 'becoming human of man', is what originates the technical self-referential organisation of law and language as well as their decay, their current *crisis*, which coincides with a process of absolute juridification of the world, as well as of transformation of all language (communicability) into communication.

[349] Caffo, 2020:13.
[350] From an interview with Antonio Gnoli published on the Italian newspaper 'La Repubblica' (2018). Available online at: https://www.quodlibet.it/recensione/3310 [30/10/2021].
[351] Kotsko, 2017:11.
[352] Kishik, 2012:4

The experience of study is therefore also an experience of crisis[353] of both the legal and linguistic form. Agamben refers to this crisis as, first of all, a crisis of legitimation of western institution related to a process of spectacularisation of political action (and ultimately of social acts and relations themselves). But he also recognises that this crisis is somehow embedded in the very (sovereign) structure of law so that, in a way, the Western tradition, in its regulative form, has always been the representation of an experience of crisis:

> "[a]ll societies and all cultures today (it does not matter whether they are democratic or totalitarian, conservative or progressive) have entered into a legitimation crisis in which law (we mean by this term the entire text of tradition in its regulative form, whether the Jewish Torah or the Islamic Shariah, Christian dogma or the profane *nomos*) is in force as the pure nothing of revelation. But this is precisely the structure of the sovereign relation, and the nihilism in which we are living is, from this perspective, nothing other than the coming to light of this relation as such."[354].

To my purposes, the crisis of the legal form, that is to say the technical problem of legal indeterminacy, and the related proliferation of theories that try to come to terms with this indeterminacy, can be understood more generally as the expression of a crisis of communicability, of its fragmentation into a series of communicative processes that remain deaf to each other and make, on one side, the experience of learning the law, an extremely unpleasant process of (de)subjectification[355] and, on the other, constitute the legal field a battle-field in which different schools of thought fight to decide what the function of law has-to-be.

Study is, instead, the attempt to create what Benjamin would call a constellation, and more precisely a constellation of encounters, i.e. a conversation, in which is not the transmission of a determinate essence of the law which is made possible, but, with Lewis, "the transmission of transmissibility (…) the pure potentiality of transmission as such"[356]. Similarly, Hesse has suggested that the knowledge produced through the use of what she calls 'metaphysical analogies' consists in '*definienda*' (paradigms) that "are not genera or species", given that there is no property which applies 'to the examples in the same

[353] On this see also Chryssostalis (2005).
[354] Agamben, 2017:45-46.
[355] For a similar argument see Lewis's take on learning as a process of desubjectification (2013).
[356] Ibid.

sense'[357]. Moreover, as Hesse further observes, this unessential knowledge can only be grasped "from induction from a number of examples", that is to say, through 'multiplication of examples' that allow to 'grasp the analogy' inductively[358]. The study of transmissibility then becomes possible as the production of a constellation of analogies, i.e. paradigms. Such transmissibility cannot properly be said, as just another content to be communicated, but only exemplificated in and through the very practice – or with Agamben 'critic gesture'[359] – of bringing together examples, i.e. paradigms of a common signature. This operation is both the contingent and personal selection made by the student, influenced by his or her own personal encounters with the tradition, as well the impersonal and necessary selection made by tradition itself that allows itself to be encountered in certain ways and not other; thus, it constitutes the student as a zone of indistinction between personal and impersonal, contingency and necessity, in which both are exhibited in their possibility. For the very same reason the search for paradigms has no proper object or end and, with Agamben, it cannot properly be concluded but only abandoned[360].

---

[357] 1965:336.
[358] Ibid.
[359] 2000.
[360] 2017:1019.

Out (or 'A Glossary')

Abandoning a work, after long time spent on its making, is not an easy task. In order to abandon my work, I've decided – instead of writing a conclusion (in itself, an impossible task) – to provide for what could be described as the *indistinction* of the arguments presented so far. Practically, I will try to *dis-organise* my thesis by making a series of general and quite indistinct remarks – divided into nine *macro-thematic sections* (that could however also be read, cumulatively, as one long section) – on the main concepts discussed in the previous texts, but without following the order of their appearance in the thesis. This is to suggest that each of the texts that form this thesis are connected to each other to such an extent that, from the perspective of 'study', they are, ultimately, indistinguishable, despite all my attempts at organising my thoughts into a coherent 'research'. This thesis, of course, could have been written *otherwise* and, in order to emphasise this element of openness towards a generic potentiality, I would also like to suggest that it could be *read* otherwise. From the point of view of a research that has-to-be-defended, this could make the thesis a bit weaker, more fragile, but from the point of view of study – which is ultimately the object of this research – fragility is not necessarily a bad thing. Specifically, the exposure of the thesis's fragility allows me here to perform a critic *gesture*, which consists in producing what might be considered an 'indistinct glossary', in order to suggest that while each of the texts written so far might contain a certain specific *content* – i.e. an object to be *communicated* – at the same time, they all deal with the same *communicability*.

Universalisation. Weil and Benjamin's reflections on the *universality* of law provide the ground for what could be described as Agamben's *methodological anarchism*, the anarchy of (his) study. Anarchy here stands not for a desire to either destroy or to appropriate the law but rather (with Cercel) for a sort of 'legal scepticism' which, at the same time, makes the study of law *possible*. For both Weil and Benjamin (and ultimately for Agamben too) law, as a universal *form*, can be problematised in terms of its presuppositional – or exceptional – relation with *force* or *violence* or, more generally, *power* (Benjamin's *Gewalt*). For example, the presupposition of force implies, in the context of Weil's critique, that the (in potency) egalitarian and universal *person of rights* is '*wedded*' to a social context made of (actual) hierarchies and forces. The 'wedding' of these two dimensions constitutes what Agamben would call an articulation that, it might

be argued, produces both: it is a *fictional* operation, a representation of the singularity *before* and *after* the law through which both dimensions are constituted as, respectively, forceful and formal, social and legal, violent and non-violent, destructible and indestructible, singular and universal, and so forth. The (legal) person is, for Weil, a paradigm of the *indestructibility* (i.e. *sanctity*) of law: the indestructibility of a *universal* and forceless form which, however, *presupposes* the *destructibility*, as well as the force, of life. *Power*, from this point of view, is not the force presupposed by a form, but rather the *organisation* or *articulation* of both form and force (of both law and life) which ultimately produces an *order of governability* of their (un)stable relation. In this sense, force and form are *co-produced* which means, with Benjamin's vocabulary, that their *ambiguous* relation is *constituted* and *preserved* or, with Agamben, organised, articulated. The words '*organisation*' and '*articulation*', in other words, define a situation where law and life are (*constituted* as) *indistinguishable* in law (as, precisely, force and form *of* law) *in order to* ground a *power* to decide on (the *preservation* of) their relation. This does not mean, of course, that there is no violence before the form of law, or better, that life is not destructible until it has been wedded to the fiction of its indestructibility: it means though that the violence and destructibility of life – as we(sterners) have become accustomed to think them – are the *product* of a re-presentation which *produces*, at the same time, also the fiction of its non-violence and indestructibility. This is why law can be *valid* in spite of its lack of *efficacy*, *coherent* in spite of its lack of *consistence*, or *in place* even when it is *eluded*. It is, therefore, possible to argue, with Weil, that the law, while constituting the *person* as *sacred* (thus producing its own *sanctity*) immolates the *singularity* which is re-presented as sacred into a system of collective forces that defines the form of its destructibility and which is preserved precisely through the fiction of indestructibility. This means that, at the same time, to be preserved is also the fiction of indestructibility, the universal form of law, and that the function of this *articulating power* is, precisely, *self*-reflectively, to preserve itself, i.e. to preserve the power to organise the *ambiguous* relation between of (indestructible) law and (destructible) life. Agamben describes this *ambiguity* as 'indistinguishability' and this 'indistinguishability' of law and life is further described as *ex-ceptional* or *presuppositional*, in order to highlight, precisely, that the indestructibility of law includes the destructibility of life by excluding it. Following Zartaloudis's reflections on the two worlds *of* the law, it could be argued that the *fiction* of law presupposes the destructibility of life as *another fiction* (another form of *sacredness*, i.e. the presupposition of the *sanctity* of law), that is to say, as a

(re)presentation of singularity *before* the law – of existence *before* essence – which therefore *belongs to* the latter precisely by being excluded by it: a *fictional destructibility* which is functionally related to a *fictional indestructibility*. The 'theorem of the sanctity of life' as Benjamin suggests, represents ultimately the power to separate one's existence from '*existence itself*', namely, a re-presentation of singularity as always subjected to the possibility of a decision. The two orders of (in)destructibility form an *ambiguous Order*, a *Power* as the *functional articulation* of a before and an after of law.

Guilt. The study of the law is possible only through a critical reflection on what it means for life to stand before the law. For Benjamin, and for Agamben too, this means that life as such, natural life, is (re)presented, in and through study, as always-already *guilt*, that is to say, as *more* than just 'being' (or living): as an excess of being (and life), as a having-to-be or, with Levi-Strauss's words, as an excess of signification. Life and being are, more precisely, exposed to the possibility of *judgement*, namely of *deciding* the ambiguous relation between the world which *is* and the world which *has-to-be*; in other words, they are exposed to a *power* to *decide*, a *decid-ability*. This power rests on the production of a *threshold* in which the two worlds are thought as *indistinct* and, for this very reason, as separable by means of further decisions. What is to be *preserved* in every decision is, in general, the power to decide as such: the power to make law and life indistinct in order to decide on their relation but *never* once and for all: only for the sake of maintaining the power to *keep on deciding*. This means that every decision on the relation between law and life will presuppose, again, their indistinction. Legal theories too, from this perspective, can be investigated as decisions on the relation between law and life that, however, presuppose, again, their indistinction as the ground for new decisions. This *endless* (not without ends, but without end, namely, always producing new ends) circuit of decisions can also be called *tradition*, the object to be studied in order to, eventually, put an end to it (by *suspending* its circularity rather than destroying it). This demands, more generally, an investigation on life as that which is presupposed as the ground (a *zero-degree*) of decid-ability. In other words, a reflection on what Benjamin calls the *guilt* of *nature*, nature as the source of and ground of power. Nature becomes, in this respect, the ground for the exercise of a general *social function* which can be described, with Pufendorf, as the (self-reflective) obligation to preserve *sociality*. To be preserved is, basically, a dialectic between nature and society such that the former is constituted as a zero-degree of the latter, i.e. nature as a presupposition of society and,

therefore, as the ground of a power to decide on their relation. Human actions become therefore *functional*, in the sense that they are means for the preservation of *sociality*, an excess of signification or, with Agamben an 'alterity in whose name the function is carried out'. What makes human action *effective*, in other words, is neither the action as such neither the product of the action, but the fact that it 'coincides with the effectuation of a function' of sociality through which, with Agamben 'being and praxis, what a human does and what a human is, enter into a zone of indistinction in which being dissolves into its practical effects and, with a perfect circularity, it is what it has to be and has to be what it is'. Functional indistinction is, in other words, indistiction *instrumentalised* for the purpose of reproducing a *power-to-decide*, a *decid-ability*. The problem of the relation between law and life, as well as that between society and nature, in other words, is the problem of their articulation to be understood as the constitution and preservation of a threshold *by means of* which law and life are made indistinct as respectively, form of law (society) and force-of ~~law~~ (~~society~~). To be preserved, from this perspective, is neither life nor nature, but their use as means (force) for the *survival* of the (forms of) law and society, or more generally, for the preservation of a power to decide on their relation. Schmitt's *circular* reflection on the sovereign exception (as a means to preserve the form of law which, in *turn*, is a means to maintain the power to decide) points, in this respect, in exactly the same direction. In general, form and force are two poles around which the indistinguishability of law and life, that is to say, the constitution of life as a zero-degree of law (life as a means to the ends of law) is organised. Their relation is, therefore, an ambiguous relation, one which, with Moran, 'cannot be clarified by thought' *once and for all*. The *ambiguity* of their relation – or, with Agamben, their *indistinction* – could be represented as a '*forиa*' and it is precisely as a result of this ambiguity that decisions (on the form of their relation) are *needed*. The decision, however, does not resolve the ambiguity but rather reproduces a universal decidability as the necessary *end* of every decision: every decision – to be considered as a possible *articulation* of form and force (of law) – reproduces, as its presupposition, the indistinction of law and life. Benjamin's idea of *nature* as *guilt* can therefore be interpreted as a representation of the indistinction of law and life which, following his critique, seems to constitute the *presupposition* of the power or violence (*Gewalt*) of law: more specifically, the *Gewalt* of law is that it presupposes a life which is natural only insofar it is guilty, that is to say, always-already abandoned to the possibility of judgement, *i.e.* of becoming the object of a decision.

Forиa or *Decid-ability*. A possible interpretation of both Benjamin's and Agamben's critiques of law, aimed at developing a theory of study as a means without ends, is that life and law are made indistinguishable *in order to* ground a decision on the form of their relation, a decision which, in other words, reproduces a form of law *separated* from life which, however, in turn, is always-already presupposed *as* a force-of-~~law~~ and, in this sense, as indistinguishable from law. Agamben's idea of a form-of-life, 'a life that cannot be separated from its form', represents from this perspective, to the very least, the negation of (or more simplistically, the anarchic praxis of studying) law's potentiality, to be understood as the *power* to presuppose the indistinction of law and life as the ground of a decision on their *relation*, that is to say, as the ground of an articulating power (of thought in general). The articul-ability of law and life, in fact, presupposes their indistinction which, however, does not constitute 'a form that *cannot* be separated from life' but rather the opposite: a form that *can be* separated from life because or after (in a *functional*, rather than causal or temporal sense) it has been made indistinguishable from it. In other words, indistinction *instrumentalised* for juridical or pseudo-juridical (*govern-mental*) purposes: more simplistically, indistinction as *decid-ability*, that is to say, as the *ground* of a *power* to preserve law *through* life. The force-of-~~law~~ stands, from a methodological point of view, for an *excess* of form (of law) and, therefore, at the same time, for the representation of the *potentiality* of the form of law as an empty signifier, a 'form in *force* without significance': in other words, a representation of what critical legal theorists call legal *indeterminacy* which, in turn, constitutes a particular manifestation of Benjamin's problematisation of the *ambiguity* of law. That the law is indeterminate, or ambiguous, means in other words that its form *can* (has the *power* to) include that which excludes by turning it into what could be called a force-of-~~law~~. The form of law at stake here is not any particular form but a generally indeterminate potentiality of the law which Agamben describes precisely in terms of a *form* or *structure* of inclusive-exclusion, i.e. ex-ceptionality. This structure is therefore a meta-form or, with Zartaloudis, a 'Law of the law' which, however, does not make intelligible *only* pseudo-political (transcendental) claims to a '*P*ower' of the law which would *exceed* its actual manifestations (law*s*) grounding therefore (transcendentally) their legitimacy (e.g. law on behalf of Democracy, the People, the Social, and so forth): from a methodological point of view, i.e. the point of view of *study*, to be made intelligible is the structure of law's *thinkability* or *communicability* as such, which is to say, a 'signature' or an '*enunciative function*' which informs the *existence*, rather than the *essence*, of legal

communication broadly understood (the possibility to speak about the law, i.e. to make of law the object of communication including also, for example, legal theory). This means that the technical problem of legal indeterminacy of the form of law constitutes a particular manifestation of what is, more generally (i.e. philosophically), ‘the problem of the relation between law and life’, of ‘the institutional integration of life’, that is to say, the fact that law makes (or better, *has made*) itself thinkable and communicable as a form of law held in relation with a force of life turned force-of-~~law~~: in other words, that law’s power (as communicability) rests on its ability to make life thinkable as a *zero-degree of law*, i.e. as indistinct from law, in order to ground a *decision* on their articulation. Methodologically speaking, law’s communicability rests on the presupposition of a broadly understood power (of thought) to *decide* (decidability) on the articulation of law and life. This fact is neither good nor bad but, more fundamentally, *problematic*, in the sense of deserving critical inquiry, i.e. study.

Instrumentality. The legal order can be thought as space in which life is constituted as a force-of-~~law~~, which is to say, as a space of decidability, i.e. a space in which life is, first of all, decidable. This is reflected, for example, in what can be interpreted as the positivist argumentation concerning the relation between law and life. This is framed, first of all, as the articulation of law into, respectively, rules and ‘operative facts’ to which rules can *deductively* apply (according to the formula ‘if fact-x occurs then rule-y applies’). The application of a rule *y* to a fact *x*, however, *presupposes* the necessity of what MacCormick calls ‘ascriptive decisions’, the power to treat a certain fact as, precisely, the (operative) fact *of* a rule. Crucially, this *necessary* relatability of law (rule) and life (fact) is not simply *deducted* from the content of rules as each of them, in fact, is more than just its content: a rule *exceeds* its content by *incorporating* a system of *coherent* values, i.e. ends, which makes the rule itself *overridable*. As a result, legal rules always make room for *exceptions* to the rule, they are ‘open hypotheticals’ providing for a ‘defeasible universality’ and, in this sense, they include that which they exclude, ‘they contain the principle that overrides them’, producing a ‘coherent inconsistency’. Most crucially, among these *coherently organised* principles (values as ends exceeding the rule as means) it is included the principle (value or end) of coherence itself, the *coherence of law* as a whole, intended as a general principle of decidability: ‘decide like cases alike and different ones differently’. From this perspective, if – as MacCormick suggests – the coherence of the ends of the legal system, a principle which *every* rule of the system

incorporates, ‘can be conceived as expressing a satisfactory form of life’, then this form of life, in its most basic (bare) manifestation, can be understood as, precisely, a ‘case’, the fiction of a decidable life: at the same time both ground for a decision on (a form separated from) life, and, as ground, a zone of indistinction between life and decision, i.e. (natural life as a zero-degree of decision). Nature, from the perspective of the legal order, functions, with Fusco (who, more specifically, draws a parallel between the singularity of the body and the universality of the legal person) as a sort of ‘hidden support’ for the law. Civility is ‘the opposite of the state of nature’ which, in turn, is just the functional negation of the possibility for orderliness, i.e. the *end* of the legal order, to be understood as the maintenance of a power to make life decidable (a force-of-~~law~~) by *means* of an (in potency) empty form of law. As a result, the endless (due to its circularity) debate between positivist and natural theorists of law can, on one side, be re-framed (as suggested by Green too), as a debate between theorists of means and theorists of ends and, on the other, resolved into a critic gesture (the one performed by Benjamin) which consists in suggesting that the ultimate end of law is nothing but its own *self-preservation* as a means: law-founding violence, in other words, is the (ontological) decision concerning the necessary relatability of law and life which grounds the necessity of its preservation, i.e. law-preserving violence. The end of law is, self-reflectively, its own survival as a means and this realisation produces the threshold in which theories of means and theories of ends become indistinguishable. This becomes possible through the presupposition of a state of nature which, despite its many possible theoretical configurations, can be ultimately reduced to a minimum degree of representation expressing the idea of an *instrumentalised* indistinguishability of law and life (a *signature* of instrumentality), which is to say, indistinction as the ground of a power to articulate law and life by means of decisions that *preserve* the sphere of (law’s) decidability (on life).

Govern-ability. The monopoly of violence consists, from a methodological point of view, not so much in the power to produce legal ends by violent means or, with Benjamin, in ‘the (founding) historical acknowledgement (for example, through a constitution) of particular violent ends’ but, more generally, in the power to distinguish between legal and natural ends and, therefore, in the power to subject to scrutiny the whole of nature or, with Zartaloudis, to ‘place all events and all human actions as subject to the law’s suspicion’. In this sense, contrary to what a certain reading of Foucault could suggest, the law is a bio-political manifestation, in the sense that it partakes to the modern,

more or less (un)conscious, process of constituting life as such as *governable*, life as a space of *governability*. The fact that this often is achieved through non-legal means – e.g. *normalisation*, as opposed to *legalisation* – does not make the law less relevant, not at least from the perspective of a philosophical problematisation of the relation between law and life. On the contrary, the power to articulate (legal) rules and (non-legal) norms, even when eventually this leads to a *withdrawal* or *invisibilisation* of law from the stage of (bio)power, is another particular representation of the problem of law's ambiguity and its presupposed decidability: the fact that life is constituted as decidable, i.e. the ambiguous indistinction of law and life, represents the legal expression of what, following Foucault's reflections on *governmentality*, could be defined as a general governability of life, the constitution of life as *governable*, as a zero-degree of government. Ultimately this is what norm, as opposed to rule, stands for, namely, governability as a supreme *end* of power (and therefore of law too). The dichotomy rule-norm – which, according to many interpreters, grounds Foucault's biopolitics – can therefore be understood as a functional relation which is constitutive of an *order* in which norms represent, in consideration of what Kelly describes as their *utopic* dimension, the end of law: more precisely, the ideal of life as such as *governable*, i.e. life as a zero-degree of governability. The meeting point of both positive and natural theories of law, namely, decidability itself as the end of law, constitutes, in this sense, a legal representation of a broader principle of governability which makes a biopolitics (as a form of inquiry into the problem of power) possible. (Legal) Decidability, in fact, rests on the interplay of rule and norm, to be understood (if considered from the perspective of a biopolitical/philosophical problematisation of the relation between law and life) as, respectively, form of law and force-of-~~law~~. (Legal) Decidability, from this perspective, can be temporally suspended if and only this is instrumental to the preservation of a broader governability of life. This, in any case, does not render decidability impossible: on the contrary decidability is displaced somewhere else (which is why, for example, Foucault speaks of a society now formed by 'judges of normality'). The *Gewalt* of law then is *power*, to be understood following a Foucaultian re-interpretation of law (and legal theory), as the use of law as a means to an (quasi-ontological) *end*, namely, the constitution of the world as an order of governability, a space in which life is made governable or, with Zartaloudis, the constitution of the world as a masterable place. The fact that, at times, governability is achieved through an invisibilisation of the law remains an expression of the problem of the relation between law and life.

Oiko-nomia. Power, from the point of view of (a *study* of) law, becomes *economic*, in the sense of grounded on a *functional articulation* of form and force-of-~~law~~, a *signature* of law that can be described with the formula '*forиa*', here used to represent the indistinguishability of form (forma) and force (forza), as well as the power of thought to *organise* it, 'power as the organisation of potentiality' as Agamben would have it. This signature has a methodological function, namely, to define, in very broad terms, an 'enunciative function' that would make law *intelligible* and, more specifically, *communicable*: the signature allows to grasp, or better to study, what, in Benjamin's terms, could be defined the being-in-language of the mental being 'law'. This requires, in other words, a reflection on 'the very fact that there is language', the *existence* of language as the fundamental presupposition of every politico-juridical discourse. Like law always organises, self-reflectively, what could be defined the 'being-in-law of life', the study of law can explore this self-reflexivity of law as the *expression*, or with Agamben, the *technicalisation*, of the self-reflexivity of language, the fact that all language, with Benjamin's words, 'communicates itself in itself'. The signature of law is, in this sense, also the signature of language, which does not mean that language and law are the same: it means that law and language are *analogous* which, in turn, means (from Agamben's perspective) that both reproduce, in their own terms, the structure of ex-ceptionality, a structure of inclusive-exclusion. From the point of view of law and language as *disciplines* (e.g. legal theory and linguistics) the inside of the discipline (e.g. system of rules and system of signs) is held in relation with an outside (e.g. life and speech) which is, at the same time, both included and excluded, or better, included through exclusion. This operation finds its metaphysical expression in the distinction, which is also an articulation, of, respectively, essence (the inside of metaphysics) and existence (the outside of metaphysics) or also, with Watkin, between Common and proper. In all these many disciplinary instances, the outside is operationalised by the inside, turned into its foundation, the source of its *force*. To study the law means, in this sense, to *wander* through the politico-juridical tradition in search for examples, i.e. *paradigms*, of this *trans/extra-disciplinary* signature. To be looked for is, then, the articulation of a *relation* between inside(s) and outside(s) as, respectively, form(s) and force(s) of law. Examples of this *articulation* are *analogous* (this is what makes them *paradigms*), which means that the analogy concerns, specifically, the structure of a relation between two terms. The *analogy*, in other words, is not between two terms, but *between two relations*: on one side,

the original (methodological) matrix, the signature that makes study possible (ex-ception as the power to articulate the indistinguishability of inside and outside; or forиa, as power to articulate the indistinguishability of form and force) and, on the other, other paradigmatic *relations* that reproduce this matrix (such as, for example, sovereignty and legality, validity and efficacy, rule and norm, law and government, decision and conduct, application and decision, and so forth). The signature is economic, in the sense of *oiko-nomic*, namely, an expression of a power to articulate together the anomic and the nomic (or, with Aristotle, *zoe* and *bios*) so as to constitute the former as an excess which the latter has somehow to grasp. It is precisely by considering life as an excess of *nomos*, i.e. the sphere of decidability, that life is turned into both an object and a subject of government, both a bare and a sovereign life provided with a force which grounds, or better, is said to ground the possibility of order. Through this operation what is grounded is actually the *Power* (of thought) to relate the one to the other, i.e. governability as a power of articulation. This power can find its manifestation in paradigms of both invisibilisation of the anomic (e.g. the rule, validity, *Res*, *Summa Natura*, lawscape, legal means, legal, etc.) and invisibilisation of the nomic (norm, sovereign exception, living law, the Roman notion of *res nullius*, *Varia Natura*, atmosphere, non-legal ends, illegal, etc.). Despite their differences – in terms of degree of intensity of (in)visibilisation – what remains *analogous* is the fact itself of an *oiko-nomic* relation, which endlessly re-organises itself along these two poles of (a)nomia, form and force. The genealogy of the term *oikonomia* allows to consider it, from a methodological point of view, as the signature of a general enunciative function which characterises human praxis (including the practice of theorising), not at the level of its content but at the level of its existence, as a form of *ex-ceptional government* of life.

Anthropogenesis. The study of law is not concerned with legal content for its own sake: it is concerned with legal content insofar this legal content is the expression of a general communicability of language. The study of law is an attempt to make the *experience* of (language's) communicability in and through law. From this perspective, the study of law does not provide a theory of legal communication, because *communication* presupposes an essentialisation of language as means to an end, that is to say, a means (signifier) to communicate a specific content (signified) and, with Hamacher, of law as a means of 'preserving or mandating certain ways of life'. The binary distinction legal/illegal, for example, is one possible *content* of (a theory of) legal

communication, but what remains unquestioned here is the presupposition on which this distinction rests, namely, as De Caroli suggests, the distinction *legal/non-legal* or, with Agamben (and Benjamin) that between linguistic and non-linguistic (linguistic and mental being). It is on this distinction that rests the communicability of every communication and the solution offered by Agamben consists *not* in trying to essentialise the non-linguistic (as well as the non-legal) through, for example, a new theory of (legal) communication but rather in trying to critically engage with the ways in which communicability has been organised within tradition while, at the same time, suggesting that that which has been presupposed is not some ineffable, non-linguistic, entity, but rather, communicability itself as the place of language, i.e. language communicating itself *in* itself. What remains unsaid in theories of (legal) communication is the non-violent (that is to say non-instrumental) *pure mediality* of what Benjamin calls 'conversation' ('*unterredung*'), the possibility to speak (write, think, read, etc.) as such. This is, from the perspective of Agamben's methodology, the ultimate presupposition, the unsayable of every said: (un)sayability itself. The study of the (ex-ceptional) organisation of communicability, from this point of view, is the experience, or better, one possible experience of language (and relatedly of law) as the place(s) in which (un)sayability – the *co-originarity* of linguistic and the non-linguistic (as well as the legal and the non-legal) – is articulated, the place (i.e. tradition) in which an ex-ception, an inclusive-exclusion, is *made*. Trough this *making*, (un)sayability, the indistinction of linguistic and non-linguistic or the possibility to speak, is *instrumentalised* and turned into *communication*. As a result, to be experienced is the making of tradition as such. With respect to law, given the role it played and still plays in the constitution of *sociality*, this *making*, i.e. the *enunciative praxis* of articulating together an inside and an outside of law, has an *anthropogenetic function*: it is an expression of a process through which man becomes a human subject, and, in consideration of its analogy with the linguistic/non-linguistic distinction, it is also a *technicalisation* of their co-originarity. This *social function* can be described as the technicalisation of *both* the *factum pluralitatis* and the *factum loquendi*, a process which, as Agamben's biopolitics suggests, produces *subjects of power*: *both* sovereign and bare, that is to say, exposed to the two extreme possibilities of being either sovereign or bare (and to whatever other possibility which falls in between these two poles). The *subjective pronoun I*, from a methodological point of view, stands for the *gap* or, with Colli, a 'void of representation', which separates signifier and signified, semiotic and semantic or, more radically, language and world, but also for the process through

which this gap is articulated, the *power* to use the gap as the ground for a *decision*, as a *threshold*, and therefore as a means to an end, namely, another representation. From a methodological point of view, the legal person is one re-presentation (one analogical reproduction in the field of social relations) of this power of articulation. But the same goes with both sovereign and bare life: they are *fictions* too, that radicalise the exceptionality which the law carries within itself, insofar as the law is a *means* of power, one which, with Philippopoulos-Mihalopoulos, 'remains relevant' even when it becomes invisible. The study of law provides therefore a priviledged platform for a (philosophical) reflection on the *power* of human thought, the power to organise the co-origination of nature and culture, assertion and veridiction, the cognitive and the ethical, world and language, and so forth. The critical gesture performed through study consists in trying to *not-re-articulate* this co-origination, that is to say, in trying to make the experience of tradition as a place in which this co-origination *has been* articulated.

Past. The experience of study has its own *ethical* dimension, in the sense that is an experience of *seity*, of the *making* of the self, of *subjectification*, in and through tradition. Study allows to make it by, precisely, studying the ways in which this anthropogenetic process has been organised, limited, technicalised, instrumentalised, in and through concrete instances (*paradigms*) that the student encounters while *wandering* among the ruins of our politico-juridical tradition. What makes them ruins is the fact that this politico-juridical tradition – a representation of the past of modern man which has concurred (for good or/and bad) to his humanisation – has been forgotten as a result of a, probably inevitable, process of fragmentation of the anthropogenetic experience itself, i.e. fragmentation as such as an anthropogenetic event. What the student – or with Lewis, the studier – does is, from this perspective, *not* simply to remember the past, but to remember it *anew*, an experience which the Italian poet Giorgio Caproni describes in the following terms: 'tornare là dove non sono mai stato' ['to go *back there* where I have *never been*']. Concrete instances of our past politico-juridical theorisation provide, in the present, the space for an anthropogenetic experience in a *twofold* sense. On one side, to be experienced is how the potentiality of man, the communicability of his language, has been organised, articulated, technicalised, etc. into a certain form of communication; on the other side, the experience of this articulation, which is an experience of the power of thought, is, as such, the experience of a dis-appropriation or dis-articulation, namely of the attempt to *not*-appropriate this power and therefore to avoid producing another (better

or more powerful) articulation, which is to say, another representation (even, for example, in the form of another theory). This is why Lewis describes it as a process of de-subjectification and this is, also, why Agamben's own study of law ends with a theory of the *destituent power*: to be destituted is the power to represent as such and, when it comes to (legal) theory, also the power to theorise as such. The theory of destituent power is, for this reason, nothing but a method (of study): its (dis)function is to question (i.e. study) the logic of every function, including the logic of *instrumentality* which makes of the indistinction between form and life the ground of a decidability or, more generally, of a governability: in other words, the ground of power. Critical legal theory too could therefore be approached (studied) as a re-presentation of power, specifically, as the attempt to make law and life indistinguishable *in order to* appropriate the law, i.e. in order to re-present its force. Legal theory more generally can be studied as a law-making *power*, as the expression of a power to make law, namely, as the attempt to occupy that (*gap* turned) *threshold* through which inside and outside of law are made indistinguishable and articulated (every legal theory, therefore, is *critical* to the extent that it operates in the liminal position of the inside/outside of law, in the attempt at redefining this critical limit). This, of course, does not make legal theory less relevant: quite the contrary, it makes it worth *studying* anew. It makes it possible in a context in which law's communicability has reached a point of absolute fragmentation, a point in which, in other words, the study of law seems to become (almost) impossible.

Matter. The critique of law's power can lead to the conclusion that this power coincides with the method which studies it. The signature of power is, equally, a signature of method, i.e. signature as method. To argue that, in the architectonics of power, law and life are made indistinguishable in order to ground a decision on their relation, is not the same as arguing that there is a temporal or causal relation between *indistinction* and *separation*, such that indistinction would come temporally or causally *before* the institution of a form *separated* from life (i.e. law). From the perspective of (a study) of power, notions such as 'articulation', 'oiko-nomia', 'ex-ception', suggest precisely that there is a functional *co-implication* and *co-originarity* of indistinction and separation. Ultimately, the very idea of a *relation* has a *methodological (dis)function*, that is to say, it is *functional* to the purpose of *study* as the exposition and the suspension of the articulating function of power. The study of law is made possible by the conceptualisation of the law as a *signature* of *exceptionality* which includes life by excluding it or, with

Watkin, which constitutes it as the proper *of* a Common, a singularity abandoned to universality and, in this sense, a means to an *End*. The study of law allows to consider law – or better governability of life through the self-preservation of law, through the 'remaining relevant' of the law – as the *telos* of life and, at the very same time, it allows to question this teleology (by studying it). The law, if considered in its anthropogenetic dimension, is a representation of what, following for example Khatib's interpretation of Benjamin's weak messianism, can be described as a past that the present, with its individual experiences, is allowed to redeem. This redemption, with Khatib, consists in present's capacity to 'recognise its intendedness by the past'. I would suggest that this 'intendedness' has a *twofold* nature: 1) if we consider law as *past*, this intendedness is, first of all, the *telos* of law, the instrumental use of life (a *present* presence) for law's ultimate end, namely, the creation of a sphere in which life's presence in the present is made *governable* through an order of (legal or pseudo-legal) decidability; 2) intendedness however refers, at the very same time, to the *exposure* of the first intendedness, a 'profane action' (of study) which consists, with Agamben, in accounting for 'a potentiality that has not been actualized in the victorious course of history': it is crucial though to stress that a potentiality that has *not* been actualised is, more specifically, an *impotentiality*, a potentiality-not-to, which is to say, the *suspension* of the 'organisation of (life's) potentiality' into form (of law) and force(-of-~~law~~), (legal) means and (~~legal~~) ends of power. In other words, the suspension of power: study as destituent power; destituent power as a reflection on the conditions of communicability, of the ways in which human encounters, and therefore the potentiality of their '*conversation*', have been organised into a tradition (of *power*). Incidentally, this means that the self-reflexivity of law, with its many paradigmatic manifestations, is in itself a paradigm of power's (of thought) attempt to grasp and organise the self-reflexivity of language, communicability as what remains unsaid in every communication. Rather than trying to re-articulate this communicability into a new theory, the study of law allows to make the experience of a destituent power, namely, a *power* which, with Bartleby, 'would prefer not to', a power to not-decide. This, of course, means that the theory of destituent power *can-not* be a theory: it destitutes itself, showing its own nature as *made*, as a *method*. The (twofold) experience of study, which could be described as the dis-articulating experience of an articulation, finds (self-reflexively) its *matter*, its being *made*, in the very object – a thesis in this case – which has been produced in the attempt of having this experience. More

precisely, this experience touches its own materiality in the fact of its own *making*, that is to say, in the *praxis* of both writing and reading it.

Bibliography

Abbott Mathew (2014), *The Figure of this World: Agamben and the Question of Political Ontology*, Edinburgh University Press

Agamben Giorgio (translated by Schiesari Juliana) (1987), 'The Thing Itself', *SubStance: Contemporary Italian Thought*, 16, 2:53, 18-2

Agamben Giorgio (translated by Heron Liz) (1993), *Infancy and History*, Verso

Agamben Giorgio (translated by Michael Sullivan & Whitsitt Sam) (1995), *Idea of Prose*, Suny Press

Agamben Giorgio (translated and edited by Heller-Roazen Daniel) (1999), *Potentialities. Collected Essays in Philosophy*, Stanford University Press

Agamben Giorgio (translated by Casarino Cesar & Binetti Vincenzo) (2000), *Means Without End*, University of Minnesota Press

Agamben Giorgio (translated by Kevin Attell) (2004), *The Open*, Stanford University Press

Agamben Giorgio (translated by Michael Hardt) (2007), *The Coming Community*, University of Minnesota Press

Agamben Giorgio (translated by D'Isanto Luca with Attell Kevin) (2009a), *The Signature of All Things: On Method*, Zone Books

Agamben Giorgio (2009b), *What is an Apparatus?*, Stanford University Press

Agamben Giorgio (2011), *Nudities*, Stanford University Press

Agamben Giorgio (2017), *The Omnibus Homo Sacer*, Stanford University Press:

- I, *Homo Sacer: Sovereign Power and Bare Life*, 5-160
- II.1, *State of Exception*, 161-246
- II.2, *Stasis*: *Civil War as a Political Paradigm*, 247-294
- II.3, *The Sacrament of Language: An Archaeology of the Oath*, 295-362
- II.4, *The Kingdom and the Glory*, For a Theological Genealogy of Economy and Government, 363-642
- II.5, *Opus Dei: An Archaeology of Duty*, 643-760
- III. *Remnant of Auschwitz: The Witness and the Archive*, 761-880
- IV.1, *The Highest Poverty: Monastic Rule and Form-of-life*, 881-1010
- IV.2, The Use of Bodies, 1011-1279

Agamben Giorgio (2017b), *Autoritratto Nello Studio*, Nottetempo

Agamben Giorgio (2017c), 'A Jurist Confronting Himself: Carl Schmitt's Jurisprudential Thought', in *Jens Meierhenrich and Oliver Simons* (ed.)*,* The Oxford Handbook of Carl Schmitt, 457-470

Agamben Giorgio (2017d), *Creazione e Anarchia, L'opera nell'età della religione capitalista*, Neri Pozza

Agamben Giorgio (translated by Kotsko Adam) (2018a), *Karman: A Brief Treatise on Action, Guilt, Gesture*, Stanford University Press

Agamben Giorgio (2018b), *Homo Sacer. Edizione integrale 1995-2015*, Quodlibet

Agamben Giorgio (translated by Chiesa Lorenzo) (2018c), *What is Philosopy?*, Stanford University Press

Agamben Giorgio (translated by Chiesa Lorenzo) (2018d), *What is Real?*, Stanford University Press

Agamben Giorgio, (2019) *Creation and anarchy: The work of art and the religion of capitalism*, Stanford University Press.

Andrew Edward (1986), 'Simone Weil on the Injustice of Rights-Based Doctrines', *Review of Politics*, 48, 60-91

Arendt Hannah (1998), *The Human Condition*, University of Chicago Press

Attell Kevin (2015), *Giorgio Agamben: Beyond the Threshold of Deconstruction*, Oxford University Press

Bartelson Jens (1995), *A Genealogy of Sovereignty*, Cambridge University Press

Beck Anthony (1996), Foucault and Law: the Collapse of Law's Empire, *Oxford Journal of Legal Studies Vol. 16, No 3*, 489-502

Benjamin Walter (1995), Per La Critica Della Violenza, in Solmi Renato (ed.), *Angelus Novus*, Einaudi

Benjamin Walter (Bullock & Jennings ed.) (2004), *Selected Writings: Vol. 1 (1913-1926)*, Harvard University Press:

- 'Experience', pp. 3-5
- 'On Language as Such and on the Language of Man', pp. 62-71
- 'Fate and Character', pp. 201-206

- ‘The Right to Use Force’, pp. 231-234

- ‘The Critique of Violence’, pp. 236-252

- ‘The Task of the Translator’, pp. 253-263.

Bennett Harold (1930), ‘Sacer Esto’**,** *Transactions and Proceedings of the American Philological Association***,** 61, 5-18

Berger Peter & Luckmann Thomas (1991), *The Social Construction of Reality. A Treatise in the Sociology of Knowledge*, Penguins Books

Bignall Simone (2016), On Property and the Philosophy of Poverty: Agamben and Anarchism, in McLoughin Daniel (ed.), *Agamben and Radical Politics*, Edinburgh University Press, 49-70

Birnbaum Antonia (2015), Variations of Fate, in Moran Brendan & Salzani Carlo (eds.), *Towards the Critique of Violence: Walter Benjamin and Giorgio Agamben*, Bloosmbury, 91-106

Blichner Lars & Molander Anders (2005), What is juridification?, Working Paper No.14, Center for European Studies

Braverman Irus (2016), *Animals, Biopolitics, Law. Lively Legalities*, Routledge

Brophy Susan (2019), Freedom without being: Kant’s corrective as the philosophical crux of Agamben’s ‘Homo Sacer’ series, *European Journal of Political Studies*, Vol 18:2, 195-215

Caffo Leonardo (2017), ‘Dieci brevi note su Giorgio Agamben, l’Università, e la trilogia non dichiarata’, *Animot*, 7(7), 10-19

Calarco Matthew (2014), Ungovernable Potentialities, *Revista Brasileira de Estudos Politicos*, 108, 95-124

Carrino Agostino (1993), Eugen Ehrlich and Hans Kelsen: una controversia sulla sociologia del diritto, *Inst. De Ciènices Polítiques i socials* - *Working Papers,* 79

Carnelutti Francesco (1951), 'Matematica e Diritto', *Rivista Diritto Processuale*, 6(1), 201-212
Cercel Cosmin, Fusco Gian Giacomo, Lavis Simon (editors) (2021), S*tates of Exception: Law, History, Theory*, Routledge

Cercel Cosmin (2021), ''Through a Glass Darkly'. Law, history and the frontispiece of exception', S*tates of Exception: Law, History, Theory*, Routledge, pp. 34-53

Chiffoleau Jacques (2020), 'Contra naturam. Per un approccio casuistico e procedurale alla natura medievale', in Spanò Michele (ed.), *L'Istituzione della Natura*, Quodlibet

Christodoulidis Emilios (2007), 'Against Substitution: The Constitutional Thinking of Dissensus', in Martin Loughlin and Neil Walker (ed.), *The Paradox of Constitutionalism*, Oxford University Press, 189-208

Chryssostalis Julia (2005), The critical instance 'after' the critique of the subject, *Law and Critique*, 16 (1), 3-25

Clemens Justin (2008), 'The Role of the Shifter and the Problem of Reference in Giorgio Agamben', in Clemens, Heron & Murray (ed.), *The Work of Giorgio Agamben. Law, Literature, Life*, Edinburgh University Press, 43-65

Clemens Justin (2016)*,* An Alogical Space of Genetic Reintrication: Notes on an Element of Giorgio Agamben's Method, in McLoughin Daniel (ed.), *Agamben and Radical Politics*, Edinburgh University Press, 115-140

Coccia Emanuele (2013), '*Regula et vita.* Il diritto monastico e la regola francescana', *De Medio Aevo*, 3(1), 169-212

Cohen Maxwell (1938), ‘Some Considerations on the Origins of Habeas Corpus’, *Canadian Bar Review*, 16(2), 92-118

Cohen Felix (1931), ‘Ethical Basis of Legal Criticism’, *Yale Law Journal*, 41, 201-220

Cohen Felix (1935), ‘Transcendental Nonsense and the Functional Approach’, *Columbia Law Review*, 35(6), 809-849

Colli Giorgio (2016), *Filosofia dell’Espressione*, Adelphi

Cornell Drucilla (1992), The Philosophy of the Limit, Routledge

Croce Mariano & Salvatore Andrea (2014), *The Legal Theory of Carl Schmitt*, Routledge

Crosato Carlo (2019), Una forma inaudita di resistenza. Agamben e il paradigma come strumento di analisi archeologica, *Etica & Politica / Ethics & Politics*, XXI/1, 265-298

Davies Margaret (2008), Feminism and the Flat Law Theory, *Feminist Legal Studies*, 16 (3):281-304.

Davie M., (2017), *Law Unlimited*: *Materialism, Pluralism and Legal Theory*, Routledge

Davies Margaret (2017b), *Asking the Law Question*, Thomson Reuters

DeCaroli Stephen (2007), Boundary Stones: Giorgio Agamben and the Field of Sovereignty, in Matthew Calarco Steven DeCaroli (ed.), *On Agamben: Sovereignty and Life*, 43-69, Stanford University Press

DeCaroli Stephen (2008), ‘What Is a Form-of-Life?: Giorgio Agamben and the Practice of Poverty’, in McLoughin Daniel (ed.), *Agamben and Radical Politics*, Edinburgh University Press ,207-233

DeCaroli Stephen (2013), Political Life: Giorgio Agamben and the Idea of Authority, *Research in Phenomenology*, 43 (2), 220-242

De la Durantaye (2009), *Giorgio Agamben: A Critical Introduction*, Stanford University Press

Derrida Jacques (1992), 'Force of Law: The Mystical Foundation of Authority', in Cornell Drucilla, Rosenfeld Michel and Carlson David Gray (ed.), *Deconstruction and the Possibility of Justice*, 3-67

Derrida Jacques (edited by Garritano Francesco) (2010), '*Forza di Legge. Il "fondamento mistico dell'autorità*"', Bollati & Boringhieri

Derrida Jacques (Translated by Sandra van Reenen and Jacques de Ville) (2018), *Before the Law. The Complete Text of Préjugés*, Minnesota University Press

Douzinas Costas & Warrington Ronnie (1994), *Justice Miscarried: Ethics, Aesthetics and the Law*, Harvester Wheatsheaf

Douzinas Costas & Gearey Adam (2005), *Critical Jurisprudence: The Political Philosophy of Justice*, Hart Publishing

Douzinas Costas (2019), The responsibilities of the critic: law, politics and the Critical Legal Conference, in Christodoulidis Emilios, Dukes Ruth, Goldoni Marco (ed.), *Research Handbook on Critical Legal Theory*, Edward Elgar Publishing, 223-237

Doussan Jenny (2013), *Time, Language and Visuality in Agamben's Philosophy*, Palgrave Macmillan

Dillon Robin S. (2018), "Respect", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/sum2021/entries/respect/

Eggers von Nicolai & Jessen Mathias Hein (2020), 'Governmentality and Statification: Towards a Foucauldian Theory of the State', *Theory, Culture and Society*, 37 (1):53-72

Ehrlich Eugen (2017), *Fundamental Principles of Sociology of Law*, Routledge

Eulau Heinz (1942), 'The Depersonalization of the Concept of Sovereignty', *The Journal of Politics*, 4(1), 3-19

Ewald François (1990), Norms, Discipline, and the Law, *Representations, No. 30, Special Issue: Law and the Order of Culture*, 138-161

Ewald François (1986), 'A Concept of Social Law', in Teubner Gunther (ed.), *Dilemmas of Law in the Welfare State*, Walter de Gruyter, 40-75

Ewald François (1987), 'The Law of law', in Teubner Gunther (ed.), Autopoietic Law - A New Approach to Law and Society, De Gruyter, 36-50

Falk Moore Sally (1973), 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', *Law & Society Review*, 7(4), 719-746

Fenves Peter (2019), Intervention, Encroachment: Walter Benjamin on Violence and Expiation, *Critical Times*, 2:2, pp. 209-220

Fitzpatrick Peter (1983), 'Marxism and Legal Pluralism', *Australian Journal of Law and Society*, 1(2), 45-59

Foucault Michel (Translated by Hurley Robert) (1978), *The History of Sexuality (Volume I): An Introduction*, Pantheon Books

Foucault Michel (edited and translated by Gordon Colin) (1980), *Power/Knowledge*, Pantheon Books

Foucault Michel (1982), 'The Subject and Power', *Critical Inquiry*, 8(4), 777-795

Foucault Michel (1988), 'What is Enlightenment', Rabinow Paul (ed.) *The Foucault Reader*, pp. 32-50, Pantheon Books

Foucault Michel (1990), Politics and Reasons, *Michel Foucault: Politics, Philosophy, Culture*, 57-85, Routledge

Foucault Michel (Translated by Sheridan Alan) (1991), *Discipline and Punish: the Birth of the Prison*, Penguin Books

Foucault Michel (1993), ‘About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth, *Political Theory*, 21(2), 198-227

Foucault Michel (2002), ‘The Political Technology of Individuals’, in Rabinow Paul (ed.), *Essential Works of Foucault, Vol. 3: Power*, pp. 403–17

Foucault Michel (Translated by Burchell Graham) (2004), Security, Territory, Population: *Lectures at the Collège de France 1977-78*, Picador

Foucault Michel (2009), Security, Territory, Population, Palgrave Macmillan

Frost Tom (2010), ‘Agamben's Sovereign Legalization of Foucault’**,** *Oxford Journal of Legal Studies*, Vol 30:3, pp. 545-577

Fusco Gian Giacomo (2017), Normalising sovereignty: reflections of Schmitt’s notions of exception, decision and normality, *Griffith Law Review*, Vol 26:1, pp 128-146

Fusco, Gian Giacomo (2018), Notes on the Person and the Anthropological Machine of Law, in Zartaloudis Thanos (ed.), *Law and Philosophical Theory: Critical Intersections*, Rowman and Littlefield International

Fusco Gian Giacomo (2021), ‘Exception, Fiction, Performativity’, in *States of Exception*: *Law, History, Theory*, Routledge, pp. 15-33

Green Leslie (2009), Law as a Means, Hart-Fuller at 50, Peter Cane, ed., Oxford: Hart Publishing, Oxford Legal Studies Research Paper No. 8, Available at SSRN: https://ssrn.com/abstract=1351304

Green Michael (2016), 'Marmor's Kelsen', in D. A. Jeremy Telman (ed.), *Hans Kelsen in America - Selective Affinities and the Mysteries of Academic Influence*, *William & Mary Law School Research Paper No. 09-344*, 45-87, Available at SSRN: https://ssrn.com/abstract=2779187

Green Mitchell (2020), 'Speech Acts', *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2021/entries/speech-acts/>
Frost Tom, ed. (2015) *Giorgio Agamben: legal, political and philosophical perspectives,* Routledge

Gasché Rodolphe (2016), 'Deconstruction, Its Force, Its Violence, together with "Have We Done with the Empire of Judgment?", State University of New York Press

Genel Katia (2006), The Question of Biopower: Foucault and Agamben, *Rethinking Marxism*, 18:1, 43-62

Gentili Dario (2019), 'La politica dei mezzi puri. Sui paragrafi 10 e 11 di Sulla critica della violenza di Walter Benjamin', *Rivoluzioni Molecolari,* 5, 3-10

Giddens Thomas & Siliquini-Cinelli Luca (editors) (2021), Proposal for Edited Collection Life and the Structures of the Law School: The Biopolitics of Legal Education, unpublished

Golder Ben & Fitzpatrick Peter (2009), Foucault's Law, *Routledge*

Goodrich Peter (1990), *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*, The Macmillan Press

Griffiths John (1986), 'What is Legal Pluralism?, *Journal of Legal Pluralism*, 24, 1-56

Griffiths John (2006), The Idea of Sociology of Law and its Relation to Law and to Sociology, in Freeman Michael (ed.), *Law and Sociology*, Oxford University Press, 49-68

Grossi Paolo (1972), ‘Usus Facti: la nozione di proprietà nella inaugurazione dell’età nuova’, *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, Giuffrè Editore, 287-355

Guastini Riccardo, ‘Kelsen on Validity (Once More)’, *Ration Juris*, 29(3), 402-409

Hamacher Werner (Translated by Hollander Dana) (1992), ‘Afformative, Stike’, *Cardozo Law Review*, 13, 1133-1157

Heron Nicholas (2011), ‘The Ungovernable’, *Angelaki*, 16:2, 159-174

Hesse Mary (1965), ‘Aristotle’s Logic of Analogy’, *The Philosophical Quarterly*, 15(61), 328-340

Humphreys Stephen (2006), Legalizing Lawlessness: On Giorgio Agamben’s State of Exception, European Journal of International Law, 17-3:1, 677–687

Hunt Alan & Wickham Gary (1994), *Foucault and Law*, Pluto Press

Hunt Ian (1989), ‘Labour and Labour-Power’, *Radical Philosophy*, 52, 22-26

Hvdibak Thor (2008), ‘The Contingent Necessity of the State’, *Distinktion: Journal of Social Theory*, 9(2), 121-147

O'Donoghue Amy (2015), Sovereign Exception: Notes on the Thought of Giorgio Agamben, Critical Legal Thinking: Key Concepts, available at: https://criticallegalthinking.com/2015/07/02/sovereign-exception-notes-on-the-thought-of-giorgio-agamben/

James A. Gardner (1961), The Sociological Jurisprudence of Roscoe Pound (Part I), Villanova Law Review, 7(1), 1-26.

James William (1891), ‘The Moral Philosopher and the Moral Life’, *International Journal of Ethics*, 1(3) ,330-354

Jasinsky Igor (2018), *Giorgio Agamben: Education without Ends*, Springer

Johnson, Robert and Adam Cureton (2021), 'Kant's Moral Philosophy', *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2021/entries/kant-moral/>.

Kahan Dan (1997), 'Ignorance of Law Is an Excuse: But Only for the Virtuous', *Michigan Law Review*, Vol. 96, No. 1, pp. 127-154

Kafka Franz (2018), 'Before the Law', in Derrida Jacques, *Before the Law. The Complete Text of Préjugés*, Minnesota University Press

Kerstein, Samuel (2019), 'Treating Persons as Means', *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2019/entries/persons-means/>.

Kelley Donald (1990), *The Human Measure. Social Thought in the Western Legal Tradition*, Harvard University Press

Kelly Mark (2019), 'What's In a Norm? Foucault's Conceptualisation and Genealogy of the Norm', *Foucault Studies*, 27, 1-22

Kelsen Hans (Translated by M. Knight) (1967), *Pure Theory of Law*, University of California Press

Kelsen Hans (1990), 'On the theory of interpretation', *Legal Studies, 10*(2),

Kelsen Hans (Translated by .L. Paulson and S.L. Paulson) (2002), *Introduction to the Problems of Legal Theory*, Clarendon Press

Kelsen Hans (Translated by Trevino Javier) (2005), *General Theory of Law & State*, Transaction Publisher

Kelsen Hans (Translated by Knight Max) (2008), *Pure Theory of Law*, The Law Book Exchange

Kelsen Hans (Translated by Bonnie Litschewski Paulson and Stanley L. Paulson) (2015), 'Validity and Efficacy in Law', in Carlos Bernal, Carla Huerta, Tecla Mazzarese et. al. (eds), Essays in Legal Philosophy, 52-68

Khatib Sami (2013), 'The Messianic Without Messianism: Walter Benjamin's Materialist Theology', *Anthropology and Materialism. A Journal of Social Research*, 1, Online at: http://journals.openedition.org/am/159

Kishik David (2012), *The Power of Life. Agamben and the Coming Politics*, Stanford University Press

Klink van Bart (2009), Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen, in Hertogh Marc (ed.), *Living Law. Reconsidering Eugen Ehrlich,* Hart Publishing, 127- 156

Konzen Lucas & Bordini Henrique (2019), 'Sociology of law against legal dogmatics: revisiting the Ehrlich-Kelsen debate', *Direito & Praxis*, 10(1), 303-334

Kotsko Adam (2008) 'On Agamben's Use of Benjamin's "Critique of Violence"', *Telos: Critical Theory of the Contemporary* (145), pp. 119-129

Kotsko Adam & Salzani Carlo (ed.), *Agamben's Philosophical Lineage*, Edinburgh University Press

Lagaay Alice & Schiffers Juliane (2009), Passivity at Work. A Conversation on an Element in the Philosophy of Giorgio Agamben, *Law and Critique*, 20(3), 325-337

Le Brun (2017), 'Ourselves', Bare Life and the Lifeworld: Exposure as Communion and Repossession in Virginia Woolf's *Between the Acts*', '*Études britanniques contemporaines*: Bare Lives/Virginia Woolf: Becoming Photographic, 53

Lemm Vanessa (2017), Interlocutors: Michel Foucault, in Kotsko Adam & Salzani Carlo (eds), *Agamben's Philosophical Lineage*, 51-62

Lévi-Strauss Claude (Translated by Jacobson Claire & Grundfest Schoepf Brooke) (1963), *Structural Anthropology* , Basic Books

Lévi-Strauss Claude, (Translated by Baker Felicity) (1987), *Introduction to the Work of Marcell Mauss*, Routledge

Lewis Tyson (2013), *On Study: Giorgio Agamben and educational potentiality*, Routledge

Lewis Tyson (2020), 'Education for potentiality (against instrumentality)', *Policy Futures in Education*, 18(7):878-891

Lindhal Hans (2013), *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, Oxford University Press

Likhovski Assaf (2009), 'Venus in Czernowitz: Sacher-Masoch, Ehrlich and the *Fin-de-siècle* Crisis of Legal Reason', in Hertogh Marc (ed.), *Living Law. Reconsidering Eugen Ehrlich*, Hart Publishing, 49-72

Loizidou Elena (2007), Judith Butler: Ethics, Law, Politics, Routledge

MacCormick Neil (2003), *Legal Reasoning and Legal Theory*, Oxford University Press

MacCormick Neil (2005), *Rhetoric and the Rule of Law*, Oxford University Press

MacCormick Neil (2007), *Institutions of Law. An Essay in Legal Theory*, Oxford University Press

MacKenzie Iain (2004), *The Idea of Pure Critique*, Continuum
Majorana Ettore (2018), 'The Value of Statistical Laws in Physics and Social Sciences", in Agamben Giorgio, *What is Real?*, Stanford University Press, 45-65

Marmor Andrei (2021), 'The Pure Theory of Law', *The Stanford Encyclopedia of Philosophy*, Zalta E.(ed.), available at: https://plato.stanford.edu/archives/fall2021/entries/lawphil-theory/>

Marovich Beatrice (2017), *Simone Weil*, in Kotsko Adam & Salzani Carlo (eds), Agamben's Philosophical Lineage, Edinburgh University Press

Masschelein Jan & Simons Maarten (2015), Education in times of fast learning: the future of the school, *Ethics and Education*, 10:1, 84-95

McFeely Douglas (1976), 'The Historical Development of the Habeas Corpus', *SMU Law Review*, 30(3), 585-600

McGinn Thomas (2015), 'The Expressive Function of the Law and the *Lex Imperfecta*', *Roman Legal Tradition*, 11, 1-41

McLeod Ian (2003) (2nd Edition), *Legal Theory*, Palgrave Macmillan

McLoughlin Daniel (2009a), In Force Without Significance: Kantian Nihilism and Agamben's Critique of Law, *Law and Critique*, Vol 20,

McLoughlin Daniel (2009b), The politics of caesura: Giorgio Agamben on language and the law, *Law and Critique*, vol. 20, 163 – 176

Mcloughlin Daniel Paul (2010), The Sacred and the Unspeakable: Giorgio Agamben's Ontological politics, *Theory and Event*, 13(1), pp. online - online, http://dx.doi.org/10.1353/tae.0.0118

McLoughlin D, 2017, 'Giorgio Agamben on security, government and the crisis of law', in *Agamben and Law*, 113-140

Menke Cristoph (2010), Law and Violence, *Law and Literature*, 22(1), 1-17

Merry Engle Sally (1988), ‘Legal Pluralism’, *Law & Society Review*, 22(5), 869-896

Meskin Jacob & Shapiro Harvey (2014), To Give an Example is a Complex Act’: Agamben’s pedagogy of the paradigm, *Educational Philosophy and Theory* 46 (4), 1-20

Moran Brendan (2015), ‘Nature, Decision, and Muteness’, in Moran Brendan & Salzani Carlo (eds.), *Towards the Critique of Violence: Walter Benjamin and Giorgio Agamben*, Bloosmbury, 73-90

Morgan Benjamin (2007), ‘Undoing Legal Violence: Walter Benjamin’s and Giorgio Agamben’s Aesthetics of Pure Means’, *Journal of Law and Society* 34:1, 46–64.

Motha Steward & Zartaloudis Thanos (2003), ‘Law, Ethics and the Utopian End of Human Rights’, *Social & Legal Studies*, 12(2):243-268

Muller J. Benjamin (2011), Governmentality and Biopolitics, *Oxford Research Encyclopedia of International Studies,* Oxford University Press, website: http://internationalstudies.oxfordre.com/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-50?print=pdf

Murray Alex & Zartaloudis Thanos (2009) 'The power of thought', *Law and Critique,* 20 (3), 207-210

Murphy Tim (1997), *The Oldest Social Science*, Oxford University Press

Nancy Jean-Luc (1993), Abandoned Being, in Hamacher & Wellbery (ed.), *The Birth of Presence*, 36-47, Stanford University Press

Nancy Jean-Luc (2003), *A Finite Thinking*, Sparks Simon (ed.), Stanford University Press
- ‘The Kategorein of Excess’, 133-151.
- ‘Lapsus Judicii’, 152-171.

Parsley Connal (2010), The Mask and Agamben: the Transitional Juridical Technics of Legal Relation, *Law Text Culture*, 14, 12-39

Patton Paul (2007), Agamben and Foucault on Biopower and Biopolitics, Calarco Matthew & DeCaroli, Steven (eds), *Giorgio Agamben: Sovereignty and Life*, Stanford University Press, 203-218

Pellam Gregory (2015), 'Sacer, sacrosanctus, and leges sacratae', *Classical Antiquity*, 34(2), 322-334

Philippopoulos-Mihalopoulos Andreas (2013), 'Atmospheres of law: Senses, affects, lawscapes', *Emotions*, *Space and Society*, 7, 35-44

Philippopoulos-Mihalopoulos Andreas (2014), *Spatial Justice: Body, Lawscape, Atmosphere*, Routledge

Post Gaines (1964), 'The Naturalness of Society and the State', in Gaines Post, *Studies in Medieval Legal Thought*, Princeton Legacy Library, 494-570

Pound Roscoe (1943), 'Survey of Social Interests', *Harvard Law Review*, 57(1), 1-39

Roscoe Pound (1954), 'The Role of the Will in Law', *Harvard Law Review*, 68(1), 1-19

Pottage Alain (2002), 'Unitas Personae: On Legal and Biological Self-Narration', *Law & Literature*, 14:2, 275-308

Pottage Alain (2012), 'The Materiality of What', Journal of Law and Society, 39(1), 167-183

Ricciardi Alessia (2009), From Decreation To Bare Life: Weil, Agamben and the Impolitical, *Negative Politics* Vol. 39(2), 75-84

Ross Alison (2015), ‘The Ambiguity of Ambiguity in Benjamin's 'Critique of Violence'’, in Moran Brendan & Salzani Carlo (eds), *Towards the Critique of Violence: Walter Benjamin and Giorgio Agamben*, Bloomsbury

Rose Nikolas, O'Malley Pat, Valverde Mariana (2009), Governmentality, Legal Studies Research Paper No. 09/94, pp. 1-32

Rouland Norbert (1994), *Legal Anthropology*, Stanford University Press

Salzani Carlo (2010), ‘Purity (Benjamin with Kant)’, *History of European Ideas*, 36(4), 438-447

Santner Eric L. (2006), *On Creaturely Life. Rilke, Benjamin, Sebald*, Chicago University Press

Scheppele Lane Kim (1994), ‘Legal Theory and Social Theory’, *Annual Review of Sociology*, 20, 383-406

Schmitt Carl (Translated by George Schwab) (2005), ‘Political Theology. Four Chapters on the Concept of Sovereignty’, University of Chicago Press

Schmitt Carl (Translated by Hoelzl Michael and Ward Graham) (2014), *Dictatorship*, Polity Press

Schmitt Carl (Translated by Castrucci Emanuele) (2016), *Legge e Giudizio*, Giuffrè Editore

Schütz, Anton (2000), Thinking the law with and against Luhmann, Legendre, Agamben, *Law and Critique*, 11**,** 107–136

Schütz Anton (2005), Legal Critique: Elements for a Genealogy, *Law Critique*, 16**,** 71–93

Schütz Anton (2008), The Fading Memory of Homo non Sacer, in (ed.) Clemens Justin, Heron Nicholas and Murray Alex, *The Work of Giorgio Agamben: Law, Literature, Life*, Edinburgh University Press, pp. 114-131

Segev Re'em (2006), Justification, Rationality and Mistake: Mistake of Law is No Excuse? It Might Be a Justification, *Law and Philosophy,* Vol. 25, No. 1, pp. 31-79

Searle John (2010), *Creare il Mondo Sociale*, Raffaelo Cortina

Selwyn Neil (2014), 'So What?'… a question that every journal article needs to answer, *Learning, Media and Technology*, 39(1), 1-5

Shapiro Scott (2009), 'What is the Rule of Recognition (and Does it Exist)?', *The Rule of Recognition and the U.S. Constitution*, Matthew Adler, Kenneth Himma, eds., Oxford University Press, Yale Law School, Public Law Working Paper No. 184, Available at SSRN: https://ssrn.com/abstract=1304645

Simons Maarten & Jan Masschelein (2006), 'The Learning Society and Governmentality: An introduction', *Educational Philosophy and Theory*, 38:4, 417-430

Siliquini-Cinelli Luca (2018), Vilhelm Lundstedt's 'Legal Machinery' and the Demise of Juristic Practice, *Law Critique* 29, 241–264

Simoncini Roberto (2008), Un concetto di diritto pubblico: lo "stato di eccezione" secondo Giorgio Agamben, *Diritto & Questioni Pubblice*, 8, 197-211

Snoek Anke (2010), Agamben's Foucault: An overview, *Foucault Studies*, Vol. 10, 44-67

Spanò Michele & Massimo Vallerani (2016), 'Come se. Le politiche della finzione giuridica', in Thomas Yan, *Fictio Legis*, 9-120

Supiot Alain (2017), *Homo Juridicus. On the Anthropological Function of Law*, Verso Books

Tamanaha Brian (2000), 'A Non-Essentialist Version of Legal Pluralism', *Journal of Law and Society*, 27(2), 296–321

Tamanaha Brian (2006), *Law as a Means to an End*, Cambridge University Press

Teubner Gunther (2012), *Constitutional Fragments. Societal Constitutionalism and Globalization*, Oxford University Press

Thomas Yan (1999), 'L'"usage" et les "fruits" de l'esclave', Enquête, 7, 1-22, online at: http://journals.openedition.org/enquete/1578

Thomas Yan (edited by Spanò Michele) (2015), *Il Valore delle Cose*, Quodlibet

Thomas Yan (edited by Spanò Michele) (2016), *Fictio Legis*: *La finzione romana e i suoi limiti medievali*, Quodlibet

Thomas Yan (2020), 'Imago Natura. Nota sull'istituzionalità della natura a Roma', in Spanò Michele, *L'Istituzione della Natura*, Quodlibet

Tillich Philip (1944), 'Existential Philosophy', *Journal of the History of Ideas*, 5(1), 44–70

Tritten Tyler (2014), 'Language and Anthropogenesis: Agamben's Profanity', *Tijdschrift voor Filosofie*, 76(3), 477-502

Ubertis Giulio (2020), 'Quaestio Facti e Quaestio Iuris', *Quaestio facti. International Journal on Evidential Legal Reasoning*, N. 1, pp 67-74

Vernant Jean-Pierre (1965), *Mythe et pensée chez les Grecs. Etudes de psychologie historique*, Maspero

Vlieghe Joris (2014), Education in an Age of Digital Technologies: Flusser, Stiegler, and Agamben on the Idea of the Posthistorical, *Philosophy and Technology*, 27 (4), 519-537

Walby Kevin (2007), Contributions to a Post-sovereigntist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism, *Social and Legal Studies,* Vol. 16(4), 551–571

Ward Ian (2006) (2nd Edition), *Introduction To Critical Legal Theory*, Routledge

Watkin William (2013), *Agamben and Indifference*: *a critical overview*, Rowman & Littlefield Wetters Kirk (2015), The Rule of the Norm and the Political Theology of “Real Life” in Carl Schmitt and Giorgio Agamben, in *Agamben and Law,* ed. By Thanos Zartaloudis, Ashgate.

Weil Simone (2005), ‘Human Personality’, in Miles Sian (ed), *Simone Weil: an Anthology*, Penguin Books

Wheeler Michael (2010), ‘Martin Heidegger’, *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2020/entries/heidegger/>.

Whyte Jessica (2009), ‘I Would Prefer Not To’: Giorgio Agamben, Bartleby and the Potentiality of the Law*, Law and Critique*, 20 (3), 309-324

Whyte Jessica (2013), *Catastrophe and Redemption. The Political Thought of Giorgio Agamben*, Suny Press

Wickham Gary & Pavlich George (2001), *Rethinking Law, Society and Governance*: *Foucault’s Bequest*, Hart Publishing

Yudanin Michael (2015), ‘Can Positive Duties be Derived from Kant's Categorical Imperative?’, *Ethical Theory and Moral Practice*, 18(3), 595-614

Zartaloudis Thanos (2005), The Case of the Hypocritical, *Law and Critique*, 16(3), 387-418

Zartaloudis Thanos (2008), *Giorgio Agamben*, *Power, Law and the Uses of Criticism*, Routledge

Zartaloudis Thanos (2011), On Justice, *Law & Critique*, 135-153

Zartaloudis Thanos (2015), 'Violence Without Law? On Pure Violence as a Destituent Power', in Moran & Salzani (eds.) *Towards the Critique of Violence: Walter Benjamin and Giorgio Agamben*, pp. 169-186, Bloosmbury

Zartaloudis, Thanos. ed. (2018), *Law and Philosophical Theory: Critical Intersections*, Rowman & Littlefield