

CHAPTER 11

Law's Disappearance:

The State of Exception and the Destruction of Experience

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In this chapter, I focus on philosopher Giorgio Agamben's challenge as regards the theoretical and historical understanding of law with a view to investigating the limits of legal hermeneutics. In particular, I reflect on the possibility of a radical rupture between law, violence and narrative that would be specific to the state of exception. By capturing the status of the law as it emerges from Agamben's theory of the exception and recovering its disruptive potential, I impugn the possibility of ascribing a meaning to the law, that is, I contest the assumption that lies at the very core of the hermeneutical enterprise.

The starting point of this exploration is a polemical observation according to which we are still far from assessing the significance of the state of exception for legal theory in a decisive manner. This analysis is, above all, historically situated: it takes place at a time when Agamben, the author to whom we owe the revival of the arcane politico-legal concept of the state of exception, announces the end of his genealogical reading of the history of law and power in the Western tradition (2014: 9-10). It is the

end of a process which started almost twenty years ago by unearthing the secret *nomos* of modernity under the instantiation of the concentration camp (Agamben 1995), continued with a closer analysis of the legal and philosophical structure of the exception (Agamben 2003) and ultimately brought to light the concept of civil war as a central political paradigm (Agamben 2015). Given that this long and often convoluted exploration of the depths of European legal thought and political philosophy – to which the state of exception has been a central feature – has now come to an end, it is perhaps worthwhile to take a closer look at its intellectual legacy for the legal field. In particular, we need to ask to what extent we, as lawyers who are trying to make sense of the meaning and functioning of the law within our polities, are able to think the exception. With a view to a critical understanding of the law, the moment has come to underline the limits, the dangers and the opaque zones fostered by the concept of the exception. A thorough analysis requires to problematize both the exception's frail edges, that is, its recognised and unassumed restrictions, and its implications for other fields intimately related to the study of law such as history and political theory.

The standpoint from which I intend to map out the importance of the state of exception for legal thought is informed by a theoretical framework that puts history at the core of law's becoming. It is therefore a legal and historiographical understanding that infuses and sustains my project of reading the state of exception, both with and against Agamben, while keeping under a close scrutiny the ways in which the theory of exception points to a wider theoretical and intellectual framework that is part of our historical situation and affects the ways in which lawyers think, represent and relate to the law. My project is twofold. On the one hand, as a matter of intellectual history, it

wishes to question the ways in which the re-emergence of the state of exception as a concept within legal thought is indicative of a wider sense of *malaise* with and within the law. On the other hand, as a matter of critical theoretical concern, it seeks to explore the hidden potentialities of the concept of the state of exception and to open the theoretical space for an authentic engagement with its consequences within jurisprudence and legal studies. I intend to do this by offering a reading of the concept of exception as used in Agamben's writings, while also relating to the intellectual constellation that infuses his work. Equally, I shall try to underline the ways in which Agamben re-enacts a series of intellectual topoi in order to approach the existing contemporary unfolding of a historical state of exception that he describes as being the advent of a both diffuse and looming '*global civil war*' (Agamben 2003: 87, emphasis added). As the state of exception appears to be the crucial dynamics befalling law in modern times while significantly undermining the articulation of the law as a self-referential system of signification, I seek to map further the conceptual background to which the exception refers and to assess its significance for understanding law as a historically inscribed structure.

In the context of my analysis, I will turn towards Agamben's earlier writings, and more specifically his essay on 'Infancy and History' (1978). Particular attention will be given to the concept of 'infancy' (ibid: 11-63), which appears to encapsulate the paradigmatic Agambenian analysis of the relation between life and a structured system of signification such as language. In this way I intend to stress out the philosophical soundness of the thread linking the state of exception, understood here as an embodiment of the nexus between life and law, to the destruction of experience. While I find this line of thought particularly important for underlining the limits of

law's hermeneutics, I am critical of Agamben's use of '*transcendental history*' (ibid: 50, emphasis original) as well as of the ambiguous place he ordains to history in his philosophical project. It is against this background that I emphasize a rather marginal and fleeting occurrence in his essay, that is the political significance entailed by the modern dissolution of experience. I will argue that the state of exception could be read as precisely the politico-legal instantiation of the destruction of experience. Out of this argument, a series of historiographical, legal and memorial intricacies arise which need to be addressed in relation to the exception and the modern effacement of experience. I will conclude by suggesting some possible paths to escape the unhistorical temptations of Agamben's project while saving the initial critical potential that the concept of exception brings to the legal field.

A Morphology of the Exception

The state of exception is now part of the critical legal vocabulary and seems to become the more obscure the more it is presented and related to various contemporary readings of constitutional law (Humphreys 2006; Parsley 2010; McLoughlin 2012), international law and international relations (Johns 2005; Bikundo 2013) or simply to our contemporary political situation. This proliferation of the signifier 'exception' does not necessarily add much to the explanatory or exemplary value of Agamben's work for the legal field, rather it tends to confuse or to normalise the otherwise exceptional character of this concept for an understanding of our contemporary politico-legal landscape.

Apart from this overrepresentation of various tropes pertaining to the state of exception, there obtains, this time outside the ivory towers of scholarly investigation, a historical situation which can rightly be envisaged as an unfolding of the exception. This conjuncture appears under the guise of a series of ominous phenomena, which Agamben has astutely apprehended, either in his work addressing the state of exception at greater length (Agamben 1996: 3-49; Agamben 2009: 46-54) or on the occasions when he has embraced public positions in reaction to current political circumstances (Raulff 2004; Agamben 2008; Agamben 2013). Indeed, whether one is thinking of the status of international law in the post-Kosovo era, of 9/11 and the series of exceptional measures enforced and observed at both national and international level in relation to the threat of terrorism, of the financial crisis and the ensuing sovereign debt crisis with their own ‘exceptional’ financial measures or of the rise of authoritarian movements, of the proliferation of various threats and of the overall discourse of looming catastrophes befalling our polities under various forms, it seems that the state of exception resonates secretly with a time of crisis, which is the ‘now-time [*Jetztzeit*]’ (Benjamin 1940: 395)¹ of our experience. To put it otherwise, ‘now-time’ is the time when the state of exception has once again ‘enter[ed] into legibility’ (Cadava 2001: 38).

Yet, the semantic commerce at work between various discourses such as economy, politics, arts and the law seem to obscure and to some extent normalise the state of exception and its disruptive potential for challenging the (post)political disavowed consensus still dominant in the daily practice and theorization of the law. That is because the more the exception takes the guise of a ready-made cultural artefact apt to describe the diffuse malaise with our contemporary polities, the more it conceals its

core, that of being a nonetheless legal theoretical matter. It seems thus perhaps too hasty to relate the exception to any instantiation of the suspension of the regular rules of a discourse without keeping in mind the ways in which the state of exception calls into question the foundations of our legal thought.

This is not to say that the state of exception is a purely formal legal problem or only a mere instantiation of the time-honoured debate around the autonomy of law in relation to politics. Of course, the emergence of literature on the exception bears the imprint of otherwise exceptional times, but one should be aware of the rather problematic historiographical framework that would enable us to link our contemporary status to the historical unfolding of the exception. According to Agamben's insights, as informed by Walter Benjamin's reading of history (1940), the exception is, and has always been, part of our modernity (Agamben 2003: 41-51). Moreover, the state of exception cannot be a purely legal phenomenon inasmuch as it points to law's indistinction in relation to violence and ultimately with unarticulated life. What should perhaps be emphasised is how the state of exception nests itself at the core of the law and as such undermines the symbolic structures of the political. It is in order to recover this initial critical thrust of the exception that its status within legal theory needs to be clarified. In order to embark into this process of conceptual clarification, I shall first propose a possible morphology of the state of exception before moving to a further situation of the concept within the work of Agamben as well as within the critical theoretical field.

It should be noted from the outset that the state of exception is a limit-concept for legal theory, inasmuch as it questions the basic assumptions of modern continental legal thought and it blurs the pivotal distinction between the normative and the descriptive. Although its practice has nothing exceptional and responds to a long-lasting logic of unhindered state intervention in times of danger, the theoretical implications of such praxis are extremely compelling for legal thought and to some extent symptomatic for the continental legal tradition. In short, the paradigm of the state of exception advanced by Agamben is a philosophical construct which, somewhat problematically, builds upon the constitutional practice and the normative statements existing in various modern constitutions consisting in either the suspension of constitutional guarantees or of the whole constitutional process, for a series of actions taken by state authorities for the protection of the constitution or of the constitutional order.

At this primary level we certainly face some difficult assumptions about the historical and cultural instantiations of the state of exception. To be sure, Agamben's preliminary investigation regards the state of exception as an essentially modern institution that becomes visible as a practice at the time of the French revolution on the continent (2003: 11-12)² and the Mutiny Acts at the outcome of the Glorious Revolution in Great Britain (Clode 1872: 64-76; Neocleous 2008: 42-44). While to some extent aware of the distinctions between the various legal traditions, Agamben still notes that 'the division – clear in principle, but hazier in fact – between orders that regulate the state of exception in a constitution or by a law and those who prefer not to regulate it explicitly' (2003: 9-10). However, as he concludes, this distinction is tenable only at the level of the formal constitution, since 'on the level of the material

constitution something like a state of exception exists in all above-mentioned orders, and the history of the institution, at least since World War One, shows that its development is *independent of its constitutional and legislative formalization*' (ibid: 10, emphasis added).

The state of exception seems to exist regardless of its environment, perhaps as a historical phenomenon outside the law, yet intimately connected to constitutional practice. What is important to capture at this juncture is the unstable topology of the state of exception in both historical and cultural terms. However this does not prevent us from reading the state of exception as a structure which emerges within modern constitutional orders and which knows a specific process of proliferation in the times following World War I (ibid: 7). More than a question of constitutional interpretation or even of historical truth, which perhaps it transcends, the state of exception emerges as both a symptom of high modernity and as a specific relation between law and politics within the framework of constitutional orders.

Indeed, drawing on Carl Schmitt's concept of '*Ausnahmezustand*' ('state of exception') (Schmitt 1922: 5), Agamben isolates the exception as a zone of indistinction in the structure of the law, a conceptual area where it is logically impossible to make any relevant distinction between law (as a normative category) and fact (as a descriptive one). It is through this suspension of the legal that a zone of indistinction between fact and norm, between force and form, is brought upon social reality. As he writes, '[s]ince "there is no rule that is applicable to chaos", 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 – the state of exception’ (Agamben 1995: 19).

In this sense, the suspension of the law creates an area between the stability traditionally attributed to legal normativity and its exterior: ‘[T]he situation created in the exception has the peculiar characteristic that it cannot be defined either as a situation of fact or as a situation of right’ (ibid: 18). One should not hasten to dismiss the state of exception as simply a marginal feature of modern legality. The paradox entailed by the state of exception is not a case of a mere *lacuna* in the law but purely and simply the status of the legal order. What the exception attests for is that the law acts ‘as if the juridical order [*il diritto*] contained an essential fracture between the position of the norm and its application, which [...] can be filled only [...] by creating a zone in which application is suspended but the law [*la legge*], as such, remains in force’ (Agamben 2003: 31).

In other words, in order to be effective the legal order has to be suspended for in itself it is pure normativity, estranged from life (ibid: 40). The mechanism of the exception is functionally the only way out from law’s pure self-reference. By the operation of the exception law presupposes within its own texture an outside of the law, a state of lawlessness that precedes and renders it conceivable, an outside awaiting to be colonized: ‘Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the *exceptio*: it nourishes itself on this exception and is a dead letter without it’ (Agamben 1995: 22).

The Territory of Exception

It could be safely argued that in many respects the area mapped out by the concept of the state of exception is not an entirely new occurrence within the critical cartography of legal oddities. From the initial forms of positivism asserting the sovereign as a foundational character above the law (Bodin 1576; Hobbes 1651; Austin 1832: 166) to the realist experience looking at the law as social fact (Holmes 1897), to various forms of social theory informing our understanding of the law ever since the mid-19th century (Marx 1844; Marx and Engels 1846; Weber 1922), the law's close relation to other configurations of knowledge or other social structures, which adopts many forms, is almost part of the established intellectual order of discourse.

Moreover, the fact that law is and can be related to unbridled exercises of force or to domination, control and instantiations of either mythical or historical violence is certainly no longer a radical stand even in our post-ideological context. Indeed, after the Marxist critique of law (Marx 1844; Marx and Engels 1846; Marx and Engels 1848: 1-30; Marx 1875: 208-26; Pashukanis 1924: 37-132) the onslaught launched by the Critical Legal Studies (CLS) movement against the quietism of legal orthodoxy (Gabel and Kennedy 1984; Fraser 1990) and the multitude of counter-discourses within legal studies which still fashion themselves as critical, radical or progressive, it seems that little can be added to the project of contesting the regimes of authority within the legal field and its complicity with domination. Even more, the choice of weapons might seem, at least at a first glance, somehow unfit as Agamben's sapping tools (Foucault 1975a: 105) include nonetheless the reflections of a conservative jurist

in the person of Carl Schmitt not foreign to the very system of hierarchy the critical legal field aims to contest and the legal institution *par excellence* under the guises of figures of ancient and medieval Roman Law.

What is perhaps worth to note in Agamben's project is the method of reading and positively being able to propose a cartography of law's finitude which aims at circumventing and problematizing the intellectual legacy of modern political partisanship by going beyond the visited *topoi* of class struggle and domination. This is not to say that the project does not bear the imprints of a dialogue with a certain tradition of Marxism essentially carried out through the Benjaminian undertones present in the choice of theme and in his reading of history. However, it should not be forgotten that rather than discussing some of the obvious themes related to exception and sovereign power present in the *Eighteenth Brumaire of Louis Bonaparte* (Marx 1852) or the *Class Struggles in France* (Marx 1850) already indicating the role of dictatorship and exceptional measures in modern context (Carver 2004), Agamben's investigation takes as a starting point both Michel Foucault's concept of biopolitics (1976b: 14-36; 1976a: 175-211) and Hannah Arendt's theory of totalitarianism (1951).

Agamben's initial intention is to cover the gap between Foucault's apparent disregard for the totalitarian experience and Arendt's forgetting of the concrete exercise of power over human life. The analysis of the exception emerges thus as an exploration of 'this hidden point of intersection between the juridico-institutional and the biopolitical models of power' (Agamben 1995: 10-11). Instead of denouncing the

legal system as ideology or an ‘ideological state apparatus’ (Althusser 1970: 67), Agamben’s reading of the law unravels its critical points, those areas where the tension between the law and the sovereign power it is supposed to contain becomes visible. What the exception unravels is both law’s limits as a system of signification and its very inscription in the registers of language. As he writes,

[h]ere the sphere of law shows its essential proximity to that of language, just as in an occurrence of actual speech, a word acquires its ability to denote a segment of reality only insofar as it is also meaningful in its own not-denoting (that is *langue* as opposed to *parole*, as a term in its mere lexical consistency, independent of its concrete use in discourse), so the rule can refer to the individual case only because it is in force, in the sovereign exception, as pure potentiality in the suspension of every actual reference.

(Agamben 1995: 19, emphasis original)

More specifically, ‘just as language presupposes the nonlinguistic as that to which it must maintain itself in a virtual relation [...] so that it may denote it later in actual speech, so the law presupposes the non-juridical as that with which it maintains itself in a potential relation of state of exception’ (ibid). The suspension of the law is thus not only an institution which founds the constitutional order and is essential to its survival, but something inscribed in the very possibility of articulating the law as and through language: ‘*The sovereign exception (as a zone of indistinction between nature and right) is the presupposition of the juridical reference in the form of its*

suspension’ (ibid, emphasis original). The slippage between law and language under the light of the relation of exception goes as far as to unravel a dual enigma traversing both language and law: that of constantly being beyond themselves insofar as ‘[l]anguage is the sovereign who, in a permanent state of exception, declares that there is nothing outside language’ (ibid: 20). As such, the intimate bond between law as normativity and language exposes the uncanny consequence of a constant equation blurring the distinction between meaning and power as ‘to speak is [...] always to “speak the law”’ (ibid).

The first line of analysis entailed by this position opens up the possibility to read the state of exception in its political instantiation. Law as a bearer of the relation of exception does not contain the exercise of sovereignty and cannot limit the investment of life by forms of power. Rather, law under the seal of exception functions along the lines of the ban, the old Germanic term which defined at the same time the exclusion from the community and the insignia of the sovereign. Following Jean-Luc Nancy’s theory of the ban (1983: 141-53), Agamben writes: ‘we shall give the name ban [...] to this potentiality [...] of the law to maintain itself in its own privation, to apply in no longer applying. The relation of exception is a relation of ban’ (1995: 23). To this stance of the law correspond two eerie historical figures. On one hand we find the *homo sacer*, the bearer of nude life who can always be killed, but never sacrificed, a life which is not protected by the law, rather through the law it becomes devoid of juridical meaning (ibid: 52-62), while on the other we face the concept of the camp, ‘the most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life, without any mediation’ (ibid: 97). To be sure, it is this essential fracture inside the law which is placed at the centre of the historical

unfolding of totalitarianisms within the history of 20th century and to the escalation of the control society (Foucault 1975b: 225) within the structure of our present.

At the end of this first exploration of the exception some consequences become obvious for the writing of history, political theory and for legal thought. Perhaps the most audacious thesis is constructed around the blurring of the distinction between democracy and totalitarianism (Agamben 1995: 13). Indeed, Agamben's writing questions already at this point the possibility of drawing a clear dividing line between totalitarian terror and democratic stability. The emergence of biopolitics exercised through administrative practices, enacted through statutes and regulations and sustained by the development of criminology, racial thought, social sciences, but also by legal thought and practice, are part of a drive which finds its roots in the Western politico-juridical thought before the World War II and stretches beyond what we commonly refer to as pertaining to totalitarian experience. However, the centrality of the law within the framework of *Homo sacer* (Agamben 1995) is somehow obscured by the place of sovereignty and biopolitics which is either exercised in the indistinction opened by the exception or it invests and divides the body politic as a consequence of the modern confusion between life and politics.

The exception stays as the background against which the biopolitical investment and the production of *homines sacri* takes place under the forms of ancient rituals still resisting in the fabric of the modern. It is not the rather tortuous path from exception to the relation of ban, to the *homo sacer* and then ultimately to the camps, which discusses at various lengths literature, linguistics, theology, historiography, ethics and

politics, which hinders Agamben from fully engaging the exception and from addressing the cracks in the symbolic web of the law. It is perhaps the hasty slip into the realm of classic philosophy and his return to Aristotle in order to understand the meaning of life proper and that of a life devoid of meaning (*zōé*) (Agamben 1995: 1, 11-13), as well as his readiness to read into this distinction the seemingly timeless biopolitical significance of any exercise of political power (ibid: 55, 65, 73, 100, 102). For where Foucault posited biopolitical power as a result of the interplay between practices, knowledge and techniques of power, strategies emerging at a historically confuse, yet still identifiable moment, in European history which we may call modernity (1976b: 214-15), Agamben assumes the modern to have already been infused with the biopolitical thought that the ancients have passed on to us through precisely political and legal vocabulary inasmuch as ‘the history of Western politics is [...] the history of the shifting articulations of the functional bipolarity of the governmental power’ (Zartaloudis 2011: 86).

Just why the exception and the ominous nexus between law and violence come to the fore particularly at the time of the interwar and continued to accelerate and proliferate through the experience of the camps, totalitarian regimes and putative democracies during the 20th century, seems to stay one of the many enigmas entailed by the unfolding of the exception. While this historical conundrum casts its shadow over Agamben’s reading of the exception and calls into question its place within the horizon of the history of legal practices, some possible answers might be found in the continuation of its project.

Origins, Traces and the Temptation of the Past

Whereas *Homo sacer* (Agamben 1995) follows the story of the biopolitical attributes of sovereign power and its disastrous consequences for our contemporary situation, the *State of Exception* (Agamben 2003) returns to the conditions of possibility of this new articulation of sovereign power and life. At this stage Agamben revisits the relation of exception and discusses at some length the intricacies opened by the exception within legal thought as well as the consequences entailed by these aporias. This analysis is followed by a new and at times arresting archaeological investigation into the origins of the exception.

Before tracing further Agamben's intellectual roots and mapping out some further consequences involved by the concept of exception for law, it is important to re-assert the disruptive character of the exception. This essential fracture inside the law is fundamental for legal thought as it is the place where law is linked to biopolitical projects, the place through which the law suddenly steps down from being pure normativity and gives voice to the 'force of law' (Derrida 1992: 5; Agamben 2003: 32-41) underlining it. Rhetorically, the tension between law, understood as normativity, and 'force of law', unregulated historical violence (Felman 2002: 15-16) is crucial for the morphology of the exception he devises. The exception is an 'infancy' of the law (Agamben 1978: 11-63), the place where language fails and where the speaking being (Lacan 1975: 10) enters the scene of symbolization. Such a stance of the law calls into question both its stable normative dimension as it

undermines the political as such. By this displacement politics and law are debased, adulterated forms of practices that are now doomed to fail.

Inasmuch as this poignant reading of the state of exception highlights the destitution of law and politics in contemporary settings, it is a continuation of a vocabulary and a rhetoric of fall and decline owed perhaps to Carl Schmitt's own attempt at making sense of the exception. Whilst critical of Schmitt's conclusion on the structure and the function of the exception, Agamben refers constantly to his work in a dialogue over time with the conservative lawyer. For his part, Schmitt holds that a legal norm cannot be conceived without presupposing the existence of a normal situation. Simply put, 'for a legal order to make sense, a normal situation must exist' (1922: 13). From this point of view, the place of sovereignty can be located in the act of deciding upon the existence of the normal situation. Otherwise said, the fundamental norm is itself subsequent to an act of decision of the sovereign, which means that there is, in effect, nothing "fundamental" about it. In this sense, the law is exposed as being tainted at its very core by a continual permeability to the political. Not only, then, does the state of exception evoke a limit situation in the functioning of constitutional law, but it represents the paradigmatic structure of the legal. As 'the exception is more interesting than the rule' and since 'the exception proves everything' (ibid: 15), it becomes the epitome of legal adjudication. In this manner 'every concrete juristic decision contains a moment of indifference from the perspective of content because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment' (ibid: 30).

Accordingly, ‘the exception in jurisprudence is analogous to the miracle in theology’ (ibid: 36) by linking the celestial realm of the law to the daily life of politics. While discovering the exception, Schmitt does not refrain from declaring fully that the exception reveals law’s deepest nature, that it founds itself on a mere decision. Within its own intellectual project of legitimizing a conservative dictatorship (Balakrishnan 2000: 42-52) this limitation of the regulative power of the law is rather ambiguous. On the one hand, it opens the way to the ultimate destitution of the law under the strain of revolutionary forces, such as epitomised by the notion of sovereign dictatorship (Schmitt 1921: 112-31). On the other hand, as in the case of the commissarial dictatorship (ibid: 1-33, 34-79, 132-47, 148-79), it enables the law itself to continue its life away from the dangers raised by the anarchic mob.

Both Schmitt and Agamben underline the impossibility of fully understanding sovereignty and the legal order without presupposing a relation with the non-legal, which can only take place through the state of exception. The state of exception – or the suspension of the legal – is the condition of the possibility of every instantiation of the legal discourse. Juridicity’s secret lies in its non-relation with something that it necessarily escapes. In Agamben’s words, ‘the politico-juridical order has the structure of an inclusion of what is simultaneously pushed outside’ (1995: 18). But while Schmitt ends up by celebrating the law’s dissolution as enabling the assertion of the ‘true’ sovereign (1922: 7), Agamben dreads the way in which the opening of law colonizes life (2003: 64).

At this stage one tackles perhaps the most arresting part of Agamben's project which consists in shifting the focus from the troubled times of the interwar and the modern politico-legal implications of the state of exception towards the seemingly golden age of medieval legal reasoning as epitomised by *Decretum Gratiani*. In his own words, 'a recurrent opinion [...] posits the necessity as the foundation of the state of exception' (ibid: 24). This shift functions here as an Ariadne's thread linking the French Decree of 1791 on the 'state of siege' to the European legal past of the *Corpus Juris Canonici*. It is now possible to enter into the Roman world of legal archetypes, for the *justitium*, an ancient Roman law institution, we are told, 'can in some ways be considered the archetype of the modern *Ausnahmezustand*' (ibid: 41).

After a lengthy discussion of the significance of the *justitium*, that is, of the suspension or gridlock of the law, we learn that the state of exception is nothing but the production of the void within the legal system. Law's self-effacement thus appears as the central jurisprudential enigma that thinkers of dictatorship such as Schmitt, and perhaps intellectuals hailing from the Marxist tradition, are unable fully to understand. According to this reading, 'the state of exception is not a dictatorship [...] but a space devoid of law, a zone of anomie in which all legal determinations [...] are deactivated' (ibid: 50). But this space is central to the law as it is only through its existence that law can be deployed. In hindsight, its mere existence, either as a historical possibility or as law's structural necessity raises a crucial question for legal theory: if the law can fully disappear, what is the significance of acts which take place under the *justitium*? Or, in other words, what is a life without juridical meaning? In an attempt to render the theory of exception useful for an understanding of our

contemporary situation, one must look back towards the silent dialogue between Benjamin and Schmitt over the meaning of the exception.

To put it simply, the exception read through *justitium* now seems to offer a new light into the stakes of this debate. Whereas Schmitt stubbornly insists in understanding the force brought by the void as still being part of the law, Benjamin sees in its unfolding the possibility of the existence of violence outside the law, which would be a pure violence unadulterated by the mythical forces of the law. According latter's reading, law is nothing short of a perpetual repetition of mythical powers (Benjamin 1921: 249). Indeed, the status of the law under the strain of the exception exposes law's original sin of being complicit with the forces which block history and demand sacrifice (ibid: 250-52). Following Benjamin, Agamben tries to map not only the cartography of the exception, but also its potential limits. Along this line of argument, nothing seems to resist the deployment of the exception, except a continual study of the law (Schütz 2011: 187) that would enable us to sever it from its ambiguous roots. As Agamben notes: 'the law – no longer practiced, but *studied* – is not justice, but only the gate that leads to it. What opens a passage toward justice is not the erasure of the law, but its deactivation and inactivity' (2003: 64, emphasis added).

But perhaps this unravelling of the limits of the exception is not enough, if not misleading. In opposing to the state of exception the search for a pure violence untainted by law (Benjamin 1921: 249), while shifting the register from politics to the theological and aesthetic implications of reading the suspension of the law, Agamben moves away from tackling the historical significance of the exception. Now, in his

latest writings Benjamin shows the path in opposing the exception which has become the rule by precisely developing ‘a conception of history that accords with this insight’, while at the same time stressing that the ‘amazement’ at civilisation’s fall under the onslaught of fascism ‘is *not* philosophical’ (1940: 392; emphasis original). However, Agamben eludes these insights and turns towards Benjamin’s reading of Kafka and its mystical overtones (Benjamin 1934). While for Benjamin the way out of the unfolding of the exception was an understanding of history apt to sustain a ‘real state of emergency’ (1940: 392), which would sever the law from violence, Agamben focuses on the ontology of law and on the possibility of its deposition; in other words, he addresses philosophy, thus obscuring Benjamin’s historical materialist inflections.

In order to further highlight the ambiguity at the core of the exception, read now through the lenses of *justitium*, another shift is added, this time moving further his own devised timescale from institutions of Roman law towards the anomic rituals and feasts specific to the Indo-European cultures. At the end of the day, the state of emergency is nothing else than ‘the anomic drive contained in the very heart of the *nomos*’ (Agamben 2003: 72). This temporal digression is illuminating inasmuch as it offers a possible answer to the causes that root the state of exception within the law. It is as if in the process of understanding the exception, Agamben turns his eyes away from a purely historical reading towards a deeper structural and seemingly unhistorical feature of legality. Accordingly, law enables the exception within its framework insofar as the construction of legal thought and language in the Western tradition has been articulated around the radical ambivalence between chaos and order which is traversing the *nomos*. It is through the latent work of the *justitium* that jurists

constantly conceal through their writings because they cannot think an outside-of-the-law that exception nests at the core of the law and constitutes itself as the real *arcana imperii*.

But the same gesture which evokes the times immemorial of the exception, thus turning it into a necessity that ceaselessly saps from inside law's pretences to predictability, order and clarity also renders inoperable its disruptive features. It seems that from this standpoint, the state of exception risks to turn itself into another argument supporting and comforting the cynical legal lethargy prevailing within the legal field. At the end of the day, law's constant self-transgression is nothing less than another chapter in an illustrious history of confusions from which there is no way out. Even more, this reading also confronts us with a central question. If the state of exception is the inner truth of the law, how can one still recognize the exception in its unfolding and how is it to be countered? Agamben's paraphrase of Alberico Gentili opening his investigations of the exception asks why jurists remain silent on things that concern them, but the question cannot but resolve itself in the aporia of the fact that lawyers cannot but remain silent.

Redeeming the law

The answer that Agamben suggests comes in the form of a number of sibylline remarks concluding the State of Exception. As he writes, the task is 'to show the law in its nonrelation to life and life in its nonrelation to law means to open a space between them for human action, which once claimed for itself the name of "politics"'

(2003: 88). There are also some hints pointing back towards the origins of the exception: ‘life and law, anomie and *nomos*, *auctoritas* and *potestas* result from the fracture of something to which we do not have access than through the fiction of their articulation and the patient work that, by unmasking this fiction, separates what it had claimed to unite’ (ibid, emphasis original). To fully grasp the consequences of this programmatic injunction for a critical reading of law, some further remarks appear necessary.

At first glance, Agamben’s call seems to point towards a continual undoing of law’s violence that can only be achieved by an unravelling of law’s fictitious attempt to being both a container of life and sovereignty as well as a bridge between normativity and life. The aim of such a work of deconstruction would be to redeem the law under the form of pure language, reclaiming it from mythical violence and opening the space for an authentic politics beyond the law. However, the praxis of such a task remains obscure, inasmuch as law is built upon this structural limit that is the state of exception, as Agamben constantly reminds us. It is in this sense that a return to the origins of the Agambenian project might shed a new light over the tedious process of redeeming the law.

In his essay on the destruction of experience, Agamben provisionally visits some of the major themes of his work: the relation between language and life, the status of the contemporary subject and the stitching between the semiotic and the semantic. Using as a starting point Walter Benjamin’s essay ‘The Storyteller’ (1936) Agamben identifies as one of the central features of modernity the ‘destruction of experience’

(Agamben 1978: 13). He then follows on by tracing the intellectual origins of this current expropriation of experience. According to his reading, there are two major threads determining the impossibility of articulating life within a significant experience. His indictment does not come as a surprise, as the modern ‘poverty of experience’ (ibid) is the result of the work undertaken by modern science and the new status ascribed to the subject within this project. As he writes, ‘the expropriation of experience was implicit in the founding project of modern science’ (ibid: 17). It is by displacing the inner authority of experience that modern science, whose symptom is the Cartesian subject, with its search for certainty, that abolishes the traditional separation between living experience and knowledge (ibid: 19) and posits the experience as only the empty space of method. Insofar as ‘in its original pure state, the Cartesian subject is nothing more than the subject of the verb, a purely linguistic-functional entity [...] whose existence and duration coincide with the moment of its enunciation’ (ibid: 22) it is and cannot act as the subject of experience.

This postulation finds its descendent in the Kantian subject of ‘the *I think*, a transcendental subject which cannot be given substance or psychologized in any way’ and who cannot *know* an object, rather (s)he can only *think* it (ibid: 31; emphasis original). Under this light, the Hegelian dialectics is indicative of the radical change of the modern relation to experience which now becomes ‘something one can only undergo but never have’ (ibid: 34). By asserting the ‘Science of the experience of consciousness’, which is ‘a *path* towards science, an experience which is itself science’ (Hegel 1807: 56) in his project of overcoming the Kantian split between the transcendental and empirical I, the last remnants of traditional experience are washed away by simply being displaced as negative and unattainable (Agamben 1978: 34).

The ensuing philosophical and scientific projects of 19th century, passing from Engels' attempt to offer a dialectic of nature, to the myriad of positivisms trying to construct science of conscious facts do not aim at recuperating experience, but at obscuring its loss and its traces. At the antipodes, '[t]he entire "philosophy of life", as well as a good part of turn-of-the-century culture, including poetry, set out to capture this lived experience as introspectively revealed in its preconceptual immediacy' (ibid: 35). In this sense, it appears that the philosophical origins of hermeneutics lie precisely in the impossibility of understanding experience unless 'it ceases to be "mute" and "obscure" to become "expression" in poetry and literature' (ibid: 36). But if the work of expropriation of experience is to be undone, and the reconstruction of experience within the frames of the present is to be possible, it can only pass through approaching the question of an experience which is still mute, as an infancy, that is a state which 'cannot merely be something which chronologically precedes language and which [...] ceases to exist in order to spill into speech [...]; rather, it coexists in its origins with language – indeed, is itself constituted through the appropriation of it by language in each instance to produce the individual as subject' (ibid: 48). It is not by mere coincidence that the exemplary instances of experience to which Agamben points are the famous accidents of Montaigne and Rousseau heralding, both in their way concepts of unconscious, but also the impossibility of subjective experience as such.

That is because experience is a fleeting moment which the subject cannot assume otherwise than through trauma (that is, it cannot assume), inasmuch as it has been

evacuated from the ambit of modern subjectivity. In its liminal form, as infancy it is precisely the slippage point between the speech and the speaking being. It is a point of discontinuity, which is already at work within the human being. As Agamben observes, '[t]he historicity of the human being has its basis in this difference and discontinuity. Only because of this is there history, [...] only because there is a human infancy, only because language is not the same as the human, and there is a difference between language and discourse, semiotic and semantic' (ibid: 52). The expropriation of experience is intimately linked to a debasement of authority understood as inherent to the articulation of narrative. As Agamben writes, 'experience has its necessary correlation not in knowledge but in authority – that is to say, the power of words and narration' (ibid: 14).

Seen through these lenses, the destruction of experience is not only, if it could have ever been, a phenomenon affecting *only* subjectivity, but a dynamics which slips beyond the status of the subject in the realm of politics and law. Now is the time when 'all authority is founded on what cannot be experienced, and nobody would be inclined to accept the validity of an authority whose sole claim to legitimation was experience' (ibid). Deprived by the claim to experience, as it could never be restated as a form of legitimation, both law and politics, as constituted authorities narrating the being-together become effaced themselves. The consequences are bleak and herald Agamben's later politico-legal pessimism inasmuch as they echo the totalitarian experience: '[H]umankind is deprived of effective experience and becomes subjected to the imposition of a form of experience as controlled and manipulated as a laboratory maze for rats' (ibid: 16). The state of exception is indicative of this dynamics, inasmuch as it points to the remnant of a limit form of experience which

cannot be articulated, rationalized or integrated within the framework of a law that has broken its links with the narrative. Indeed, the indistinction between law and fact and the overall temporary and spatial confusions brought by the state of exception, they all point in the direction of the exception being nothing short of an infancy of the law, the limit point where life relates to law and fails to articulate this relation. In this sense, it is apt to describe it as underlining a stand of the legal discourse in which the law has become ‘the monument of its own disappearance’ (Schütz 2008: 127, emphasis omitted). With the state of exception not only do we witness the failure of the law as a system of signification, but the continual re-enactment of this failure. It is central to observe that this failure resolves itself through a recourse to violence, as in psychoanalytical discourse violence, under the form of a *passage à l’acte*, signals both a dysfunction in the Symbolic and the flight into the Real (Lacan 1963: 136). More importantly perhaps, this recourse to violence does not only reconstructs the pre-juridical limits of the law by bringing to the fore law’s mythical violence, but it partakes in exposing the historical deadlock in which law finds itself under the conditions of the modern. In this sense, the state of exception is a symptom of the legal subject, pointing towards its recent history of debasement. Its inner logic is that of the ‘extimacy’, for the subject reveals through its own language its inherent excess beyond signification.

Such a reading of the state of exception understood as an instantiation of the disappearance of experience or as a rendition of law’s infancy – of the pre-juridical roots still present within the structure of the law – enables us further to explore the jurisprudential intricacies and pitfalls revealed by this concept. However, when placed within the framework of the intellectual history outlined by Agamben, this

interpretation cannot offer an account of the material origins of law's destitution within modernity. In this way, it preserves the enigma at the core of the state of exception, that is, it maintains law's failure to limit and articulate the excess of violence sustaining it. It follows that a thorough understanding of the state of exception necessarily calls for a historical gaze. This is because the state of exception is structurally tainted by force in the very process of its formalisation, an extreme situation from the standpoint of legal hermeneutics. One does not have in mind the gaze that classic historiography can offer, for the exception is both within and outside the law. Rather, one is thinking of the perspective of a historian able to move between disciplinary boundaries and to inquire into the conditions that have expropriated out of the law and its subjects the ability to translate into experience the material conditions of modernity.

Endnotes

¹ For a thorough analysis of Benjamin's understanding of historical time, see Hamacher (2005).

² See Loi des 8-10 juillet 1791 concernant la conservation et le classement des places de guerre et postes militaires, la police des fortifications et autres objets y relatifs, *Collection générale des décrets rendus par l'Assemblée Nationale*, Paris: Baudouin,

1791 [July], pp. 79-134; Loi du 10 fructidor an V [27 August 1797] qui détermine la manière dont les communes de l'intérieur de la République pourront être mises en état de guerre ou de siège, *Bulletin des lois de la République française*, no. 139, Paris: Imprimerie nationale [1797], # 1380, pp. 14-15.

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