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## Agamben – (im)potentiality of law and politics

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**Abstract:** Placed between constituting and constituted power, *homo sacer* reveals the state of exception, which through sovereign ban, is kept both inside and outside the law. Agamben's latest political and legal philosophy is based upon this concept. As the victim of sovereignty, *homo sacer* unfolds the paradox of sovereign power, criticizing its fundamentals and showing the emptiness of law. However, for potentiality which is at the centre of Agamben's argument, we need to look not only outside sovereignty and sovereign power, but also outside *homo sacer*. This article aims to examine such space, arguing that through absolute potentiality, the fulfilment of law is possible with the content to be focused on reaching conditions of justice and happy life.

**Keywords:** *Homo sacer*. Potentiality. State of exception. Happy life.

### *Agamben - (Im)potencialidade do direito e da política*

**Resumo:** Posicionado entre os poderes constituinte e constituído, *homo sacer* revela o estado de exceção, que por decisão soberana é mantido dentro e fora do ordenamento jurídico. Os últimos escritos políticos e filosóficos de Agamben são baseados neste conceito. Como vítima da soberania, *homo sacer* revela o paradoxo do poder soberano, criticando seus fundamentos e mostrando o vazio do direito. Contudo, para compreender a ideia de potencialidade – ideia central no pensamento do autor – nós temos que olhar não somente para fora da soberania e do poder soberano, mas também para fora do *homo sacer*. Esse artigo pretende investigar esse espaço, no qual a potencialidade torna possível a efetivação do direito, cujo conteúdo visa atingir condições de justiça e felicidade.

**Palavras-chave:** *Homo sacer*. Potencialidade. Estado de exceção. Felicidade.

## Introduction

At the opening of the third chapter of his *Collected Essays in Philosophy*, Agamben writes: “I could state the subject of my work as an attempt to understand the meaning of the verb ‘can’ [*potere*]. What do I

mean when I say: ‘I can, I cannot?’<sup>1</sup> To have potentiality to-be, to-do and to act in a certain manner is inseparable with the potentiality to not-be and to not-do, and this potentiality is proper to human beings. Even though in *Homo sacer* (*HS*) the concept of potentiality is not in its centre, in my opinion, potentiality remains crucial for understanding the possibility of “pure law”. On his way of understanding potentiality, Agamben moves slowly from Aristotle’s writing tablet towards whatever particularity where Leibniz’s God seems to understand very well Bartleby, a legal scribe, who has stopped writing; finally, reaching to his angel, Gabriel, with the black wing that balances the right of the actual world to not-be, with the right to-be for all other impossible worlds. Therefore, the story of potentiality is the story of the actual and non-existing worlds, of the Being and non-Being, of the abyss of potentiality where what that has not happened has the right to exist. On this road filled with gods, scribes, pens and angels, we can find the glimpses of possible worlds that exist in their impotentiality, hidden in the labyrinth of the Palace of Destiny. Also, of another freedom built both upon its possibility and impossibility, where contingent is possible when its impossibility is allowed access to actuality. Finally, of a coming community and a new man, a different human being that asks for a liberation from the “oldness of the letter”, in other words, a different human being asks for a new Law and new rationality.

Another central notion for this philosopher is life, being what finally keeps *homos sacer* as an exception inside of the biopolitical argument is the differentiation between *zoe* and *bios*. Only *bios* can be considered as the base of the new politics. Following Derrida’s critique, I tend to show that this distinction is at least not absolutely justified, as Agamben presents it. Problems of ancient and modern, the first and thresholds that Derrida tracks in *HS*, are connected to the exception that Agamben does not know how to cope with – *zoon politikon*. However, by consulting Agamben’s writings about potentiality, the impotentiality of *homo sacer* in reaching happy life becomes the place where we can criticize sovereignty. In other words, the potentiality of law is preserved in *homo sacer*. He or she is the victim of sovereignty, placed in the space between constituting and constituted power. However, sovereignty – that secures the

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<sup>1</sup> Agamben, *Potentialities: Collected Essays in Philosophy (Potentialities)*, p. 177.

state of exception – is not capable of reaching its pure potentiality. Potentiality of freedom and human politics is possible only when we abandon sovereignty. Only in this light, we must understand the chapter “Law as potentiality” in *HS*.

Finally, Agamben focuses also on the state of exception, the limit between law and politics, where Carl Schmitt engrained his reflexions about sovereignty. A limit, a threshold that Derrida criticizes on so many fronts. Another task of this article is to show that the state of exception [*Ausnahmezustand*] in Agamben’s political and legal theory is closely connected to his theory of potentiality. Contrary to Carl Schmitt, whose thinking about *Ausnahmezustand* is led towards radicalization of sovereignty, Agamben wants to radicalize law and politics. Albeit he is following Schmitt’s definition of the state of exception, placing *homo sacer* between political and legal, it is precisely on the lines of its impotentiality where we can start drawing a form of the new law. Finally, the new law is actually not new at all if it is not seen differently, filled with another meaning, and given another use, a use that follows the idea of happy life and justice.

My work starts on such grounding by examining the concept of potentiality as understood by Agamben. From potentiality, I move towards the concept of happy life that allows Agamben to radicalize a bare life as the carrier of modern politics where we are mired. Afterwards, *homo sacer* can be observed as an exception that reveals the emptiness of law, which is in force without meaning. Only by announcing this characteristic of law, we can abandon it, in order to give it a new use and meaning. Therefore, the last part of this work will reflect upon the possibility of fulfilment of law and politics, and finally, in the conclusion, this work will approach Agamben’s early ideas, which claim that playing with law stands out as a possibility for the coming community.

## Understanding potentiality

Agamben’s understanding of potentiality corresponds to Aristotle’s *dynamis*, which does not only mean potential to do something, but also potentiality to not-do, in other words – not to pass potentiality into real-

ity. Aristotle's "the potentiality to not-be" [*dynamis me einai*] is the engine of the passage from potentiality to act, from common to particular. Likewise, Aristotelian philosophy shows us how intellect has the potentiality for thought, but before thinking, it is the absolute nothingness, and it is in this nothingness where Agamben finds the pure potentiality. Even though this ancient Greek philosopher is at the beginning of his thinking about potentiality, Agamben's openness for the possibility of incorporating the impotentiality, which never happened into our modern understanding of the world, goes far beyond Aristotelian understanding of potentiality.

When reflecting upon language, Agamben notes that any general notion "while remaining unthought, is nothing other than the *factum loquendi*, the pure existence of language grasped as a universal linguistic essence".<sup>2</sup> The pure linguistic act is therefore always outside of the discourse and it is not determined by it, and, indeed, it has the freedom from it. The "forgotten", the "unspeakable", the unthought, all of them depend solely on the voice; and Agamben is driven by their force since his early works, such as *Idea of Prose or Infancy and History: Essays on the Destruction of Experience*. The passage from potentiality to act is similar to the passage from the pure language to discourse that enables us to distinguish the pure from other potentiality, or the potentiality to not-be from the potentiality to be. In the case of the latter, potentiality is focused on a certain act and on a certain activity that has to be done for "being-in-act." On the other hand, the potentiality to not-be is not centred on the transition "*de potentia ad actum*". "It is, in other words, a potentiality that has as its object potentiality itself, a *potential potentiae*".<sup>3</sup> In its power to not-think, to be nothingness, thought can reflect on itself and think itself in its speculation, representing the pure, divine potentiality. In this way, human intellect does not belong to reality, but to potentiality that is never fully grasped in its own experience of to be and to do.

To illustrate this better, Agamben observes the relation between thought and the act of writing thoughts, using Aristotle's example of empty writing tablet that represents the potentiality of intellect. This writing tablet can be filled with the written symbols, but it can also be empty, and still continue to be potential. From the further reflection upon what we

<sup>2</sup> Agamben, *Potentialities*, p. 73.

<sup>3</sup> Agamben, *The coming community*, p. 35-6.

can call *tabula rasa* (that Agamben prefers to call *rasura tabulae* where the thin layers of wax represent *rasum tabulae*,<sup>4</sup> the intellect itself), the act of writing can be seen as the act of intelligence. Accordingly, in Arabic tradition, the creation of the world is always linked to the writing, and the one who makes the passage from potentiality to act possible is the angel who is called *Qalam*, which means pen.

Therefore, human potentiality is defined in its relation with its own impotentiality [*adynamia*], and the essence of potentiality is in its relation to this impotence. Other living beings are capable only of their specific potentiality; they can only do this or that. On the other hand, human beings are the animals who are capable of their own impotentiality. “The greatness of human potentiality is measured by the abyss of human impotentiality”.<sup>5</sup> Being capable for impotentiality, according to Agamben, is not limited to an awareness of the potentiality to not-do or to not-be, which disappears once the potentiality to be or to do becomes actualised, realised in reality. On the contrary, the preservation of the concept of human potentiality, as defined above, means that both potentiality and impotentiality pass fully to actuality when an act is done, and are both preserved in the act *per se*.

### *Bartleby's fundamental passivity*

In the act of preserving the impotentiality, the potentiality “gives itself to itself”, setting aside its impotentiality in order to allow an act to happen. Correspondingly, *dynamis* (potentiality), through its connection with *adynamia* (impotentiality), always welcomes a non-Being, and this welcoming (which is potentiality) is what Agamben calls “fundamental passivity”.<sup>6</sup> Welcoming, because it allows a relation between Being and non-Being, defined by the ontology of potentiality according to which every human potentiality depends on its privation. Agamben finds this relation in the scribe who prefers not to write. By letting his impotentiality into actuality, Bartleby becomes “absolute figure of Nothing from which all creation derives; and at the same time, he constitutes the most impla-

<sup>4</sup> See Agamben, *Potentialities*, p. 245; or in Agamben, *The coming community*, p. 37.

<sup>5</sup> Agamben, *Potentialities*, p. 182.

<sup>6</sup> *Ibid.*, p. 182.

cable vindication of this Nothing as pure, absolute potentiality”.<sup>7</sup> In other words, in his dwelling into the abyss of potentiality, Bartleby opens the door to non-Being into actuality, jumping over borders of *ratio* that promises the supremacy of Being over non-Being. That is why Bartleby is not only a God of the pure potentiality, but also an angel, a herald of such potentiality that finally guides Agamben through the labyrinth of human *potentia*. There is no rationality that can be used to explain Bartleby’s acts. His example is, according to Agamben, above both nihilism and positivism, and it announces the potentiality to “experience the impotent possibility that exceeds both [Being and Nothing]”.<sup>8</sup> Therefore, Bartleby shows us how the relation between Being and non-Being does not have to correspond to the opposite meanings given by language. It represents the Being of potentiality that is liberated from all rationality, whatever Being, and “[t]he being that is properly whatever is able to not-be; it is capable of its own impotence”.<sup>9</sup>

In the same abyss of potentiality, we can also search for freedom that does not only stand for the potentiality of the free will, but is capable of reaching its own impotentiality where it can welcome its non-Being. Experience of freedom is the experience of impotentiality, of ability to experience its own incapacities; and only through its powerlessness, freedom can become Being itself. Bartleby does not want to write, he *prefers* not to write. These two words distinguish his acts from his will, or as Agamben says, between *potentia absoluta* and *potentia ordinata*. In the words *I prefer not*:

“there is only a ‘rather’ fully freed of all *ratio*, a preference and a potentiality that no longer function to assure the supremacy of Being over Nothing but exist, without reason, in the indifference between Being and Nothing”.<sup>10</sup>

Therefore, only when placed in front of freedom, Bartleby becomes a messenger – a “law-copyist” who becomes a medium between Being and Nothing exposing the *pathos* without his opinion, without adding

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<sup>7</sup> Ibid., p. 253.

<sup>8</sup> Ibid., p. 258.

<sup>9</sup> Agamben, *The coming community*, p. 35.

<sup>10</sup> Agamben, *Potentialities*, p. 258-259.

anything. His freedom is not particular freedom of will, but a moment when his thoughts become free from all rationality, knowledge or intentionality, when they exist only as a pure potentiality, as Being itself. This way “[p]otentiality (...) frees itself of the principle of reason. Emancipating itself from Being and non-Being alike, potentiality thus creates its own ontology”.<sup>11</sup> Hence, Bartleby’s act of freedom begins in language, in the referred sentence “I prefer not”.

Another medium where communication takes place is politics, and this is where Bartleby meets Agamben’s political philosophy. Scrivener’s acts are reflected in the refusal to act, and are performed in front of “the man of the law” and that is why Bartleby’s “trial is the most extreme trial a creature can undergo”.<sup>12</sup> Additionally, Bartleby is a scribe who copies the law, and his refusing to act can be understood as a liberation from the “oldness of the letter” that according to Agamben, Saint Paul in Romans wanted to substitute with the “newness of spirit”.<sup>13</sup> For Deleuze, Bartleby is Original, belonging to the primeval world, to Primary nature, but he has to be in contact with Secondary nature that the narrator of the story, the attorney, represents. In their relation, the figure of Original shows the emptiness of the secondary world, of its rationality and its laws, revealing “the world as masquerade”.<sup>14</sup> The man of the law, on one hand, has the role of a prophet “who can recognize the wake that originals leave in the world, and the unspeakable confusion and trouble they cause in it”.<sup>15</sup> However, following Deleuze, the man of the law betrays “the new Christ” and refuses the critique that Bartleby has offered. The attorney decides to follow the positive law, instead of the divine law that consists in ‘something inexpressible and unfathomable’<sup>16</sup> that could fill the empty normative world. For Agamben, on the other hand, Bartleby is not a Messiah “who comes to bring a new table of law” or “to redeem what was, but to save what was not”.<sup>17</sup> His acts are not of creation, but “rather, a de-creation in which what happened and what did not happen are returned

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<sup>11</sup> *Ibid.*, p. 259.

<sup>12</sup> *Ibid.*, p. 259.

<sup>13</sup> See *ibid.*, p. 274.

<sup>14</sup> Deleuze, *Essays Critical and Clinical*, p. 83.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Agamben, *Potentialities*, p. 270.

to their originally unity in the mind of God, while what could have not been but was becomes indistinguishable from what could have been but was not”.<sup>18</sup> In other words, by revealing the copying of the world, its emptiness grounded in the law, by placing them in actuality, Bartleby speaks in the name of the forgotten struggles, laws, places, and people – the Forgotten time. As a messianic figure, he breaks with the linear time and sovereignty, because “[t]he messianic vocation is not a right, nor does it furnish an identity; rather, it is a generic potentiality [*potenza*] that can be used without ever being owned”.<sup>19</sup>

From Agamben’s reading of Bartleby, there are many ways we can move into further discussion. In one direction, the cabalistic messianic interpretation of the scribe is merging with Benjamin’s *Angelus Novus* and with angel Gabriel with one black wing. On another path, we can go back to Heidegger’s *Dasein*, and think it together with Bartleby in the search for freedom. Another possible direction would be moving back to St. Paul’s ‘Letter to Romans’ that Agamben carefully reads in *The time that remains*. There we can search for the potentiality in the ideas of Christianity, where together with Paul we can try to reach the justice outside the law. Finally, the reading of *HS* and *State of Exception* can lead us to the place from which we can think law and politics as pure potentialities. Law that will be able not only to think both actuality and potentiality as not a *priori* connected to Being, but also to welcome that what was not. In *HS*, Agamben reflects upon the problem of constituting and constituted power, but always connected to the notion of bare life that represents exception *per se*. On this path, *homo sacer*, as a limit concept between law and politics, refers to both Being and non-Being, maintaining itself outside the law; but through sovereign decision and sovereign ban, *homo sacer* is captured inside the law. Just like Bartleby, *homo sacer*, as the extreme concept, also stands against sovereignty and sovereign ban, challenging its rationality, and by that, challenging the law itself. Similarly, the “coming politics” intertwines with the path of law, because what is at stake at both *homo sacer* and new politics is a happy life, freed from any fate and destiny, from any discourse and identity, the truly “whatever singularity” that Bartleby has reached in his acts. However, before reaching

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<sup>18</sup> Ibid., p. 270.

<sup>19</sup> Agamben, *The time that remains*, p. 26.



the doors of the state of exception and *homo sacer*, we have to see what happy life, a proper human life, means for Agamben.

## Happy life and *homo sacer*

### *Problematization of life*

In Agamben's political philosophy, we can observe two main processes: a distinction between bare life and happy life, and the process of exception becoming the rule. They are always defined by modern or ancient adjectives, which challenges Foucault's definition of modernity and biopolitics, making Agamben to be "the first to say that Foucault was almost the first to say, that what appears to be modern (...) is in truth immemorial".<sup>20</sup> In sum, according to Agamben, what becomes excluded throughout the Western history is a bare life, and *homo sacer* represents its archetype and proof of its antiquity. In order to understand ancient, but yet modern character of *homo sacer*, we need to employ two other words: *zoe* and *bios*, because what is truly absolutely ancient is the "inclusive exclusion" of *zoe* in the *polis*.

The antipode of happy and political life is a bare life, and each of these two types of life in Ancient Greek had one word, a phenomenon that we cannot find in another language. For Agamben, *bios* means a life opposite to animal life. It stands for a mode of living or specific kind of life. For example, there are humans whose lives are focused on theoretical investigations, just as were the lives of the philosophers who lived in the Ancient Greece. This type of life, this mode of living, for the Greeks was called *bíos theoretikós*, which can be translated as "contemplative life". The other mode of living – *bíos politikós* – that was focused around the participation in the public affairs and public institutions.

*Zoe* also means life, but more specifically a life understood as a property that characterizes the existence of living beings guided by their autonomous movements, without external influences – to grow, to move, to reproduce without the need for something outside our bodies. To be more precise, "zoe denotes in Greek the physical vitality of organic be-

<sup>20</sup> Derrida, *The beast and the sovereign*, Vol. 1, p. 317.

ings, animals, men and plants. Life is understood, not as a thing, but as vitality, as the nature or manner which characterizes all living creatures as such”.<sup>21</sup> However, when it comes to the usage of this word, there are at least two exceptions. Firstly, in the Christian philosophy, *zoe* defines a divine *nous* as a noble and eternal life [*zoe artiste kai aidios*]. Related to this reading, in the final report by the Vatican’s Theological Commission that ends the state of limbo for infants that were not baptised and giving them possibility for heaven, it is written: “Enjoyment of true life (*zoe* and not *bios*) corresponds to human nature, and is possessed in the degree that virtue is practised”.<sup>22</sup>

Agamben recognises this exception, but what is more complicated to deal with, and where the core of Derrida’s critique is placed, is related to Aristotle’s *zoon politikon*. At the very opening of *HS*, Agamben states that the word *politikon* can be read as “a specific difference that determines the genus of *zoon*” rather than “the attribute of the living being as such”.<sup>23</sup> For Derrida, there is absolutely no difference between “a specific difference” and “an attribute.” Therefore, Derrida is of the opinion that Agamben simply refuses to “admit (...) that Aristotle already had in view (...) the possibility that politics, policity, could, in certain cases (...) qualify or even take hold of bare life (*zoe*)”.<sup>24</sup>

Additionally, just few pages after drawing a distinction between “a specific difference” and “the attribute”, Agamben quotes Foucault’s interpretation of *zoon politikon*, as a “living being with the additional capacity for political existence”.<sup>25</sup> However, when problematizing the political existence of humans, one needs to focus on the act of inclusively excluding *zoe* from the *polis*, where the former becomes the carrier of the modern politics, “as if politics were the place in which life had to transform itself into good life and in which what had to be politicized were always already bare life”.<sup>26</sup> Therefore, it does not come strange that in a couple of pages after this quote, Agamben defines his approach as the correction or complementation of Foucault’s thesis, to which I will return shortly.

<sup>21</sup> Bultmann, *Theology of the New Testament*, Vol. 2, p. 832-833.

<sup>22</sup> ‘The hope of salvation for infants who die without being baptised’, paragraph 12.

<sup>23</sup> Agamben, *HS*, p. 2.

<sup>24</sup> Derrida, *The beast and the sovereign*, Vol. 1, p. 327.

<sup>25</sup> Agamben, *HS*, p. 7.

<sup>26</sup> *Ibid.*

Another important point in Derrida's deconstruction of Agamben's thesis about life is related to the fact that while developing the concept of life as a function, Agamben does so without employing Heidegger's problematization and discussion about *bios* and *logos*, about the human essence. According to Derrida, this additionally shows Agamben's fixation on the absolute and clear distinction between two types of life, distinction without which his whole political philosophy might collapse. Heidegger's doubts are mostly focused around Aristotle's definition of man as *zoon logon ekhon* [*animale rationale*], a living being endowed with reason. Related to this, Derrida writes:

The question here is how did this determined, defined *logos* separate from Being, becoming a reason, a logic? In other words, Heidegger talks about "a violently imposed sovereignty of *logos* as reason, understanding, logic: it really is a question of a force of reason that overcomes [*a raison de*] another interpretation or several other interpretations or ways of hearing *logos*, the word or the vocabulary, the sense of *legein*, *logos*; it really is a question of a sort of war and conflict of forces in which reason wins by force, and along with reason (...) the rationalism of what will come later (...) to be inscribed in the concept of *animal rationale* or *zoon logon ekhon*.<sup>27</sup>

Agamben does not put his focus on this violence that gives the power to the strongest argument. Moreover, when discussing about the relation between Nazism and Heidegger, he says that this relation acquires its significance "[o]nly when situated in the perspective of modern biopolitics",<sup>28</sup> and a couple of pages later, he follows Levinas's thought that the Nazism found its possibility in Heidegger's ontology.<sup>29</sup> On the other hand, Heidegger's thinking about *zoon logon ekhon*, according to Derrida, represents a critique of biologism, and therefore, a critique of at least some ideas of Nazism. Heidegger says that there is something else besides animality in our human essence, something above zoological interpretation of man coming from the interpretation of Aristotle's *zoon politikon*. For Derrida:

<sup>27</sup> Derrida, *The beast and the sovereign*, Vol. 1, p. 318.

<sup>28</sup> Agamben, *HS*, p. 150.

<sup>29</sup> See *Ibid.*, p. 152.

this indicates, most importantly, that Heidegger, whom one can hardly suspect of lack of interest for the resources and rules of the Greek language, does not place between *bios* and *zoe* the airtight frontier along Agamben constructs his whole discourse.<sup>30</sup>

Finally, at the very opening of *HS*, Agamben admits that the entry of *zoe* in the *polis* is “the decisive event of modernity”, and that our societies are in crisis “because politics failed to reckon with this foundation event of modernity”.<sup>31</sup> Derrida sees this as a paradox of Agamben’s thesis; paradox in which the ancient power, the power of *zoe* entering the *polis*, was firstly forgotten, and then again, recognised on modernity where it represents the decisive moment, a threshold for the collapsing modern politics. Even though Agamben without any doubt places the birth of biopolitics at the very beginning of politics, bounding it to sovereignty, he advocates awaking of politics to that “decisive moment of modernity”.

It was mentioned above that Agamben wants to correct or complement Foucault’s ideas, distinguishing his thesis about the modern politics from Foucault’s. Related to this, he writes:

[W]hat characterizes modern politics is not so much the inclusion of *zoe* in the *polis* – which is, in itself, absolutely ancient – nor simply the fact that life as such becomes a principal object of the projections and calculations of State power. Instead the decisive fact is that, together with the process by which the exception everywhere becomes the rule, the realm of bare life (...) gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, *bios* and *zoe*, right and fact, enter into a zone of irreducible indistinction.<sup>32</sup>

Derrida’s doubts about this statement are focused on the “idea of an entry (...) into a zone of irreducible indifferenciation [of *bios* and *zoe*], when the differentiation has never been secure”.<sup>33</sup> Moreover, a distinction between *zoe* and *bios*, which is (as it was said above) at least not so clear, centres all other concepts on it, leaving the thesis of potentiality in

<sup>30</sup> Derrida, *The beast and the sovereign*, Vol. 1, p. 321.

<sup>31</sup> Agamben, *HS*, p. 4.

<sup>32</sup> Agamben, *HS*, p. 9.

<sup>33</sup> Derrida, *The beast and the sovereign*, Vol. 1, p. 316.

a shadow of this dichotomy of life. Finally, a bare life according to Agamben is not a natural fact, but a product of political power that reveals the most sacred relation between political and natural. It is with *homo sacer* when distinction between *zoe* and *bios* disappears, revealing a life that does not belong neither to bare nor to happy life, but that exists in the sphere of exception. Therefore, according to Agamben, there is no possibility for *bios*, as a bare life, to be a subject of politics. Under the same token, the colonization of bare life by the political power is an ancient and historical concept where at some point bare life and political order coincide and become indistinguishable.

### *The state of exception*

In addressing the state of exception, Agamben follows Carl Schmitt, whose theory of sovereignty is rooted in exception. Schmitt's *Political Theology* starts with the examination of the situation when the "no-law" gets inserted in the space of "law" – the state of exception. For him, the most important legal and historical situation of exception was the Article 48 of the Weimer Constitution, and as Agamben points out, without reflecting upon the meaning of this article, it is impossible to understand Hitler's rise in the 20<sup>th</sup> century Germany.

Schmitt correctly deconstructs the state of exception, staying focused on its normative claim, because the definition of the "normal" legal situation is defined in regard to exception. If the state of exception is included in the body of constitution, conditions that allow that situation are listed by the law. However, at the same time they are outside of law in the sense that they do not belong to the normal situation, and hence, cannot be treated by "normal" legal instruments. To be more precise, they cannot be treated by any legal instruments. A distinction between a normal and a non-normal situation is what Walter Benjamin also described in his writings about police, and it is linked with the difference between a false and a true state of exception.<sup>34</sup>

Besides its normative claim, Schmitt observes another characteristic of exception that remains outside the norm, but simultaneously de-

<sup>34</sup> See Walter Benjamin, *Critique of Violence*.

fining it. Agamben names this paradox as a “zone of indifference”<sup>35</sup> that can also be seen as a type of resistance. In this “zone”, constitution represents the legal sphere, and act of resistance represents the political-social sphere. The relation between those spheres is a game of exclusion and inclusion. Moreover, a jurisprudence cannot understand extreme cases because there is no rule to govern a chaos. However, the state of exception, as Schmitt points out, is not equal to chaos or anarchy, and that is why it possesses an order, even if it’s not a legal order. The way he defines the state of emergency (that can also be seen as a product of political crises) and the exceptional measures (that are product of political activity), enters into the core of modern political and legal paradox. Similarly, for Agamben, exceptional measures “find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form”.<sup>36</sup> In other words, Schmitt’s definition of the legal character of the state of exception reveals the “paradox of sovereignty”<sup>37</sup> where the law can be outside itself. Just like a man from the country in Kafka’s short parable “Before the Law” who fails to pass through the open door of law, staying forever outside and inside of it.

Exception also shows the essence of state’s authority grasped in the sovereign decision. Schmitt rightly states that “[i]n this situation, the decision parts from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law”.<sup>38</sup> This is a very interesting collocation, because it adds something to the absolute particularity of law in its relation to justice. If law does not have to be law or to even be inside of law in order to add something to itself, it is keeping itself without keeping itself. It is revealing the emptiness of its meaning that can be filled with the sovereign decision, and this characteristic of law – its impotentiality – is preserved in the juridical order. Under these premises, as Schmitt observes, exception “defies general codification, but it simultaneously reveals a specifically juristic element – the decision in absolute purity”.<sup>39</sup>

<sup>35</sup> Agamben, *State of exception*, p. 23.

<sup>36</sup> *Ibid.*, p. 1.

<sup>37</sup> Agamben, *Potentialities*, p. 89.

<sup>38</sup> Schmitt, *Political theology*, p. 13.

<sup>39</sup> *Ibid.*, p. 13.

It can be seen that in the case of Schmitt, the subject of the state of exception is always sovereignty, more precisely, the sovereign decision that finally enables politics. That is why “[s]overeign is he who decides on the exception”.<sup>40</sup> On the other hand, Agamben stays focused on *homo sacer*, a person without political meaning, without a good life. The term *sacer* denotes someone that cannot be touched by any ordinary individual. It is a contradictory term because at the same time it makes a person sacred and untouchable, but it also allows killing that individual. The paradox is even greater since anyone can kill *homo sacer* with impunity, but he or she cannot be sacrificed in the ritual, which excludes that person even from the divine world. “This violence – the unsanctionable killing (...) – is neither classifiable as sacrifice nor as homicide, neither as the exception of a condemnation to death nor as sacrilege”.<sup>41</sup> Hence, *homo sacer* that was defined in the early Roman law by the penalty for *sacer esto*<sup>42</sup> is outside of the political and legal sphere, in front of which it has no rights or claims, and the sovereign preserves it inside of the law.

Therefore, the only sphere in which a human can be killed without committing a murder or celebrating a sacrifice is sovereignty. One that can be killed but not sacrificed has a life that is captured in this sphere. Correspondingly, for Agamben, a sovereign state is the state where all humans are potentially *homo sacer*, capable of having their life stripped to the level of a bare life. Similarly, he observes, “the law in the state of exception that has become the norm – a law stripped of transcendent authority and with no substantial claim to legitimacy”.<sup>43</sup> The empty concept of law becomes revealed in exception, and only with its revelation and recognition, we can abandon and deposit it. This is the point where potentiality meets

<sup>40</sup> *Ibid.*, p. 1.

<sup>41</sup> Agamben, HS, p. 82.

<sup>42</sup> In the Twelve Tables of the early Roman law, *sacer esto* is defined as following: “In the *leges regiae* and in the Laws of the Twelve Tables, we found three cases of wrongs committed against a human being that led to a religious punishment: the woman who maltreats her parents-in-law, the patron who violates the rights of his clients or vice versa, and the person who removes a boundary stone. It seems that these cases all deal with a breach of trust that threatened society, or, rather, the survival of the Roman people. Those who break that trust incur the penalty of being *sacer*.” From these three situations described by early Roman law, we can see that they always include tearing up of the trust relations between subjects involved. The one “that must be cursed” had betrayed the trust of its own people, and there is no more room for them among citizens. Gods are the ones to decide upon their possible destiny, but for the human world, their life is meaningless, and therefore, its abolishing has no consequence at all. Moreover, *homo sacer* lifts its status as an individual to that degree that even their death cannot have a meaning – he or she cannot be sacrificed.

<sup>43</sup> Whyte, ‘I Would Prefer Not To’: Giorgio Agamben, Bartleby and the Potentiality of the Law’ in *Law Critique*, p. 312.

law in Agamben's philosophy. By preserving the exception as a possibility grasped in the potentiality for no-law in the juridical order, the impotentiality of law is also preserved. In Schmitt's thesis, this preservation happens in the sovereign decision. On the other hand, for Agamben, it is important that law, by practising its potentiality to not-be, to be outside, but at the same time having potentiality to-be, preserves its impotentiality in actuality. Above was shown how Bartleby, the legal scribe, does not bring anything new to the definition of law, he neither adds to it nor cancels it. His potentiality is the extreme limit where Bartleby does not only, as Deleuze shows us, reveals the emptiness of the law. But more importantly, in his acts of pure potentiality, he abandons that law. Indeed, the pure potentiality of the law "is not the application of a rule but what Agamben, borrowing Jean-Luc Nancy's term, calls abandonment".<sup>44</sup> After the abandonment of law, its emptiness is completely apparent, and the possibility for its fulfilment is reached. Possibility that *homo sacer* cannot embrace.

## Fulfilment of law

By abandoning Schmitt's imperfect nihilism "that nullifies the law but maintains the Nothing in a perpetual and infinitely deferred state of validity"<sup>45</sup>, Agamben turns towards "a perfect nihilism that does not even let validity survive beyond its meaning but instead, as Benjamin writes of Kafka, 'succeeds in finding redemption in the overturning of the Nothing'".<sup>46</sup> In such a way, Agamben goes beyond Schmitt's focus on sovereignty and decisions, demonstrating the contingency for an openness towards the possibility of justice outside of law. According to this author, when related to the state of exception, law becomes connected with the violence from the political sphere, and thus, it loses its essence, which is always bound with justice. "In this respect, law and sovereignty would, so to speak, turn to an empty form, which would deprive the essence, and thus question its proper potency".<sup>47</sup> However, following Aristotle's defi-

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<sup>44</sup> Ibid., p. 312.

<sup>45</sup> Agamben, *Potentialities*, p. 171.

<sup>46</sup> Ibid.

<sup>47</sup> Schmidt, *Der Terminus „Ausnahmezustand“ nach Carl Schmitt in der Konzeption Giorgio Agambens: Eine vergleichende Analyse*, p. 15. Translation mine.



inition of potentiality as potentiality to not-be, guided by the example of Bartleby, Agamben envisages the loss of essence and disconnection from justice as the potentiality for the fulfilment of law.

To understand this better, we have to reflect upon Agamben's reading of St. Paul, which is embraced in thinking about the justice outside the law. Moreover, this justice is possible only with the radicalization of the state of exception. In VIII thesis of history, Walter Benjamin's also calls for the real state of emergency that is necessary to overturn the Nothing that law has become. However, for Agamben, the real state of emergency is not in the radicalization of the political act, as it is in the case of Benjamin, but it is in the possibility of reaching the absolute paradox,

whereby law is applied in disapplying itself, no longer having an inside or an outside. With regard to this law that applies itself in disapplying itself, a corresponding gesture of faith ensues, applying itself in disapplying itself, rendering law inoperative while carrying it to its fulfillment.<sup>48</sup>

The inoperativeness of law enables the potentiality of law, and only in its impotentiality we can search for its fulfilment. Similarly, the past can be fulfilled only in the future that it predicts, in what Benjamin calls "now-time" or *Jetztzeit*. Likewise, according to Agamben, we have to allow "that another world and another time must make themselves present in this world and time".<sup>49</sup> The messianic time is different from historic time, and our goal is to enable their existence without separating the worlds they refer to as "this world/the other world". "The messianic modality, which Agamben finds in Bartleby, is thus one in which potentiality does not precede actuality but follows it, restoring it to contingency and enabling the forgotten to act on the present".<sup>50</sup> Therefore, searching for the radical paradox where something is both preserved and deactivated, without adding or destroying, means searching for the pure potentiality. For Agamben, Paul's "the law of faith" is the example of such paradox, and it allows us to think the potentiality in the law, moving away from the

<sup>48</sup> Agamben, *The time that remains*, p. 106-7.

<sup>49</sup> Agamben, *Potentialities*, p. 168.

<sup>50</sup> Whyte, 'I Would Prefer Not To': Giorgio Agamben, Bartleby and the Potentiality of the Law' in *Law Critique*, p. 319.

dialectic of constituent and constituted power. Following this idea, “[j]ustice without law is not the negation of the law, but the realization and fulfilment, the *pleroma*, of the law”.<sup>51</sup> Therefore, Agamben’s thesis, in my opinion, goes above Benjaminian search for the real state of emergency. The theory of potentiality and of “studious play”, that I will present shortly, is where Agamben makes his separation from messianic nihilism, and where he rejects any type of violence.

At this point, we have to remind ourselves one more time that for Agamben, there was no first life as the natural fact existing in the state of anomie, and then its implication by law proceeded. Bare life is not a natural situation, indeed, it is a product of a bio-political machine that firstly allowed separation of life and law, process that is both ancient but yet decisively modern, as I have shown above, using Derrida’s critique. However, after overpassing the problem with distinction between *zoe* and *bios*, it is necessary to go back to “whatever particularity” that is capable of creating the real emergency, breaking the machinery that wants to cancel particularity, and by it, a happy life. Bartleby stands for “whatever particularity” that shows no potentiality for joint identity, not even for “whatever identity”, around which it would construct its values and common interests in the form of what we tend to call society. Because, whenever we place ourselves in some identity, no matter its presuppositions, the state can react by allowing or refusing that identity, in promoting or rejecting it. Agamben rightly observes that “[f]or the State, therefore, what is important is never the singularity as such, but only its inclusion in some identity”.<sup>52</sup> That is why, for example, terrorism represents a big obstacle for national states, simply because many times terrorist acts are product of singularities that are not grasped by any identity, for example by one religious group, in one national state or organization that would become an apparent figure of the enemy. Therefore, Agamben proposes a new politics that goes further Schmittian dichotomy between foe and friends of the political; in the case of the “coming politics” that dichotomy is dissolved in the rejection of identity as the pure expression of our human potentiality. In Agamben’s words:

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<sup>51</sup> Agamben, *The time that remains*, p. 107.

<sup>52</sup> Agamben, *The coming community*, p. 86.

[t]he novelty of the coming politics is that it will no longer be a struggle for the conquest or control of the State, but a struggle between the State and the non-State (humanity), an insurmountable disjunction between whatever singularity and the State organization.<sup>53</sup>

In relation to the ontological-linguistic identity in which all belong without any claim of belonging, when “[t]he thing of thought is not the identity, but the thing *itself*”,<sup>54</sup> law and justice should also exist without any particularity, referring to “whatever singularities” in their free potentiality to not-be anything particular. In other words, on the way to this politics, we need to disrupt the sovereign organisation of potentiality through the creation of a life in which potentiality cannot be isolated from actuality, a “happy life” in which “I am not always already and solely enacted, but rather delivered to a possibility and a power”, a life that is necessarily potential.<sup>55</sup>

## Conclusion

Throughout this paper, it has been demonstrated that placed between constituting and constituted power, *homo sacer* is the victim of sovereignty, failing to grasp the potentiality of imposed non-status that can in its impotentiality open the possibility for a happy life. He or she does not abandon the empty law; it is both the sacred and the profane law that abandons him or her. Bartleby, on the other hand, as this paper has also shown, has his absolute potentiality realised in the act of abandonment. His “I prefer not” refers to the pure language that tells us something about the primeval world where law and life were not separated. Moreover, his acts have to be connected to freedom that welcomes both non-Being and Being, a freedom that does not come to destroy and bring something new, but to reveal the truth and save what it was not. To show that the world we live in is just one of the possible worlds that was realised in actuality, and that there are so many others, impossible worlds whose place in actuality is exigent. These worlds represent the right of actual world to not-be, and their right to have existence.

<sup>53</sup> *Ibid.*, p. 85.

<sup>54</sup> *Ibid.*, p. 95.

<sup>55</sup> Whyte, ‘I Would Prefer Not To’: Giorgio Agamben, Bartleby and the Potentiality of the Law’ in *Law Critique*, p. 321.

In addition, in his earlier works, most notably in *Infancy and History*, Agamben's focus was on the notion of "studious play". For him, play is "the experience of prediscursive being that he calls *infancy*"<sup>56</sup> just like the language that Bartleby has – free from any discourse, and thus, from any rationality. In order to produce the "pure law", a new political action needs to reach this "pure language", embracing "a word that does not bind, that neither commands nor prohibits anything, but says only itself".<sup>57</sup> Moreover, after revealing the emptiness of law, we can observe it "as a disused object", an empty object with which we cannot play anymore. Therefore, we need to find a new use for it, which has to be on the side of justice, because, what is the purpose of law if not the plausibility of justice? If there is a possibility of law outside the law, as the possibility of Being in the Nothing, then we need to think about the possibility of justice outside of law. In regard to this, Catherine Mills asks: "What, for instance, does playing with law entail, and in what way might it lead humanity to a condition of justice after the law? What is the nature of this postjuridical justice, and what is its relation to the 'happy life'?"<sup>58</sup>

Thus, to understand the possibility of playing with law, following Agamben, we firstly need to deactivate it, because freedom, interminability and non-instrumentality are basic conditions to play with it. In the state of exception, where law's both possibilities to be and to not-be become indistinguishable from actuality, just like Kafka's character, we have to "seek, each one following his or her own strategy, to "study" and deactivate it [the state of exception], to 'play' with it".<sup>59</sup> Only in this way, we can think that law is a gate to justice, which is no longer practiced but is rather studied. Such ideas are shared by both Agamben and Benjamin. Justice cannot be seen either solely as a proper usage of law but it must be related closely to the notion of "good life". Additionally, it cannot be left to the endless project of deconstruction that never comes to the bottom of life because it keeps it always connected to the law. Only in exception we can see their separation, and by playing with them, we can give the law a new usage. Agamben, in the same line as Bartleby, does not want

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<sup>56</sup> Mills, 'Playing with Law: Agamben and Derrida on Postjuridical Justice' in *South Atlantic Quarterly*, p. 16.

<sup>57</sup> Agamben, *State of exception*, p. 88.

<sup>58</sup> Mills, 'Playing with Law: Agamben and Derrida on Postjuridical Justice' in *South Atlantic Quarterly*, p. 16.

<sup>59</sup> Agamben, *State of exception*, p. 64.

to erase the law in order to create a new one, but they want to search for a new possibility of law, for a new usage of law. That is why in *Profanations* Agamben asked: “what does it mean for a life to put itself – or to be put into play?”<sup>60</sup> If we chose to put ourselves into play, we can reject any rationality, be misunderstood and be irrational. We can reject the world as it is given, without destroying it.

Moreover, the passage from the sacred to profane is possible in playing. Most of the games known to us are based on sacred rituals and religious acts. Following Émile Benveniste, Agamben agrees that playing is not only derived from the sacred, but it is also capable of breaking the conjunction of myth and riot, conjunction that secures the power of the sacred act. “This means that play frees and distracts humanity from the sphere of the sacred, without simply abolishing it”.<sup>61</sup> In playing, we can deactivate the rationality and meaning of law and politics, and give them another meaning, another usage. In other words, we can refer to the potentiality of law and politics, without their destruction. By doing so, we orient our acts towards the profane, breaking up with the myth and mythological violence, “opening the gateways to a new happiness”<sup>62</sup>, to justice.

In fact, it is only in playing that we can use objects that belong to law, politics, or religion, and give them a new use by turning them into toys. According to Agamben, only in relation to this aspect of playing, we can understand Benjamin’s law as the gate to justice. Through playing, objects that become toys are not neglected, but are given “a new dimension of use, which children and philosophers give to humanity”.<sup>63</sup> Finally, both happiness and unhappiness are coming from the same world. “The just person does not reside in another world” and “[w]hat changes are not the things but their limits”.<sup>64</sup> That is why “the life that begins on earth after the last day is simply human life”.<sup>65</sup> Old world with a slight difference, where the halo that enables “the becoming singular of that which is perfect”<sup>66</sup> is “a zone in which possibility and reality, potentiality and actuality, be-

<sup>60</sup> Agamben, *Profanations*, p. 68.

<sup>61</sup> *Ibid.*, p. 76.

<sup>62</sup> *Ibid.*

<sup>63</sup> Agamben, *Profanations*, p. 76.

<sup>64</sup> Agamben, *The coming community*, p. 91.

<sup>65</sup> *Ibid.*, p. 6.

<sup>66</sup> *Ibid.*, p. 54.

come indistinguishable”.<sup>67</sup> In other words, instead of reproducing the same world over and over, instead of copying and re-interpreting its content, we need to play with it and give it another meaning through the playing.

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<sup>67</sup> Ibid., p. 55.

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