

DOES THERE EXIST AN EPISTEMOLOGICAL HERITAGE OF DEMOCRACIES?
THE NECESSARY RELATIONSHIP BETWEEN LEGAL UNIVERSALISM
AND EXCLUSION PRACTICES

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1. The universal and the exceptional in the social order according to Agamben

The aim of this study is to frame the reflections of an important philosopher, Giorgio Agamben, whose notion of sovereignty affects the contemporary debate in Italy and abroad. Like Bauman and many other scholars, Agamben puts the relationship between inclusion and exclusion at the centre concern of his inquiry, although, unlike Bauman¹, however, he does not regard this relationship with respect to the general features of the social order. Rather, he takes as his fundamental referent the notion of man as an uncertain, rather than a given presupposition: thus is always possible for any of us to wonder, using Levi's words, "*If this is a man*". At stake in the society of legal universalism, therefore, it is possible distinguish human and animal life, defining the latter as "bare life". In Agamben's thought, sovereignty is a biopolitical device able to regulate inclusion in the order of human beings. The degradation 'animalization', or 'bestialization' of human beings are the possibilities that Agamben

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¹ The differences between the approach taken by Bauman, although he too investigates the dimension of the general more than the universal, and by Agamben emerge from their treatment of the persecution of the Jews, of which the Nazis were protagonists. See Z. Bauman, *Modernity and Holocaust*, (1989).

considers to result from some ‘original’ force inherent in sovereignty itself and able to act as an ‘exceptional’ element².

By acting on the biopolitical entity that Agamben calls “bare life”, sovereignty consists in exercising an exceptional power which is not proper of the legal order but is the expression of a force external to it. Constitute the human on the basis of the possibility of its inclusion in that order, thus differentiating it from an otherness coinciding with its possible ‘animalization’. In both cases, the human order and “bar life”, the exception explains “itself and the general”, what happens as a rule.

However, in defining the processes constituting the animal as the ‘other’ with respect to the human, Agamben oscillates in evident manner: at first, and entirely correctly, he posits the possible animalization of man at the level of the ‘end of history’ propounded by Alexander Kojève in his commentary on Hegel’s *Phenomenology of Spirit*³. For philosopher commentators on the Hegelian text – and Agamben initially seems to make their interpretation his own – the animalization of man is the progressive product of the advent of that servile discourse whereby man is reduced from his state as a desiring being (subject of desire) to a entity determined by need in constant search of pacification with his natural dimension, with his given being. Agamben lucidly argues for the notion that the ‘animalization’ of the human is made possible by the operation of a particular cultural mechanism within the equally particular relationship between the universal and particular. It is, however, language which marks the essential difference between man and animal so that the latter is always and only a product of man’s interpretation. But Agamben’s entirely pertinent observation to the effect that perhaps the body of the

² See G. Agamben, *The Open: Man and Animal*, (2004).

³ For A. Kojève, *Introduction à la lecture de Hegel*, (1947) 434-5: “The disappearance of Man at the end of history is not a cosmic catastrophe: the natural world remains what it has been for all eternity. It is not a biological catastrophe either: Man remains alive as an animal *in harmony* with Nature or given Being. What disappears is Man in the proper sense – that is, Action negating the given and Error, or in general, the Subject *opposed* to the Object. In fact, the end of human Time or of History, that is, the definitive annihilation of Man properly so-called or of the free and historical Individual, means quite simply the cessation of Action in the strong sense of the word. Practically, this means the disappearance of wars and bloody revolutions. And also the disappearance of *Philosophy*; for since Man himself no longer changes essentially, there is no longer any reason to change the (true) principles which are the basis of his understanding of the World and of himself. But all the rest will be preserved indefinitely; art, love, play, etc.; in short, everything that makes Man happy”.

anthropophorous animal (the body of the slave) is the unresolved remnant that idealism leaves as an inheritance to thought, and the aporias of the philosophy of our time coincide with the aporias of this body that is irreducibly drawn and divided between animality and humanity⁴ progressively gives way to a problematization of the animal/man relationship in which the discriminant between the two elements is not mediated by the dimension of the universal, or by cultural discourse. Rather, it is a difference that ontologically exists previously, and not currently as an undiversified sphere, the object *par excellence* of sovereign power exercised on bare life. This is an obsessive endeavour both to classify or normativize it and to define the shifting and never definitive difference between human and animal. Thus conducted is an realist critique exemplary in its intelligence, brilliant as well as persuasive, which can be summarized in the following terms. Let us set aside the rhetoric of human rights, the lofty ideal of universal citizenship, and consider the exception on the basis of which the legal system is constituted as an attempt to confer order on society. A pre-legal power – political in Schmitt’s sense – therefore exists, and it is able to confer on a particular subject or class of subjects the ability to recognize itself as human, and to say, once again with explicit reference to Levi’s book, “if this is a man”. The reference to Levi is deliberate: Agamben’s context of reference is the destruction on racial grounds (and not national ones as in the case of enemies aliens) of identity.

A corollary to this reasoning is that if there indeed exists a pre-legal power *à la* Schmitt to declare the state of exception, with the purpose of performing its essential function, that of declaring the difference between friend and enemy, between similar and dissimilar, between human and non-human, and if this power is not a perverse effect of the legal order but an original possibility, then risk and the precautionary principle are lost as ideological, phantasmal elements to ‘realize’ themselves, to become concrete applications of this exceptional power. Risk and the precautionary principle thus become legitimate effects of a pre-political power of inclusion-exclusion which is exercised on that degraded, but always possible, state that is the animal, which is not the product of a non-recognition of the human, but rather the ‘zero degree’ of the living being, that ‘bare life’ understood (misunderstood?) in Foucaultian terms on which this original potential is exercised. For Agamben, this mechanism

⁴ G. Agamben, *The Open: Man and Animal*, cit. at 2, 6.

is clearly exemplified by the situation of those beings whose existence paradoxically testifies to what – excluded ‘by its nature’ from linguistic exchange – is untestifiable; beings with the status of the *homo sacer* who, in the Nazi concentration camps, hovered between life and death and was called *der Muselmann?* or *die Muselweiber* by his or her companions⁵.

The concentration camp provides paradigmatic testimony of the risk of exclusion from the human community because it allows internal differentiation between human and non-human with no reference to the universals of discourse and culture. The normal situation is given to the understanding only through exception, just as the political state of exception makes it possible to found and to define the juridical order as both legal and effective at the same time, and the concentration camp is the endpoint of the West as a whole. According to Agamben, whose ideas have had a notable impact on the European debate on exclusion, exceptional situations arise in which the boundary between “bare life” and the ‘human’ in the proper sense – of which he constantly, emphasises (moreover, with great philological rigour) the contingent nature, the fictitious structure, the constitution of the persona as a mask – disappears. To demonstrate this assertion, he traces backwards the path leading from Schmitt to Kirkegaard, finding in the latter the reasons for decisionism as a type of juridical thought⁶.

Agamben opposes the semantic intransitivity of the *Muselmann* to the transcendental foundation of the community on communicative bases; a theory which in recent years has enjoyed a certain success in Germany through the work of Habermas and Apel. For the theories centred on ‘communicative action’, to the extent that people communicate, they are condemned, so to speak, to agree on sense and validity criteria for their communication. Because the *Muselmann* was in a position of semantic intransitivity, as the blind spot of every discrimination

⁵ G. Agamben, *Remnants of Auschwitz: The Witness and the Archive*, (1999). Thus Améry-*Jenseits von Schuld und Sühne. Bewältigungsversuche eines Überwältigten*, (1977), 52: “The so-called Muselmann, as the concentration camp language termed the prisoner who had lost all hope and been abandoned by his comrades, no longer had consciousness of the contrasts between the good and bad, the noble and base, the spiritual and unspiritual. He was a walking corpse, a bundle of physical functions in agony. We must, however painful it may be, exclude him from our consideration”.

⁶ For Kirkegaard (cit. in G. Agamben, *Remnants of Auschwitz: The Witness and the Archive*, cit. at 5, 9): “The exception explains the general and itself. And when one really wants to study the general, one need only look around for a real exception”.

policy, as the 'possible risk' of every inmate, he constituted the living antithesis of every (meta-)linguistic agreement among communicators. Although this observation by Agamben is impeccable, to be noted that it juxtaposes and puts on the same level membership of the linguistic community as a reciprocal accord on the sense and validity criteria of communicative action with egress from the linguistic dimension itself, from language understood as a symbolic restraint, a material egress from a transcendental dimension. But does the situation of the concentration camp truly constitute an exception to language as a transcendental dimension? Supporting this objection is that Agamben qualifies as an "apparent contradiction" the evidence that this exceptional situation – life in the concentration camp – appears to have been strongly normativized. Yet rejecting the dimension of exchange in a linguistic situation is not to be excluded from exchange as the condition for being: besides the *Muselmann*, other figures, among them the 'psychotic' psychiatric patient, well attest to this. In these cases, the alienation from language expresses a radical, albeit tragic, determination of the human being.

Just as 'bare life' is not given as a fundamental ontological possibility of humanity in the form of risk, so a pre-political power of exception is not given either. When Hitler assumed power, and on 28 February 1933 proclaimed the *Decree for the Protection of the People and the State* implying that these were 'at risk', and suspending articles of the Weimar Constitution safeguarding individual liberties, this action was possible because it was compatible with the objective possibilities of the legal order, and not as an expression of an 'original' power⁷. Likewise, the Patriot Act passed by the U.S. Congress on 26 October 2001, which allowed the Attorney General to "maintain custody" of aliens suspected of engaging in activities which endangered "national security", and then the military order issued by the President of the United States on 13 November of the same year and which authorized the indefinite detention and trial by military commissions of non-citizens suspected of involvement in terrorist activity, are expressions of the possibility of the legal order. We have not the constitution of its 'original' possibility to include the living being in itself through its own suspension, we have not the constitution of the legal order – where not understood formalistically – as a regulation of the living. If we were indeed in the presence of a state

⁷ See G. Agamben, *The State of Exception*, (2005) 9-43.

of exception as an “original structure in which the law includes the living being in itself through its own suspension”, why locate the Guantánamo Bay detention camp outside the borders of the United States? Or, rather, must the social practices and policies of partition, Auschwitz like Guantánamo, be considered a ‘symptom’, the ‘removal’ of the universal of science, therein including human rights?

2. Conclusions. The task of the realist critique

For the politics of human rights to be a practice of liberation and not the acritical exporting of an imperialism whose rationale resides in the growth of a ‘will to power’ which has little to do with the universal because it is rooted in the particular, the affirmation of democracy as a principle, must necessarily comprise critical analysis of the relationships between the universal of the law and the reality of the social constitution. Though gainsaying the alleged ‘concrete universalism’ of the law, this critique has the task of demonstrating that the obscenity of the exercise of power is a matter internal to the legal order, and especially to its social constitution, relative to that obscene substitute for the law which has nothing original about it but is the effect of a given social context, without denying, in conformity with Bloch’s principle of hope, the universalizability of legal discourse as the effect of a ‘distant utopian future’, more than the certainty elevated by the will of contemporary Western man to the rank of truth.