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THINKING THE LAW WITH AND AGAINST LUHMANN, LEGENDRE, AGAMBEN

ABSTRACT. After the failure of all enterprises in legal ontology, and after the success of all enterprises in legal system internal theodicy, the field of legal theory is now open to receive a range of more complex, less universalist, less politicised, but also more personally shaped, more fragile suggestions. My article focusses on three such ways of dealing with the law question: the work of Pierre Legendre, a French psychoanalyst and specialist of the history of administrative law and Christian religion, the work of Niklas Luhmann, the recently deceased founder of a new German school of sociological systems theory, and that of Giorgio Agamben, an Italian philosopher whose re-opening of the discussion on the Benjaminian notion of bare life and its relationship to law has provoked worldwide attention.

KEY WORDS: Agamben, Aristotle, autopoiesis, Benjamin, closure/openness, desubjectivation, dogma, Legendre, "instituting life", life/bare life, Luhmann, messianism, power, rule/exception, Schmitt, systems theory

I

> The duc de Choiseul and the duc de Praslin had a discussion on the question of who was more stupid: the King, or Monsieur de la Vrilière. The duc de Praslin argued it was Monsieur de la Vrilière, the duc de Choiseul, as a faithful subject, claimed this honour for the King. Some days later, in council, the King said a very stupid thing. Choiseul, turning to his friend, said: "Now, Monsieur de Praslin, what is your view on this?"[1]

Theorising on law has much in common with a conversation in which every utterance takes two different values according to the two different contexts within which it appears at the same time, as in the case of the Duke of Choiseul's words. One face is turned toward the law. In Chamfort's anecdote this corresponds to the *official* meaning of Choiseul's question:

[1] Chamfort, "Charactères et Anecdotes", an. 702, quoted after Chamfort, *Produits de la civilisation perfectionnée: Maximes et pensées; Charactères et Anecdotes*, éd. par Jean Dagen (Paris: Garnier-Flammarion, 1968), 209.

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"What do you think of the opinion just now expressed by the King?" There is, strictly speaking, in the presence of the law (=the King) no status for a message without official meaning, for an utterance unconnected to the network of the legal (=royal) signifier. If this first face is compulsory, the second face is, on the contrary, facilitative. There is nothing that could stop you from producing effects of sense on a second level, from showing another face as well – this is what the Duke of Choiseul does, and what makes the question he addresses to his friend such a precious testimony of the *mot d'esprit*, the ethical genre which accompanied French 18th century absolutism as its non-absolvable remainder – in such a way that, at court, the King was in a way a mere prop on the stage of *esprit*. The two courtiers of Chamfort's anecdote are subjects of the King, but at the same time they are also accessories to the secret misery at the heart of royal mastery, it is that misery that had been at stake in their earlier private discussion, and that is now at stake in the second sense Choiseul smuggles so successfully into his disarmingly simple question. This other, private meaning of M. de Choiseul's question – rigourously public as it is to whoever is *in the picture* – runs: "Do you now, after what we have just heard, at last admit that I was right, and that the King is definitely the sillier one?" The King is the law, and the second conversation that is going on within the first is legal theory. The courtier/legal theorist talks *coram rege/coram lege* – literally: "in presence of the King's face/the law's face". Does this, however, stop him from revealing something more or else than what appears on the screen of royal/legal intelligence? It does not even protect him from it.

That legal theory takes place *coram lege*, yet actualises view-points that lie beyond the horizon of law-internal rationality is a fact that cannot be escaped, that must be dealt with – and that is dealt with under all circumstances, owing to the simple fact that meaning is analysable *ex post*, yet ungovernable *ex ante*. The legal writer's subjectivity, his intimate bond to legality and law, is displayed in capital letters, although in most cases neither willingly nor even wittingly, by every single one of his sentences – hence the climate of joyfully pedantic self-submission under law's "sovereignty" that so irresistibly comes across whenever we read our classical positivists. It is, of course, ethics which, making an art of dealing with that which has to be dealt with, of acknowledging the acknowledgable, finds in law's translegal horizon its proper subject-matter. In contrast, one would look in vain for any pre-ordained trump-value; legal theory is not the stuff revolutions are made of. It cannot be closed into law; therefore it can indicate escape routes and potentialities; but that is all it can offer, and that much only subject to resisting the perpetual temptation of taking itself to be law, of infatuating itself with a legal majesty of its own, for

whenever this happens not only the King and/or Monsieur de la Vrilière, but the courtiers/theorists themselves are caught in the official meaning and its narrow space, and become pure subjects to its one overwhelmingly indubitable truth, true eunuchs of the unique, perfect positivists, perfectly unable in the end to fulfil even their institutional role. Which of course, for a courtier, was to keep the King company. Is there, by the way, such a thing as an institutional function for the legal theorist today? Let me suggest the function of keeping company to that equally solitary and sensorily impaired being, the legal order. Only, keeping company is not at all such an obvious thing to do. Specifically, it requires that both sides, accompanier and accompanied, succeed in maintaining themselves as discrete, mutually allergic units, i.e. that they remain exposed to the other side's manoeuvres, that they abstain from fusing.[2]

II

Whether legal theory today busily invents new restrictions and imperatives, whether it is a discipline which unadmittedly functions according to legal regulation, whether human sciences at large are subject to a legalism of their own without even having law as their topic, whether academics, no matter their speciality, are thus really doing *law* (be it unwittingly, as Molière's Monsieur Jourdain does prose) – these are urgent and potentially interesting questions, which should be open to debate. In this article, however, my focus is on what the late 20th century would come up with, if asked about its own escape routes from the realm of law's rule, triumph, and self-consecration. To be sure, the situation has changed since Chamfort's times: the question of truth, farmed out to a specialised expert-agency, science, is no longer among the topics of legal or sovereign discourse. Does this however force us – or allow us – to abandon the line that links the Duke of Choiseul to the community of all those who have saved their souls by succeeding in by-passing the omnipresent *omertà*, the rule of silence in the specific historical form encountered by each of them, all those who have ventured to give away *l'inavouable secret*, to disclose

[2] On a different level, this mutually exclusive content of keeping company and *fusing together* plays an equivally important role in connection with love and intimacy, starting with the Bible's fusional imperative and "one-flesh" doctrine of marriage (Gen. 2:24) – a doctrine which, enjoining their fusion, seems to explicitly outlaw *company* between partners. Yet, there is a minority view, shared by Rashi, the famous French 11th century commentator on the Talmud, according to which the referent of "one flesh" is not, in fact, the married couple, but the child. Cf. Pierre Legendre, *La 901e Conclusion* (Paris: Fayard, 1998) 389, with further references.

the concealed, or (for Heideggerians) to unconceal the undisclosed? In comparison with the last years of French court life, the situation is trickier now. At that time, the King himself was exposed – "liable" – to *esprit*. This is what is witnessed *e contrario* by another one of the classic replies: "Sire, le roi n'est pas un sujet!".

If we compare today's legal academia to Chamfort's Paris (or Versailles), what has replaced esprit is a certain wittiness, or ownership of a capital of humour, which is imperative for successful delivery of conference-papers, but in perfect tune with attitudes formed after a submissive mould of more recent date. Needless to say, in Chamfort's world there was not the merest element of that mould. If one looks for adequate ways of marking, within the general evolution of truth, within the unfolding of the successive stages of its historic fate, the specificity of that submissiveness, what is striking is, as so often, the longevity of Friedrich Nietzsche's intuitions. In *The Case of Wagner*, Nietzsche, pointing to the surprisingly concordant job profiles for tenors in Wagner's new operas and for civil servants in Bismarck's equally new Reich, speaks – in what is certainly one of his most personal and idiosyncratic definitions – of the advent of a new type of *Germanic* personality. He summarizes it in the expression, obedience and long legs.[3] Is this athletic docility, or well-trained compliance, not, over a century later, the model of the new, now international, fashioning of academic man? Are especially we legal academics today not "Germanic" in Nietzsche's sense? In my own context, Nietzsche's notion of "Germanic" summarizes the horizon against which stand out each of the three legal theories, or ways of asking the law question without expelling the question of the meaning of law, that I wish to deal with. This is, at any rate, why I have chosen them: because their approach to the law fails to correspond to that profile, be it in its Prussian civil servant version or in its opera singer version.

Three legal theorists, then? Not quite, as none my authors is an academic lawyer strictly speaking (even if each of them holds a law degree). Their work is registered within the sciences of religion, philosophy, and sociology. Apart from the lack of "Germanicness" (in Nietzsche's sense) these works share a construction time: the last third of the 20th century; a feature of "style": they have more affinity to the signed output of an artist than to the anonymous enterprise of a body of knowledge in progress; and a gesture: their passionate, almost sectarian refusal to submit to the picturing of social consensus as a great other. That

[3] "Gehorsam und lange Beine", cf. Friedrich Nietzsche, "Der Fall Wagner", quoted after *Sämtliche Werke*, Kritische Studienausgabe, ed. by Giorgio Colli and Mazzino Montinari (Munich: DTV, 1980), vol. VI, 39.

exhausts the list of common features. As to relationships between them, they are not even competing on the same network. They do not know of each other. This is easily explained. They are all, as it will become clear, faithful consignees of traditions of thought and takes on the law which, having fallen out with each other a long time ago, have lived in mutual anathema ever since. There is a good side to that: in the absence of a common ground, they cannot cede territory to each other. This prevents them from unprincipled overtures and merely public relations imposed *Formelkompromisse* and reconciliations. Is there, then, space for anything else other than a wilful juxtaposition? How can we claim to identify in their works a common subject matter, the legal ordering of society, given that they come up, as we shall see in detail, with bewilderingly diverging answers to this question? Certainly, law is in the focus of Luhmann's enterprise of stripping society from its universally assumed status as a possible object of human rule, and of describing modern society, instead – with Spinoza ("what cannot be conceived by referring to something else must be conceived by referring to itself"[4]) – as the unpredictable and ungovernable self-creation of an acephalous, purely constructive and merely processual mock-self. Law is equally the focus of Legendre's enterprise of stripping the West's historic career from its universally accepted status as an incomparable planetary *hapax*, of revoking the First World's ever-consented title to planetary exceptionality by forcing it under the radically levelling scope of an anthropology of institution. Law is, finally, the focus of Agamben's venture of stripping the *agalma*, the beloved speculary image or identity, of Western politico-legal rationality from the illusionary *bilan globalement positif*[5] universally attached to it, of reinterpreting the rule of law as an extended state of exception, and of substituting desubjectivation-theory – or, *per* Agamben's French pupils, bloom theory[6] – for traditional subject-theory.

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[4] "Id quod per aliud non potest concipi, per se concipi debet": Spinoza, *Eth*., Book I, Axiom II. This *axiom* is quoted as epigraph to Luhmann's last book, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1997), 10.

[5] French for: "overall positive outcome". The formula used to act the part of the official jargon euphemism to which the French Communist Party used to have recourse in assessing the history of Soviet and Eastern European socialism.

[6] Cf. Tiqqun, *Théorie du bloom* (Paris: La Fabrique éditions, 2000). Drawing on the Guy Debordian concept of *société de spectacle* and working in close collaboration with Giorgio Agamben, the Paris-located collective Tiqqun (no relation to the American periodical Tikkun) strives to unfold the philosophical implications of Agamben's notions of *coming community* and *planetary petty bourgeoisie*. The concept of *bloom* denotes individual existence in its current, post-subjective state. Its sources include James Joyce's phrase: "They understand us better than we understand them". By "they", Leopold Bloom refers to cats, Tiqqun, instead, to advertising and the media.

III

There is in these three views on law an element of critique of society and a diagnosis of cultural crisis, and it is the coincidence of both which assigns to each of them its place within the history of the self-reflection of Western, indeed *old-european*[7] modernity. A mere unity of a distinction, thus. Yet, beyond that near-empty commonality of a commonly held *actio de communi dividundo*, beyond their common reference to "law", there is an intersection of horizons which forces all three of my authors within the scope of a partially common problematic, the relation between law and life. This relation is placed under the sign of its *successful interruption* in Luhmann, who celebrates, as the decisive *coup de génie* or evolutionary achievement on which functional differentiation and indeed the very workability of hypercomplex societies are predicated, the closure of social autopoiesis from both the autopoiesis of organism and the autopoiesis of consciousness.[8] The relation of law and life is placed under the sign of its *Western distortion* in Legendre, who locates the institutional order's "job" in the integration of law and life – cf. the famous and much challenged expression "*vitam instituere*" – and blames modern law for its transcendence/heteronomy bias, its readiness to buy itself into supposedly superior, "more direct" alternative accesses to social life, and its resulting self-abandon and self-oblivion for the benefit of scientifically, economically, politically defined rationalities (even if at the same time Legendre also warns that there is no such thing as a *successful forgetting* of that institutional integration of law and life).[9] The relation of law and life is, finally, presented under the sign of their *originary indiscernability* in Agamben, whose Heideggerian, *seynsgeschichtlich*, reading of the sovereignty cum rule of law compound enables him to interpret interruption and integration

[7] The term *alteuropäisch*, a luhmannian creation, has been designed to encompass the entire Western pre-history of contemporary world-society, thus deliberately ignoring even the roughest internal differentiations (antiquity, middle ages, modernity), in order to focus all attention on the single watershed: traditional/modern.

[8] Cf. Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt a.M.: Suhrkamp, 1997), 42; 131; 748ff., on social complexity. Specifically on "life", id., *Social Systems*, tr. John Bednarz, Jr., with Dirk Baecker (Stanford: Stanford University Press, 1995).

[9] According to Legendre that integrative function will, rather than disappear, find a different attributee: no longer law and religion but science or economics, with the difference that the latter, prevented by the definition of their finalities from doing that integrative "job" officially and admittedly, must do this part of their work incognito – with the travesty resulting from this, and especially with the need to build up a whole theodicy in order to bolster the all-justifying objectiveness of method in science, of the market in economy, for otherwise the incognito is at risk. Cf. Legendre, *Sur la question dogmatique en Occident: Aspects théoriques* (Paris: Fayard, 1999) 119.

– exclusion and inclusion, in his terminology – as two sides of one coin, two coordinates of one graph, and more exactly as the two ineluctable constituents of one, the one Western history-coextensive campaign, which advances, Agamben argues, on an integrative double track of sovereignty *plus* subjectivity.[10]

IV

Luhmann's problem addresses the conditions of possibility of a differentiated society. How can a society succeed in keeping pace with, and in maintaining its ability to keep pace with, the dilemmas and uncertainties it cannot help creating ever anew as a by-product of its dealing with the preceding generation(s) of dilemmas and uncertainties? Underlying this, there is a whole range of further questions which Luhmann fails or rather refuses to ask – as modern society, he argues, has already left them behind. Questions such as: How can society accomplish that task without having at its disposal a point of support, a claim to transcendence that would uplift, authentify and authorize the otherwise bare, merely positive results of its decision-making procedures, and grant it the seal and surplus value of an encompassing nature, power, principle, will, or task? How can we rule at all, if we no longer "pretend to rule that which escapes us" (Jean Cocteau)? What Luhmann rejects, to be sure, is the idea that society has found, or is likely to find, a single, ultimate, encompassing attributee for that "pretention". On the level of a functionally differentiated institution, on the other hand, the question of "ruling that which escapes it" maintains its entire significance. It indeed defines what is, according to Luhmann, the condition of the legal system's autopoietic closure. This condition, surprisingly, is created, in Luhmann's view, by what would generally be considered as a rather secondary, subordinate institution of the law: the denial of justice, more exactly the outlawing of the judge's possibility of refusing to rule a case. The judge "*must decide any case* no matter whether decidable or undecidable ('hard')".[11] As opposed to his Roman forebears, the modern judge who declares *non liquet* breaks the law. The law customer is given a right to use the legal system, a trump card which the legal system is legally bound to accept – this, if anything, is why law is (although in a

[10] This is the critical point in Agamben's discussion of Foucault who, ever oscillating between social techniques and technologies of the self, macro – "governmentalities" – and "micro-powers", *omnes* and *singulatim* –, never thematizes their relationship.

[11] Cf. Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1993), 310; Anton Schütz, "L'immaculée conception de l'interprète et l'émergence du système juridique", *Droits: Revue française de théorie juridique*, 21 (1995), 113–126.

rather limited sense) an "integrity". Luhmann, starting from the idea that governability is in modernity no longer the rule but the exception, defines the autopoietically organised functional systems as the governable exceptions to that rule of general ungovernability. In this sense, no idea is more at odds with the autopoietic account of modern society than the traditional image of a paramount order embodied, represented, localised in the best part of society, either its top or its center. Autopoiesis emerges on the ashes of those conceptions – on the ashes, first of all, of the legal order understood as *lawful rule* (order, in the German sense of "Ordnung") that flows from a competent *ruler's rule* (order, in the sense of command), on the assumption that the fact that this is so "*is the rule*" (not a mere exception). Not only can autopoiesis do without this holy trinity of rule semantics, it positively *requires* the absence of any supreme or last instance at the hub of the process of society's self-continuation. Luhmann's problem is about the performance of agencies, it is the problem of the improbable mastery of the complexity modern society is confronted with – the problem of managing unpredictible empirical challenges. We are confronted with a problematic which – in spite of its philosophical grounding, in spite particularly of its assessment of *time*, central in the dispositive the excellent Heidegger-reader Luhmann unfolds in order to avoid the phantasmagory of the one omnicompetent agency or ultimate site of "power" – fits into a classically modern, *epistemological* problem/pattern.

V

Just the opposite is true of Legendre's problem. Legendre considers modernity, in adopting Freud's description of civilised *mores*, as a mere "varnish". Below the shallow layer of scientific improvement and the emergence of modern rationality, and quite independently from the question of how long this evolution lasted, modern society finds itself, according to Legendre, struggling with the same questions as any other human society, namely the question of human life's neuralgic constitution as embedded in desire and subjectivity, and to the ensuing requirements of a social order. There is an evidential side to this question. As everybody knows, on the screen of empirical research only factual performances become visible, whereas subjectivity and desire remain as absent, as latent as among well-behaved Victorians. Legendre's problem, therefore, cannot be derived from the inherent deontology at work in the routines of scientific knowledge. It is a problem of acknowledging, recognizing, ratifying – an *exhomological* problem rather than an *epistemological* one. Candidates for that recognition are the limits human subjectivity sets to the socially possible.

That these limits fail to show on the instruments provided by the social sciences, which assume that society, being a matter of conduct, can be approached through the combined means of observation and adaptation, certainly poses a dilemma. In Legendre's interpretation, this dilemma is political. The decisive political question of our time, Legendre claims, is between cybernetic and hermeneutic approaches to society, between conduct and interpretation. If desire and subjectivity fail to show on the screen of behaviour, do we accept the verdict pronounced in the name of empirical science? Or do we side with the message and dismiss the medium?

This is a political decision, thus an ultimately undecidable (only: "take-able") decision. Legendre's position is uncompromising. Society is not a matter of conduct, nor is its adequate understanding a matter of behavioural science. Instead, 'society is a text', an arrangement of texts. There is thus, apart from interpretation, no other way of approaching society. What about empirical research, people ask anxiously. But there is really not much to worry: "empirical research" itself is an alias for "interpretation", with the nuance that empirical research is a furtive, a clandestine species of interpretation, interpretation covered with a Victorian veil, interpretation armed with an alibi. In summary, modern Western society, too, manages to accomplish the task of interpretation, a task each and every culture in history has been able to cope with in one fashion or the other, yet Western modernity manages – dares – to carry out this task only incognito, by devoting itself to the protection – all-encouraging, all-justifying, all-authorizing, meta-interpretative – of the modern pantheon's supreme divinity: objective knowledge, spoken and acted for by Her earthly representative, science. Behavioural man replacing subjective man: this substitution is bound to remain at the stage of an abortive attempt, the last of a long series of peripeties in the drama of interpretation's discrediting within the West's institutional system. This system, it has been said, is predicated on a permanently incomplete severance of law from sovereignty.[12] Interpretation provides, not one position, but a network of positions: a dialectics of discursive practice. Each actualised result virtualises an open horizon of other possible results. In the heart of interpretation, there is thus a lack of determinacy. It is essentially a "law-job", and its skills are those of priests and judges (Nietzsche, Deleuze, Foucault, criticise interpretation on that count). In a context of sovereign decision-making, however, interpretation is dead weight. Power is looking for the fast and efficient plausibilisation of its decisions, i.e. for the opposite sort

[12] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1999).

of good: an artilleristic apodicticity that rules out other possibilities and is therefore served either by positive knowledge or by military or executive command (of course, in times of peace, this command can be wielded in the name of misleading euphemisms such as "interpretive community"). The lesson to be taken from Legendre is that the planetary extension of Western power not only has conquered and annihilated non-Western cultures; it has at the same time busily – if ultimately fruitlessly – worked towards barring the West's own access to interpretation.

If there is one postulate that has no possible standing within the universe of instituted subjectivity laid out in Pierre Legendre's multi-volume *Leçons*, it is the notion of a *bare life*. The single significant aspect of any human collective lies, on the contrary, in its giving rise to an *edifice of love*, to Augustin's *structura caritatis*,[13] that articulates all life around institutional structures. A philosophical tradition, from Benjamin to Foucault and Agamben, takes the absence of a status, not as proof of the actual impossibility that such lives be really lived lifes, but on the contrary as the moment of birth of a social category that, ever-denied and ever-present, plays a key role within legal and political history and embodies its founding self-contradiction or paradox (or, to summarize Kierkegaard and Schmitt, as the exception from which alone the rule lives). For Legendre, who takes up Saussure's qualification of *language* as an institution, human life is essentially and permanently instituted, it is legal institution related life, no less indispensably institutionalised than it is individualised. The very idea of a grasp on bare life appears either a totalitarian phantasy or meaningless speculation. There is, from Legendre's viewpoint, a misunderstanding, perhaps a romantic misunderstanding, at work in that whole tradition of almost exclusively extra-legal representation of the law, according to which the salient feature of the legal institution has the character of a performance rather than of a structure, and more specifically of the performance of capital punishment. This tradition is present in the way Benjamin construes his notion of bare life. It is epitomized by Joseph de Maistre's political theology of the executioner: "All greatness, all power, all subordination rests on the executioner; he is the horror and

[13] The formula, the importance of which for Legendre's own teaching about the institutional grasp on life in the West cannot be overrated, is from Augustin's letter 53 (39). Its immediate context concerns the science of liturgy, which is described as a science functioning "like some sort of a machinery" to the purpose of "lifting up", or "keeping up", that "structure of love": "Scientia tamquam machina quaedam, per quam structura caritatis adsurgat". Cf. with further references, Pierre Legendre, "Les Maîtres de la loi: Etude sur la fonction dogmatique en régime industriel", in: *38 Annales: Economies – Sociétés – Civilisations* (1983), also reprinted in Pierre Legendre: *Ecrits juridiques du Moyen Age occidental* (London: Variorum Reprints, 1988), 507–537 (533, note 20).

the bond of the human association. Take this incomprehensible agent away, and instantly the order gives way to chaos, the thrones fall into ruin, and society disappears."[14]

Carl Schmitt's emphasis on the rule's being-subject to its exception, his concept of sovereignty as involved in the decision on the State of exception, are equally closely related to that interpretation of the law as one of the performing arts – even if it is true, from De Maistre to Benjamin to Schmitt, that the legal performance is understood as essentially exceptional, and the rule of law, as the rule of the delayed exception, as the rule of the ever-saved, ever not-yet performed (but already threatening) performance or "decision". On the other hand, if the exception, with its violent content, determines the uneventful normal state, then and only then the problem of violence becomes autonomous, and it is this autonomy, and the underlying idea of a perfect discontinuity between pure unmediated violence and the mediating, metabolising, symbolising "forms" (power, right, law), that becomes questionable. The question, then, is whether violence per se, violence without a supplement of "form" has ever been observed. Unexpectedly, for once, Luhmann's autopoietic account of the law and Legendre's critique of meta-legal rationalities converge in their rejection of the paradigms of performance and exception. For Legendre, a legal system that regulates itself according to a monitoring of its own feedback misses its point, which resides not in the shaping of factual conduct, as efficient it might be, but in the shaping of subjectivity through interpretations and texts. Autopoiesis, on the other hand, is plainly interested only in what is the rule, the common and everyday communications and outcomes; exceptions strike Luhmann as essentially rare, thus globally irrelevant. Luhmann's theory is a direct antithesis to Schmitt's myth of the exception, extraordinary with respect to the directness of its antagonism. On the other hand, not only is the appeal from the rule to the exception much too risky, in such a way that the question is that of the probability that anyone will ever take the risk and make such an appeal, but also a legal system remote controlled by events that never – or if so, only exceptionally, sporadically, erratically – actualize, cannot produce enough difference, enough "perturbation" to work on as a system.

Legendre holds that Western history, despite spectacular declarations to the contrary, has not in fact come up with any serious success concerning

[14] "Toute grandeur, toute puissance, toute subordination repose sur l'exécuteur ; il est l'horreur et le lien de l'association humaine. Otez du monde cet agent incompréhensible; dans l'instant même l'ordre fait place au chaos, les trônes s'abîment et la société disparaît." Joseph de Maistre: *Les Soirées de Saint-Petersbourg, ou entretiens sur le gouvernement temporel de la providence* (1821), vol. 1, quoted after the edition by Guy Trédaniel (Paris: Editions de la Maisnie, 1980), 34.

its originary and unterminable project, the creation of a perfectible version of socialised mankind, a *homo novus*. This is not an inch closer today than it was at whatever moment of the past. Legendre discusses specifically, in order of appearance, a) Western Christianity, with its ambition to occupy the double position of the *vera religio* (Augustin) and of the "religion of the farewell to religion" (Marcel Gauchet) – the true religion as well as the last one;[15] b) medieval Western legal rationality, with its recourse to Roman sources in order to provide the practice of law and governance with a new, fully-fledged model of communicative competence, based on what Legendre calls the "revolution of the interpreter";[16] c) early modern Humanism, that "philosophy of exoneration",[17] with its culture-revolutionary purges, its burnings of books, and its smug anti-institutional militancy against the medieval heritage;[18] and finally, d) the scientific revolution in management and administration, with its inherent promise to terminally dislocate the language-related subject and to replace it with the model of a rational actor defined in terms of behaviour, performance, choice.[19] In spite of incalculable expenditures of ink, blood, sweat, and saliva, the millenial and century-long campaigns unleashed by these efforts to modernize man have not been remotely as successful as those to modernize man's habitat. In particular, the question whether the *structure* of the relationship between the subject and its legal and political institution[20] is open to replacement by a fundamentally different kind of ordering, an ordering in which subjectivity, law, or perhaps history, are no longer participating, is still an open question. The spreading of fundamentalism, the world-wide emergence of new nationalisms, the invariably increasing liturgical role played by the mass media and, last but not least, the expo-

15 Cf. Pierre Legendre, *Leçons III, Dieu au miroir: Etude sur l'institution des images* (Paris: Fayard, 1997), 191ff.

16 Cf. Pierre Legendre, *Leçons IV, Les Enfants du Texte: Etude sur la fonction parentale des Etats* (Paris: Fayard, 1992), 237ff; *Leçons VII, Le Désir politique de Dieu: Etude sur les montages de l'Etat et du droit* (Paris: Fayard, 1988), 105ff.

17 Pierre Legendre, "La France et Bartole", in: *Bartolo di Sassoferrato: Studi e documenti*, vol. 1, Milan (Giuffrè) 1961, also reprinted in: Pierre Legendre: *Ecrits juridiques du Moyen Age occidental* (London (Variorum Reprints), 1988); 133–172 (154).

18 Cf. Pierre Legendre, *Leçons I, La 901e Conclusion: Etude sur le théâtre de la Raison* (Paris: Fayard, 1998).

19 Cf. Pierre Legendre, *Leçons II, L'Empire de la Vérité: Introduction aux Espaces Dogmatiques Industriels*, Paris (Fayard) 1983.

20 Legendre's use of the term "institution" refers to both the transitive action of institutionalising – cf. the greek/roman formula *vitam instituere* – and its solidified product, or substrate. Different from the social historian Norbert Elias, whose study on the civilisation of customs particularly stresses the transitive sense, Legendre's point is about the inseparable or recto/verso relation of both senses.

nential increase of private litigation, seem to indicate the way in which subjectivity reacts to, or rather takes compensation for, what Legendre describes as its Western abandon. This abandon Legendre finds scheduled in the West's incurable addiction to ever systematize, increase, re-organize, and tighten its grasp on itself, in its tendency to systematically overstate and transfigure the basic and modest tasks of its self-reproduction as a culture, in its inability to complete its tasks as an institutionalised humanity otherwise than by linking them to some all-justifying hyperbolical finality of variable content.

The individual according to Legendre is overwhelmingly not the autonomous, original, self-willed, and self-centered actor certain social theorists still today believe it is. The classic individualistic virtues of autonomy, discipline, self-realisation, self-reflexivity are chosen by the individual because they are desirable in the eyes of the other in cleaning that stain off the individual's *toga candida* and re-establishing its unconditional self-mastery and self-responsibility. In reality, the only appropriate politico-social question under these conditions can be that of the *addressee* of this founding alienation.[21] Legendre's answer is: Western Christianism. Western Christianism is "more than simply a religion" at the same time as it is "more than simply a power structure". Which leads Legendre to take issue with certain over-statements of the dynamics of secularisation and institutional innovation: Are subjectivity, desire, and transference[22] really the sort of thing that, at some point, can become extinguished? But if secularisation has changed neither subjective alienation, nor subjectivity-generating transference, what is it? *La fabrique de l'homme occidental*, Legendre's and Caillat's film from 1998, shows a series of merely, innocently, "life-related" scenes: a dancing class at work, the sequence of events involved in a heart-transplantation, the staging of the military manoeuvre for the 14 of July, a big trans-national company's staff-seminar. It is rigourously impossible for the viewer to escape the subjective, expressive, ritualistic dimension which, although radically unbeknownst to the participants, is present in each and every one of their gestures. What is so melancholic about these scenes is the fact that these people have no

[21] Pierre Legendre, *Sur la question dogmatique en Occident: aspect théoriques* (Paris: Fayard, 1999), 8ff.

[22] Although Legendre names the addressee of subjective alienation, that in the name of which a discourse is uttered, a *Reference*, the freudian term of a transference, whose meaning was, as one knows, first reserved to a condition of the psychoanalytical cure, is present in his general lay-out of subjectivity. On the historical and political potential of the notion of transference, cf. also the volume: *Übertragung und Gesetz, Gründungsmythen, Kriegstheater, und Unterwerfungstechniken von Institutionen*, ed. by Armin Adam and Martin Stingelin (Berlin: Akademie-Verlag, 1995).

access to the meaning of that which actually – and visibly – happens, both to them and through them. What is taking place in the very event in which they participate, radically escapes from their horizon.

VI

Agamben's philosophical thought starts, as it were, in the moment when the distinction of problem and solution – i.e. their unity – has become questionable. He refuses to address problem-solving arrangements, whether epistemologically or exhomologically, whether in the hope of "solutions" or with the purpose of merely registering, recognizing and ratifying. His preoccupation is with ultimate remainders or residues. Being part of historical time and its law, these are at the same time symptoms and messengers of the impending end of all things, the coming of the Messiah. Agamben's outlook is, thus, *eschatological*.[23] Where he refers to social problem-solving procedures, as e.g. in *Homo Sacer*, his interest in the exploration of the remainder or waste *left behind* by these procedures – provided this remainder or waste has, or had initially, human form (i.e., literally, "if it is a man" [Primo Levi]). The processes that generate that remainder are observed in discourse (cf. the rich historical material assembled in the first parts of the book), as well as in action (cf. the recent or current references in its later part, among which the *Muselmann*, the site of *bare life* in the nazi concentration camp, occupies a special place). The ultimate object of Agamben's account of the politico-legal compound is, thus, neither the untraceable phantom called "human being", nor its oblivion or expulsion (*Auslagerung*, to take up Luhmann's term). Agamben focusses, not on the sphere of social relationships or legal artefacts, but on the existence or *Dasein* which they condition, their empirical remainders and possible successors. The human waste stamped out by the machine of politico-legal rationality are *themselves*, in their living *Dasein*, the secret and never formulated, never "owned-up", living social contract which the legal paperwork social contracts listed in the textbooks of doctrinal history try to cover up. According to Agamben's radical type of empiricism, then, the point at which the parallels of subject and sovereign converge, at which the diverging rationalities in charge of conduct and of meaning intersect,

[23] Giorgio Agamben, "The Messiah and the Sovereign: The Problem of Law in Walter Benjamin", in: *Potentialities: Collected Essays in Philosophy*, ed., tr. and with an introd. by Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1999), 160–174 (174). For Agamben's recent distinction between messianic time and eschatological (or apocalyptic) time – which he rejects – cf. *Il tempo che resta: Un commento alla Lettera ei Romani* (Torino: Bollati Boringhieri, 2000), 63ff.

is located neither in a new system of social action (communication), nor in a system of text/meaning/interpretation. It is located in the experience of historically manufactured versions, side-versions, diminutions, of human life.[24]

Reading political history backwards from deeds and sufferings into the living substrate that proves capable of both and also of language and silence, the thing that Agamben refuses to do – following Foucault in that respect – means to divide one's world into a self-identical reference functioning as a universal attributee, and the events affecting it on its journey through time. Consistently, Agamben rejects the common procedure of applying to some pre-existing state or "rule" of a fairly non-problematic, stable description, the epic questions: "what happened *to*?", and: "what happened *with*?". Political history is not seen as the list of adventures experienced by a transhistorically pre-ordained substance, as the narrative of conquest, crisis, loss, ownership (or other accidents) of power throughout history. It might indeed be said, in looking at Agamben, and in looking from Agamben back at Foucault, that political history is emphatically not the history of power. Instead, it is the history of a *perpetual seizure of power*, of an *immerwährende Machtergreifung*, a permanent being – for power, the ever-performing, ever-campaigning esse-in-actu of politics.[25] A direct implication of the melting down process that leads from solidified power – open only to ownership and transfer – to a realm of pure unstructurable agonistics, is the collapse of a whole range of liberal legal distinctions. Foucault's techniques of inducing this collapse, his conception of history as a laboratory for the indefinite intensification of power's potentialities, is entirely received by Agamben. Yet, Agamben ultimately opposes Foucault's not only anti-humanist but also *aneschatological* focus on historical process *per se*, and returns to its embodiments, human and no-longer-human. The argument of *Homo Sacer*[26] consists indeed in showing that the history of power has since its beginnings implied, on the one hand, the drawing of a line that separates political life (*bios*) from its politically non-descript, politics-subtracted remainder or

[24] Cf., in addition to the last pages of *Homo Sacer*: Giorgio Agamben, *Ce qui reste d'Auschwitz: L'archive et le témoin (Homo Sacer III)*, quoted after the French edition, tr. Pierre Alferi (Paris: Bibliothèque Rivages, 1999). Engl. edition: *Remnants of Auschwitz*, tr. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 2000). For a different, classically foucaldian account of man as an artifact, cf. Walter Seitter, *Menschenfassungen: Studien zur Erkenntnispolitikwissenschaft* (Munich: Boer, 1985).

[25] For an impressive historical account of political power as uncapitalisable quantity, cf. Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, tr. Maurizia Boscagli, (Minneapolis: University of Minnesota Press, 1999).

[26] Giorgio Agamben, *Homo Sacer*, *op. cit*.

bare life (*zoe*), and on the other hand, the much less obvious but also more decisive notion that it is precisely this line of demarcation which will be used as a positive marker, that functions as a triggering or *enabling device for its own transgression*, an indicator of an always colonisable, indefinitely politicisable territory. It is this last point that, far from inducing it into the standstill of a paradox, gives its spin, its dynamic, to the legal/sovereign institution. The space declared improper for politics is singled out and indicated as the space of politics properly speaking. Political history presents itself in two parallel strings, as a history of actual declarations *and* one of actual performances. Bare life, *declared* outside, is by the same token factually singled out as the object, the inside, the territory *par excellence* of political action.

Excursus on Zur Kritik der Gewalt

When confronted with a paradoxical situation such as that of *zoe* or bare life as the improper *and thereby proper* object of power, it is the limit or boundary circumscribing *bare life* that must be given close inspection. For instance, in Walter Benjamin's conception of a mere, or natural life, what we are dealing with is the life taken from the criminal in capital punishment.[27] Here, the limit is both near and clear. To the law, all life is "bare" life, simply because life's single legal attribute lies, according to Benjamin, in life's legal "takeability". Only once that character of life as eminently takeable is generally assumed and the binary code life/death generally established, the radically impoverishing effects of that identification ensue straight away, and bare life "lays bare" life as such by reducing its indefinite potentialities to one yes/no bifurcation. Benjamin is thus, in fact, talking about a particular form of the rule of law and of legalisation, *Verrechtlichung*. There are earlier references galore to that radical reduction of life to a binary code, ranging from Hamlet's most famous line to Kant's "your purse or your life". In Benjamin, these texts are witnesses to the legal mythologization of life. The law erects its mythological empire by forcing the overwhelming indigence of its unique *distinguo* onto life at large. Yet, for Benjamin, legal violence is only one, if indeed the most objectionable, form of violence. His counter-model is, as one knows, *pure divine violence*. Different from legal violence, pure divine violence proceeds by pouncing on its victim, dealing a deadly strike without threat

[27] "Blood is the symbol of mere life", cf. Walter Benjamin, "Zur Kritik der Gewalt", in id., *Gesammelte Schriften*, vol. II/1, 179–203, tr. as "Critique of Violence" by Edmund Jephcott, in: Walter Benjamin, *Selected Writings*, Vol. 1, edited by Marcus Bullock and Michael W. Jennings (Cambridge, MA: The Belknap Press of Harvard UP, 1996), 236–252 (250).

or warning, then immediately, in the very moment, subtracting itself. Why does Benjamin call it "pure"? Because it exhausts itself in its expenditure. Divine violence is not a means to an end, especially not to the end of establishing a non-violent order. Allowing no adaptive inference to be drawn, it rules out "legal learning" – the use of another's adversity as school of one's own wisdom. The impure *legal* species of violence imposes itself, on the contrary, by reference to learning, i.e. to an adaptive, ends and means related calculus. However fragile, the opposition divine violence/legal violence is even more decisive, in the economy of Benjamin's argument, than that between life and diminished life. Legal violence, far from hurling itself on its victim for life's sake in the way pure divine violence does, uses the degraded life of the culprit for its own ends, as a mere occasion to "teach a lesson" and thereby to increase its own credibility, to replenish its own ever-threatened stability. Unfolding within the characteristically legal mix of threat and prevention, legal violence tries to squeeze a maximum of general behavioural effect out of a minimum of actual intervention, a maximum of non-violence out of a minimum of violence (which, however, is compensated by a maximum of publicity, as "Justice must be seen to be done"). Its *raison d'être* lies in the securing of as much discouragement of undesired conduct as possible for the price of as little really exerted violence as possible. This use is what Benjamin calls "impure". The successful management (reduction) of deviance with legal means founds a *communauté inavouable* of legal subjects, defined as ever-terrorised incumbents of a indefinitely precarious and revocable mere survival.

Benjamin, then, refers to bare life as a limit-concept; in a famously recondite passage – even if the full amount of its reconditeness is not, as we shall see, to be blamed on the author alone – he draws an opposition between, on the one hand, legal violence, associated to the triangle of "bare life", "blood", and "expiation", and on the other hand "divine violence", i.e. violence pure, law-free, "actual", unjustified (but also, and first of all, in no need for a justification). This second type of violence, *annihilatio ex nihilo*, is idealised by Benjamin in the most unequivocal terms, indeed, were the reference to advocating not so utterly compromised by its legal origin, one would conclude that Benjamin *advocates* divine violence. Clearly guided by the wish to oppose the traditionally dominant image of God as an only occasionally, only accidentally violent supreme judge and law-giver, Benjamin toys with a God understood as violence embodied, nothing more or else than pure unmediated violence itself. The decisive point for Benjamin, in 1921, clearly was the idea of constructing a supreme person, a divinity with no link to Christian metaphysics, called

God, yet unrelated to philosophy, never ever judging, always already acting, creating, and also caringly but unscrupulously annihilating, in order to continue/complete/exalt his own creation.[28]

A decade later, Carl Schmitt, familiar with some of Benjamin's work, presented, under the name of a *thought of concrete order*, a doctrine of legal-antilegal compromise, dealing ultimately with the question of how to rationalise/legalise the use of violence. Benjamin did not think of any "use" of violence which for him equalled abuse.[29] For him, what is wrong about legal violence is not the violent but the legal element, not violence but its compromise with the demonic forces of the law. Pure violence is indeed defined by the absence of either one of the founding components underlying what might be understood as the norm's standard relationship to the legal subject: "Drohung" (pressure, in the sense of: threat) and "Sühne" (a notion of old Germanic law, whose semantic span hovers between penitence, enforcement, atonement, and expiation). The notion of a bare life[30] appears on the last pages of Benjamin's youthful article, in two contexts – in its relationship to the axiom of the "holiness" of bare/mere life – which Benjamin radically opposes,[31] but also a few pages earlier, where bare/mere life is posited, conspicuously anticipating Foucault's developments on the subject, as a category that is necessarily involved in the logic of the blood-shedding necessarily involved – this is Benjamin's central thesis – in legal violence.

It is in this second context that we find the most difficult concept of the whole piece: "Entsühnung". An *Entsühnung* puts a stop to a *Sühne*. This, however, might as well be said of a *Sühnung* too; the payment of a debt, or the atonement for a deed, are *Sühnung* insofar as they compensate for the deed or debt, and thus either exemplify or complete one's *Sühne*. They are, on the contrary, *Entsühnung* in that they unbind the subject from his bond or duty, *release* it from its *Sühne*. One is the obverse

[28] "Fördern" (or "fördernd einwirken"), i.e. "fostering", is the term Goethe used when referring to sovereign – and particularly: his own personal – attention and intervention in whatever activity, as it might be added with respect to Benjamin's personal *Goethekult*. Indeed, pure divine violence is interpreted by Benjamin as form of fostering – fostering of "gifted", as opposed to "mere" – life.

[29] On the mythical dimension of legally ordered violence, cf. Werner Hamacher, "Affortative, Strike", *13 Cardozo Law Review* (1991), 1133–1157; also, Alexander García Düttmann, "Die Gewalt der Zerstörung", in *Gewalt und Gerechtigkeit*, ed. A. Haverkamp (Frankfurt am Main: Suhrkamp, 1994).

[30] Although Edmund Jephcott (cf. note 26) translates Benjamin's "blosses Leben" as "mere (rather than "bare") life".

[31] "Zur Kritk der Gewalt" *op. cit*., 201/2; Giorgio Agamben consistently adopts Benjamin's stance against life's "holiness".

of the other. Benjamin's own responsibility for this ambivalence goes as far as that, but the problem of his account of bare life, or rather of its obscurity, starts only here. In the last twelve lines of the paragraph beginning p. 199 of the text of the *Gesamtausgabe*, in the middle of a passage of unusual theoretical complication and stylistic intransigence, Benjamin has again recourse to another uncommon word, "Auslösung", which, through its nefarious proximity to "Auflösung", has induced many readers, and even more translators, into a supposedly "easier reading".[32] Unsurprisingly, this easier reading ends up by adding to an article which is certainly immensely complicated and charged with an indeterminate range of political implications, but in any case rigourously coherent, the supplementary character of enigmatic incoherence. "Auslösung" is a very rare word, perhaps in Benjamin's text an improvised noun, made up from the much more common verb "auslösen", one of the meanings of which is to trigger. "Auflösung", "dissolution", on the other hand, is not only a frequent and well-known word, it also fits only too well into the framework of messianism, at least according to its more modest or superficial aspects.

Let me summarize: Benjamin deals with what triggers law's violence. He is understood as dealing with what *dissolves* law's violence. In the correct translation, then law's violence, triggered (not: "dissolved") by the Verschuldung (guilt/wrong) embedded in "bare/mere natural life", punishes and thereby delivers (*sühnt* plus *entsühnt*) the subject of bare/mere natural life. But what exactly does it deliver it from? Benjamin's answer to this question is the most shattering and decisive point of the article. For what capital punishment "entsühnt"/purifies its victim from, is not, we learn, the victim's own guilt, but law itself. By bloodily ending the "innocent and unlucky"[33] culprit's life, law has arrived at the limit of its own potential – the point of its own breakdown. The power ("die Herrschaft") which the law exerts over the living fails to extend beyond bare life; all the law can do is determine the guilt and take life accordingly, but whenever it does so it acts not in the space between the guilty and his guilt, but uses both in order to pose and not solve, but dissolve – here the term would be correct – its own inherent problems. Law collapses in the moment in which its violence is acted out, in its twofold act in which life is, firstly, reduced to "takeable" or in Benjamin's use of the word: "bare" life, and then, secondly, taken or more exactly broken (cf. the importance of bloodshed within the history of legal killing). The christological overtones, more exactly the reminscences of Paul's messianic christology, are clear

32 Including Jephcott, cf. p. 250: "the dissolution of legal violence".

33 *Loc. cit*. (tr. modified).

and unambiguous.[34] Bare life for Benjamin, as half a century later "blood" for Foucault, is directly, positively, correlated to legal violence in particular and thus to the legal order in general. Bare life is both that which provokes the law into action, conjures it up, and the stumbling block at which the law and its mythical power reach the confines of their power. For Benjamin in 1921, the distinction between bare life and life at large ("alles Leben", "das Lebendige") is simple and clear-cut.

VII

Benjamin's rejection of law, rather than of violence, his assessment of law as mythical vengeance and of legal violence as mythical violence are not without relation to the myth of Pandora's box. To the box's fateful opening corresponds the historical substitution of legal, purpose-rational violence for divine, pure violence – following the mythical time sequence that leads from an unspoilt originary state to a forever spoiling event. Yet the capital forerunner of Benjamin's "bare life" pertains to history: it is *vitae necisque potestas*, in other words the institution of the *paterfamilias* unconditional and irresponsible right to draw the line of life and death for everyone in his house.[35] Roman culture, famously, cherished the idea that life, as any other object had, in order to "count" at all, to be related to a right someone has over it. The Roman institutions are proof, in this respect, that law has learned to deal with *negative quantities* well ahead of Kant's well-known "introducing" them into philosophy. The two statements whose dramatic intersection forms the topic of Benjamin's article – the decline of a violence "bastardized with the law",[36] and the degradation of a life subject not to actual violence as extreme as it might be, but to a legally authorized economy of ever merely virtual, hence permanent violence, are indeed prefigured in the Roman institution. In Benjamin's terms, a life under such a right is undistinguishable from mere life, *bloßes Leben*. If, different from Benjamin's, Agamben's understanding of the term *bare life* goes far beyond its classical sources, this is owing to the fact that it relates, not to life's devaluation by the fact of potential death being inscribed on

[34] Cf. Giorgio Agamben's comments on Paul's epistles as well as on Walter Benjamin's close – and sympathetically messianic – reading of them, in his forthcoming: *Il tempo che resta*, note 23.

[35] Cf. Yan Thomas, "Vitae necisque potestas: Le père, la cité, la mort", in: *Du châtiment dans la cité: Supplices corporels et peine de mort dans le Monde antique* (Rome: Presses de l'Ecole Française de Rome, 1984).

[36] Walter Benjamin, "Zur Kritik der Gewalt", *op. cit*., 203 (German edition), 252 (English edition).

life's permanent horizon, not to the anticipatory, deterrent effect of possible capital punishment, but to Dasein *simpliciter*. Benjamin deals with the total, omnipresent impoverishment of life brought about by the mere presence of the legal line death/(bare) life. For Agamben, that line between life and death has blurred or opened up to a voluminous fold, capable of sheltering, not only entire populations, but also a whole rationality of governance, a blueprint for reduced life, both human and below the level of actual humanity. This is why the life of the *Muselmann* of the concentration camp is no longer threatened life. "Threat" is no longer the word for his condition. In the *Muselmann*'s case, the line has been crossed for good. The *Muselmann* is the living document of the possibility of instituting, as a final, yet permanent state, a *stratum* of de-humanised, de-subjectivised existence.[37]

Agamben's critique of sovereignty and law, his appraisal of the *Muselmann*, is easier understood if replaced in immediate relation to his take on language and infancy. Note that in latin *infans*, meaning "child", is directly related to *fans* and *fari*, "speaking", and "to speak", in such a way that a child, in latin, is referred to as a *person deprived of speech.* Infancy is Agamben's first title for the problem of experience.[38] It is the fact that man has not always been speaking, that he has first been an irresponsible being, an infant, that he still is one, which is constitutive of experience. Like Benjamin on violence, Agamben on experience displays an essential anti-legal thrust. In fact, there is, beyond both Benjamin and Agamben, a definite tradition in 20th century philosophy, linking Foucault (whose *anti-juridisme* clearly determines his approach to history) and Althusser (whose appreciation of the legal world-view as "crippled" is a direct reference to Spinoza) to Antonin Artaud and Gilles Deleuze's passionate rejections of judging – which open up a different range of criticism altogether. Deleuze: "If it is so disgusting to judge, this is not because everything is worth the same but on the contrary because anything of any worth at all can be made or distinguished only by defying judgment. [. . .] Rather be a road-sweeper than a judge."[39] Agamben's own anti-legalism is much less frontal. The anti-legal charge is fully inserted in his argument on language and exper-

[37] *Ce qui reste d'Auschwitz*: *op. cit*., 72f., with reference to Primo Levi and Robert Antelme.

[38] In: Giorgio Agamben, *Infancy and History: The Destruction of Experience and the Origins of History*, tr. Liz Heron, (London: Verso, 1993).

[39] Cf. for the first part, Gilles Deleuze, "Pour en finir avec le jugement", *Critique et Clinique* (Paris: Minuit, 1993) 158–169 (169), "To have done with judgment", *Essays: Critical and Clinical* (Minneapolis: University of Minnesota Press, 1997) 126–135 (135), tr. modified; and for the last sentence, Gilles Deleuze and Claire Parnet, *Dialogues* (New York: Columbia University Press, 1987), 76.

ience. His direct target is the legal propensity to overstate responsibility. Legal postulates like freedom of speech, quite independently from the question whether it or, on the contrary, its inexistence should be called "a good thing",[40] suppose an individual in full control of a language that is understood as a mere instrument.

Agamben passionately takes issue with this traditionally uncontrovertible point – drawing, specifically, on Emile Benveniste's teaching about the split that constitutes man's relationship to language, between language and speech (langue/parole), between semantic and semiotic.[41] Not only is there no such thing as a control the individual would exert on its linguistic means, but if there was, man could have no access to language. Having always inhabited it, he would have language, quite in the same way in which the cricket has its song, but not silence.[42] The content of the philosophical opposition of man and animal is, however, political, and so is, in Agamben's view, man's ever-assumed fitness to embody the transcendentally appropriate subject of universal responsibility. This political aspect of the standard conception of linguistic/legal leads Agamben to communication theory, more exactly to a critical appreciation of the *ethical* branch of the theory of communication. How can communication in itself be interpreted as an *ethical* postulate? Communicational ethics teaches that the fact of not participating in communication involves self-contradiction. As the ethicists point out, the refusal to communicate is self-contradictory as it requires one to communicate at least as much as is necessary in order to transmit this very refusal. In his assessment, Agamben, deaf to the argument's logical delight, draws attention, once again, to the de-subjectivated human life in the concentration camp, and briefly suggests the use of a device well-known to every reader of science fiction: a time-machine, which would enable the currently leading representative of communicational ethics, Professor Karl Otto Apel, to test the well-foundedness of his theory by visiting an NS concentration camp and questioning a *Muselmann*. Without the shadow of a doubt the questioned *Muselmann* will remain silent – and once again be excluded from humanity, this time in the name of communicational ethics. The *Muselmann* is the "radical refutation of any refutation".[43] He is in other words the point at which claims

[40] Cf. Stanley Fish, *There Is No Such Thing as Free Speech … and it's a Good Thing Too* (Oxford: Oxford University Press, 1994).

[41] Émile Benveniste, *Problèmes de linguistique générale II* (Paris: Gallimard, 1974), 65 (*Problems in General Linguistics*, tr. Mary Elisabeth Meek (Coral Gables, FL: University of Miami Press, 1971); Giorgio Agamben, *Ce qui reste d'Auschwitz: L'archive et le témoin*, *op. cit*., 151.

[42] Giorgio Agamben, *Infancy and History: The Destruction of Experience and the Origins of History*, *op. cit*., 66ff.

[43] Giorgio Agamben, *Ce qui reste d'Auschwitz: L'archive et le témoin*, *op. cit*., 79ff.

and rights, titles and entitlements, indeed any normative reference, any *Geltungsanspruch* whatsoever, be it legal or ethical, founded on positivity or charity or whatever principle, *stops making sense*. The chain of law, the famous *vinculum iuris*, cannot subject the unbound, abandoned life of the *Muselmann*. This ultimate form of *life* – and not: *another law* – shows law's integral, inherent absurdity, and delineates the fragile conditions on which rests, not this or that law or legal system in particular, but the "in the name of the law" as such.[44]

VIII

Is it worth noticing at this point that neither *Homo Sacer* nor *Remnants of Auschwitz* are yet available in German. One possible access to what is perhaps Agamben's deepest and most personal, but at the same time also least personal and most philosophical concern with the law, is Alexandre Kojève's suggestion that philosophy is a discourse which "can speak of everything, on the condition that it also speak of the fact that it does so".[45] The law, in comparison, remains perfectly silent: it is, quite literally, a discourse that "can speak of everything, on the condition that it remain silent on the fact that it does so".[46] A perfect, indeed a lawful silence. The correctness, the lawfulness of law's silence with respect to its own discourse, past a self-imposed deadline, has even an authentifying, official title: the concept of *res iudicata*. By imposing a line beyond which, more precisely a deadline after which, law subtracts itself from further exposure, the legal order preserves its judgements from any interference

[44] Agamben's key source on life in the camps are Primo Levi's reports. However, it should be pointed out that reading Levi and reading Agamben are exercises of an entirely different nature. Specifically, the *Muselmann* of the NS concentration camp, the most extreme occurrence of bare life in Agamben's work, a work dedicated to embodiments of bare life, appears not only as the live testimony of inclusive exclusion, but appears simultaneously in a different, uncertain light, as the bearer of a messianic charge. In Levi, a professional chemist, who provided Agamben with the decisive information on witnessing and testimony, no trace of messianism can be found.

[45] Quoted in: Giorgio Agamben, "Philosophie et Linguistique", *Annuaire philosophique* (Paris: Seuil, 1990) 97–116. (Tr. in Giorgio Agamben, *Potentialities: Collected Essays in Philosophy*, ed., tr., and introd. by Daniel Heller-Roazen, (Stanford: Stanford University Press, 1999) 62–76). For further comments on Kojève, cf. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, *op. cit*., 60f.

[46] Quoted in: Giorgio Agamben, "Philosophie et Linguistique", *Annuaire philosophique* (Paris: Seuil, 1990) 97–116. (Tr. in Giorgio Agamben, *ibid*., 62–76). For further comments on Kojève, cf. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, *op. cit*., 60f.

by their post-history. The law stops here;[47] any further argument comes too late. Correctly identified by Agamben as the (narrow) limit of the legal order's claim to Justice,[48] this line can scarcely be overestimated in its legal order structuring implications. It provides in particular the condition of a legal order's modern constitution as an autopoietic system, an ongoing decision-making routine. If it is correct that "there are decisions where something is undecidable (and not only: undecided!)",[49] if, in other words there is no other means of distinguishing the before judgement from the after judgement than through time, then the organisation of legal decision-making can be mastered only by distinguishing between present and past, between making decisions and decisions made. Which means that autopoiesis is possible only as chronopoiesis, that the self-enabling device of the legal system resides in the time-related and judgement protective disabling device of *res iudicata*.

Unsurprisingly, there is no trace in Agamben of a comparably schematic, comparably "thing-dimensional" (Luhmann) recourse to time as a resource. Yet, Agamben's concern focusses on time too, for it deals with a remainder, with the ex-human, the less than human, the human deprived of humanity. This is, however, not owing to moral pity, addictive generosity, political correctness, or some finely tuned mix of all three, as it is often the case with "humanism", but on the contrary, – as it is true of Benjamin, too – to a philosophical calculus of the uttermost technicality. The calculus addresses the question of *power*. There are two main contexts in which Agamben deals with this question. On the one hand, as particularly in *Homo Sacer*, power, while irredeemably enslaved to its congenital paradoxes, nevertheless remains accessible through the classic disciplines of historico-political inquiry, from Festus to Kantorowicz and to Schmitt. The opposite is true of the second context, which is dedicated to Aristotle's thought on power and potentiality. The focus here is less on Aristotle's *Politics* and his *Ethics* than on the *Metaphysics* and also the *Treatise on the Soul*. Agamben is keen to show, not at all the dependence of modern politics on ancient politics (a dependence which he denies in certain contexts, and regrets in others), but the extent to

47 Formulated *en hommage* to Carl Schmitt's comment on the theme of an end of law: "Das Staatsrecht hört hier auf" ("Here public law touches its limit"). Cf. Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, 2nd edition (Berlin: Duncker und Humblot, 1934). *Political Theology: Four Chapters on the Doctrine of Sovereignty*, tr. George Schwab (Cambridge, MA: MIT Press, 1985).

48 Giorgio Agamben, *Ce qui reste d'Auschwitz: L'archive et le témoin*, *op. cit*., 19 (ch. I.4).

49 Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1993), 308. Luhman goes on: "Otherwise, the decision, being already decided, would only need to be discovered".

which modern politics and modern political thought remain prisoner to the pitfalls and "bad infinities" confronted head on by the doctrine of *actus* and *potentia*. The problem of contemporary politics, Agamben says in his critical discussion of Antonio Negri's book on constituent power, is the problem of finding a way of thinking the relation between potentiality and actuality that would release political theory from the aporias of sovereignty and the sovereign ban, and lead "beyond the steps that have been made in this direction by Spinoza, Schelling, Nietzsche, and Heidegger".[50] One of the most disquieting aspects of Agamben's work is the continuous oscillation, the spectral and never-ending dialogue it stages between its two chief sources, Heidegger and Benjamin. Each and every argument and figure of the tradition thus appears as double faced, and it is impossible to conflate both faces, but no less impossible to immobilize them and define their relationship. The victims of bio-political uses of bare human life referred to in *Homo Sacer* appear on the heideggerian screen of an analysis of *Dasein*. The uncertain creatures, half-beings, fakes, tricksters, infants, which Agamben refers to in his *Coming Community* are, on the contrary, the vanguard of Messianism. Or *is* Agamben's *homo sacer* his *homo Walser*?[51] Underlying both branches of the inquiry, there is, in any case, the effort to push the concept of power beyond the common representation of power, an excessively unambiguous, tug-of-war related representation of power. It is in this context that Agamben encounters the alternative power-model unfolded in Aristotle's *Metaphysics*.[52] Aristotle, to say the truth, looks definitely not the same here as in other portraits. Agamben's version of Aristotle is no longer the a-personal arch-master of an outlived mode of thought, the undead founder of an abolished, if never surpassed philosophical empire, or the proverbial subject of the shortest of biographies.[53] This tradition is turned upside down, and the image of Aristotle, the cardinal ancestor, *incomparable father*,[54] *philosophus noster*, and for millenia object of consensus of the professionals of thought, is replaced with the image of a stranger, almost a barbarian, who however, when asked the right questions, surprises with highly original and counter-intuite verdicts. For Agamben, the decisive question is: What kind of an experience is power as "I can"? The author of the *Metaphysics*

50 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, *op. cit*., 44.

51 Cf. on Robert Walser, Giorgio Agamben, *The Coming Community*, tr. by Michael Hardt (Minneapolis: Minnesota University Press, 1993) 30, 38, 58f.

52 *Homo Sacer*, *op. cit*., 44–48; *The Coming Community*, *op. cit*., 35–37; *Potentialities: Collected Essays in Philosophy*, *op. cit*., passim.

53 I am of course referring to Heidegger's well-known appraisal of the biographic *genre*, cast in the words: "Aristotle was born, worked, and died".

54 On the psychoanalytical notion of the incomparable father, cf. Guillermo Batista's study, *L'incomparable père du Président Wilson* (Paris: Anthropos, 1999).

responds in a way that proves his magisterial rank beyond conceivable doubt. It is only the form of his mastery that surprises, looking at traditional views. Reputedly the philosopher for whom the questions of initiation, spirituality, care of the self, etc., have been the least important among all philosopers of antiquity,[55] Aristotle now appears precisely as a master of initiatory powers, as the depository of an almost secretive access to the question of the meaning of power – while leaving to one side the entire history of power defined as an objective capital, and the related questions of how to acquire, invest, and keep it. Agamben, like a second Carlos Castaneda, transforms his interviewee, Aristotle, into a new, occidental version of the Indian medicine man, Don Juan, extorting from him the most precious and hidden knowledge on how to use the philosophical pharmacopy of power, life, and thought.[56]

IX

Agamben uses Aristotle to expose and invalidate the conventional or – taking up Deleuze and Guattari's suggestion here – "major" use and understanding of "power" as capital. Power as capital has the form "I have" (instead of "I can"). It asks, as it is the case of any capital whatsoever, the question of its accounts, sureties, and benefits. At the base of this economy of capital-power, one identifies a pretty straightforward axiom, something like: "You cannot have enough of it!" – "You simply cannot have enough shoes", according to an advertising campaign of an Austrian shoemaker (the firm has closed down since). In such conditions, the only question left is how to keep, and if possible increase, your stock. Let us call it the Imelda Marcos complex: no matter whether we are dealing with power or with power-representing footware (or alternatively: no matter whether we are dealing with shoes or with shoe-representing power), the point is that they function as denominators of a merely presumptive desire. There is an object whose desirability is presumed by every participant in the game. On that presumption, or on that complex, then, everyone strives to have as many shoes as they can. However, as soon as this becomes generalised, as soon as everyone presumes it, as soon as the "I can" of power has been transsubstantiated into an "I have" and thus becomes a capital, an untreatable inconsistency becomes rampant. Everyone agrees now on what is desirable; this however leads – strangely enough – only to the effect that,

[55] Michel Foucault, "Subjectivité et Vérité (Cours du 6 janvier 1982)", in *Cités: Philosophie, Politique, Histoire* 2 (2000), 143–185, (161f.).

[56] This is the common theme of Agamben's pieces translated and collected in the volume *Potentialities: Collected Essays in Philosophy*, *op. cit*.

as an outcome of all this harmony, what is reached is but strife, namely the deadly duel of ambition and jealousy. "My brother Charles and I, we want the same thing!", as the French King François once wittily remarked about his second cousin, the Emperor Charles the Fifth of Spain, and himself, referring to their concomitant efforts for the possession of that "thing" (which of course was no other than the city of Milan, over which they fought a bloody war).[57]

Once we are dealing with presumptive or idealised desire, agreement takes the characteristics of a sweet poison, tasting like peace but provoking either conflict or, at best, the legal *opera buffa* of possession and ownership. A great deal worse, however, than this direct effect is the retro-effect on concepts and discourse. By an action in every point comparable to the one that the virus ILOVEYOU exerts on a hard disc, presumptive and idealised desire wipes clean entire theories, putting an imagery of integrity in their place in a matter of moments, imperceptibly, and without the users becoming aware of it for a long time, or even for good. Images of integrity occupying, parasitizing, paralyzing the territory of concepts: How can theory escape from, or prevent this predicament? By abstaining from having something – some view – to recommend, *per* Stanley Fish.[58] The question to be asked is about what theorists are really doing, whenever they are doing what so many of them never stop doing, namely "recommending" some view at the expense of some other view. The point is that, whatever the view submitted, and whoever it is submitted to, it is presented as a candidate for generalised adoption – which means: it is offered to the instance of presumptive unanimity, to the mythological author of idealised desire. One might say, in defense, that every recommendation favours a counter-recommendation. But apart from the agonistic thrill unleashed by this modest dramaturgy one thing is clear: somewhere in the field, someone still wields what Antonin Artaud referred to as the "Judgement of God". Currently we would of course rather call it the "Judgement of the Market", but the essential point remains unchanged: somewhere in the field hovers the amazing, indeed admirable, capacity to decide, by sovereign verdict (the silent verdict made up of aggregate numbers does the job), on the question of what is, and what is not, desirable – for everyone!

The more interesting question to ask, however, is that of techniques, for theory, to escape or prevent the predicament of getting infected by idealised desire altogether. One obvious technique here is the choice of unappealing, presumptively undesirable concepts. My examples are

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[57] The story is referred to in Jacques Lacan, cf. "Kant avec Sade", *Ecrits* (Paris: Seuil, 1966) 765–790 (784).

[58] Cf. Stanley Fish, *There Is No Such Thing as Free Speech … and it's a Good Thing Too*, *op. cit*., 238.

"closure" in Luhmann, and "dogma" in Legendre. Some of the non popularity of autopoiesis can indeed be ascribed to the central status it bestows upon the notion of *closure*. The idea that contemporary society harbours discrete units, with boundaries between them, contains an unbearable insult to the ideals of integrity and openness, and thus unfailingly provokes the disapproval of the theorist who has "something to recommend". Now the notion of closure is "deep-level": plainly unseparable from autopoietic thought, if not outright synonymous with the core gesture at work in it. On the other hand, autopoiesis comes complete with a nuanced conceptual background, in which "openness" has also its role to play, even if it is only an extremely subordinate role, which does not extend to the formation of systems. The irony is that this arrangement, and in particular Niklas Luhmann's willingness to popularize the opportunistic formula "operationally closed but cognitively open", has saved autopoiesis, at least to some extent, from outright ostracism. "On the one hand closed – on the other hand open": this sounds already friendlier, impenetrable but friendlier, almost like a view the presumptive author or judge of what is desirable could be pleased with, like something that could be integrated by an integrity. As it happens, the cognitive openness itself is, first of all, subject to autopoietic closure, and the notion of a differentiation between the inside and the outside of the system, as well as the rigid assertion of a system's incapacity to accomplish any operations outside of its boundary – including, of course, on the cognitive level – is among the basic notions of autopoiesis theory.[59]

Although proceeding on a level of immediacy and, as it were, politicisation incomparable to Luhmann's, Legendre's later theorizing is equally predicated on that recipe: the assertive reference, or claim, to an "undesirable" entity. In Legendre's case this is the notion of *dogma*. In an ideological context marked by the progressive melting down of its stock in basic shared certainties, worn down by the interminable rumination of still-fashionable claims to "post-modernism", it goes without saying that there is a nostalgic quest for common values. A notion such as *dogma* has a rather important function here. In the absence of anything else, there is at least the following residual certainty: Surely, no decent person, no matter what her further characteristics, would like to hear that she or he sticks to a "dogma" or behaves in a "dogmatic" way. It is this residual certainty that is subverted by Legendre's provocative move of putting the notion of a *dogma* right into the center of his account of subject and society. Here, briefly, is what Legendre tells his readers on account of *dogma*:

[59] Cf. Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1997), 120ff., 127f.

There is no more appropriate term to be used with respect to the way in which a society deals with its most difficult problems. More unsettling still, Legendre claims that the time of enlightened anti-dogmatism is now behind us, in the sense that nothing prevents "anti-dogmatism" from taking on all the vices of dogma, and even the virtues of a dogma, yes virtues, for it is precisely the notion of a dogma which, situated on the cross-road of aesthetic and religious, legal and moral bonds, represents social reality in a way that keeps it accessible to the study of subjectivity.[60]

X

Let me summarize: The traditional concept of power as a capital leads into the antinomies of integrity and desire, the unfortunate effects of which require theory itself to look for specific techniques in order to escape their paralyzing effects. The situation is more favourable, more interesting, if also incomparably more complicated, in Agamben's "minor" use of the power-concept. Here, "I can", marks a matter of experience, refers to the gesture of putting one's power onto the scale, not of a competition or a "measuring" with other powers, but of one's own relation and measuring of one's own power. All potential to be or to do something is, for Aristotle, always also potential not to be or not to do, without which potentiality would always already have passed into act and be indistinguishable from it.[61] Saying that power epitomises a personal relationship, equals in particular opening oneself up to "[t]hat which is, for each of us, perhaps the hardest and bitterest experience possible: the experience of potentiality".[62] That power, such an enviable thing to have, can be shattering or difficult in itself, is what becomes plausible if we look at the Aristotelian definition of being capable of doing something, namely: being capable of the incapacity of doing it. For Aristotle, "all power is powerlessness of the same and with respect to the same":[63] I can, thus, that which I cannot, and the "I can" refers ultimately to my capacity to acknowledge[64] this. Agamben chooses

[60] Pierre Legendre, *Sur la question dogmatique en Occident: aspect théoriques* (Paris: Fayard, 1999).

[61] Giorgio Agamben, "Pardes: The Writing of Potentiality", *Potentialities: Collected Essays in Philosophy*, *op. cit*., 205–219 (215).

[62] Id., "On Potentiality", in *Potentialities: Collected Essays in Philosophy*, *op. cit*., 177–184 (177f.), with reference to an utterance of the poet Anna Akhmatova.

[63] *Tou autou kai kata to auto pasa dynamis adynamia*, Aristotle, *Metaphysics*, Book Theta, 1046 e 25–6; Agamben, *Potentialities op. cit*., 181f.

[64] Or – *per* Agamben, *op. cit*., 182 – "welcome", "receive", "admit". Cf. Aristotle, *op. cit*., 1050 b10.

Melville's Bartleby's phrase: "I would prefer not to", as the purest formulation of the Aristotelian power-dilemma. For beyond acknowledging, there is no answer, no recipe as to how this thing, to be capable of one's own incapacity, is to be done. A political theory predicated on such a philosophical account of power will relate power, not, for once, to "Milan" – to the dull struggle, infinitely repeated, between competing power-parishes – but to the more insidious history of depredation and exploitation. The exploitation of man in this sense should not be confused with the exploitation of certain humans by others. It consists of two separate steps, the first one of which is that of stripping or exposing life. Only life laid bare is subject to exploitation in the sense here referred to. And here comes the Agambenian key finding as far as political history is concerned: Aristotle – writing, this time, his *Politics* – can already refer to a perfectly separate word in order to refer to exposed or bare or pure life. There is, in that term *zoe*, a hint to something natural, naked, to something deprived of its accidents, reduced to its elements (the word for painting, for example, is *zografía*, and the reward you pay to someone who has saved your life is a *zoagría*). *Bios*, on the other hand, designates already politicised life, life according to the models of individual existence in the *polis*, and even today, a *biography* is the tribute a *polis* pays to exemplary members. The second and final step of the exploitation of man lies in the industrialisation, i.e. the systematic use of the difference of level between *bios* and *zoe*, gifted life and bare life. The accursed, the sinister and unaccountable part of the history of power in the West, is not the monotonous competition between envious or ambitious neighbours; it is the exploitation of pure life by instituted life. The coupling between the infamous, *sacri*, excluded non-participants in the story of legal and historic existence, and those on the inside, the "subjects" whose life comes complete with status and legal/political existence, is repeated within the inside, within the political order, by the relationship sovereign/subjects. I, the sovereign, who am outside of the law, declare that there is no such place as an "outside of the law".[65]

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[65] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, *op. cit*., 15 (tr. modified).