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BIOPOLITICS AND THE RULE OF LAW

The terms *biopower* and *biopolitics* first appeared in a lecture on March 17, 1976, then again in a few pages at the end of *The History of Sexuality, Volume I* published later that year. Biopower is a new form of power which appeared in the second half of the eighteenth Century. It is an interdisciplinary technology of power which resulted from the disciplinary power shaped on the turn of the seventeenth Century. The new technology of power did not completely replace the former technology of the disciplinary power concentrated on the body of an individual and the economics of its movements. Foucault writes: “It seems to me that one of the basic phenomena of the nineteenth century was what might be called power’s hold over life. What I mean is the acquisition of power over man insofar as man’s a living being, that the biological came under State control, that there was at least a certain tendency that leads to what might be termed State control of the biological”.¹ Biopower, being a new technology of power of the newly developing capitalism, does not place its attention on a single human body, rather it emphasizes the multiplicity – the population. The scope of its interest and influence envelopes biological processes of the population: birth, duration, death, epidemics, control of human sexuality and reproduction, and demographic processes.

Michel Foucault devoted his works entitled *Discipline and Punish: The Birth of the Prison* (1975) and *Society Must Be Defended* (1976) to the issue of disciplinary power.² The basic issues in *Discipline and Punish* are: the body as the object under influence of power and authority; prison as

¹ M. Foucault, *Society Must Be Defended. Lectures at the College de France 1975–1976*, ed. Mauro Bertani and Alessandro Fontana, trans. D. Macey, Picador, New York 2003, pp. 239–240.

² Regarding the foundation of disciplinary power see: S. Oliwniak, *Michel Foucault: genealogia dyscyplin. Wprowadzenie*, (in:) M. Błachut (ed.), *Z zagadnień teorii i filozofii prawa. Ponowoczesność*, Kolonia Limited, Wrocław 2007, pp. 99–111.

a realization of the disciplinary power; and microphysics of power concentrated on a single human body. Disciplinary power elaborated techniques of spacial parcelization of the bodies based on the division, order, arrangement, placement and, as a result, the increase of control. Those bodies were to be visible at the same time. Later they were described, classified, evaluated, rewarded or possible deviations from the norm were corrected. The techniques of disciplinary power were also based on the repetition, practice, coordination and control of the human body movements. The body was to be economical and efficient. In that way the “disciplinary technology of work” was born. The relations between norms and disciplines were described in a very detailed way by Foucault in his *Discipline and Punish*. In the eighteenth Century there was a change in the way in which a human body was treated. It was no longer a public execution for committing a crime. Punishment was becoming the most hidden element of the penalty process. The practices of inflicting a punishment were becoming a shameful activity. The relation ‘punishment – body’ was changing: “the body is also directly involved in a political field... Power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out task, to perform ceremonies, to emit signs. (...) caught up in a system of subjection (in which need is also a political instrument meticulously prepared, calculated and used); the body becomes a useful force only if it is both a productive body and a subjected body”.³ The scope of the body control – every gesture, movement, speed and its subject (that is, its economy and the efficiency of the body movements) was changing. “Political economy of the body”, which was blocked by the relations of the authority and dominance, was being created. It was introduced into the system of enslavement. The state organs organized the microphysics of power.

The authority keeps producing new, even more subtle methods of objectifying and normalization. Penitentiary systems are being included in the “political economics” of the body, which, being a productive power, is “blocked” by the relations of the authority and dominance. However, to be treated in this way, it *must* be included into the system of enslavement; it has to become a productive body not only by means of indirect constraint. In this way, political technology of bodies, whose realizations are not particular institutions or procedures, appears. There appear “disciplines” which are common forms of dominance. These are methods of the detailed control of the body acts, where its usefulness/susceptibility becomes its criterion.

³ M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan, Vintage/Random House, New York 1979, pp. 25–26.

The changes in the scope of penalty execution are accompanied by the appearance of “mechanisms of discipline”, the increase in the control over people and the way of how they are used. The exclusion has been replaced by subtle methods of normalization and localization of people in certain space. The norms created by the authority are “tearing” the social body. The division into something that is normal or abnormal appears. The period from the latter half of the eighteenth Century saw the development of the state policy in relation to the birth control and the birth rate. Other fields of intervention associated with biopolitics included the range of phenomena associated with old age and infirmities. A biopolitical government included various forms of control over the environment: water, swamps, conditions of urban life. Biopower intervenes in “the birth rate, the mortality rate, various biological disabilities, and the effects of the environments”.⁴

One has to deal with a continual pressure presupposing a defined course of actions in accordance with the codification and regimen which parcel time, space and gestures. There appear disciplines such as universal forms of dominance. Law’s regulation functions are gradually becoming bigger and the role of normalization increases at the cost of the jurisdictional system of law.

Disciplinary power changed its character quickly – in the second half of the eighteenth Century. Foucault concludes that at that very moment a new technology of power appeared, that is, an interdisciplinary power. Using the formed, disciplined and enslaved human body, it transforms its acts on a different surface. A human being, as a biological creature, becomes both its object and subject. It wishes to supervise, control and use the collectivity of individuals, the masses, and population. Its influence encompasses population and, within its reach, birth, sexuality, productivity and death of the previously individualized persons who are now perceived as the masses. For Foucault, biopolitics is another name for the technology of power, a biopower, which needs to be distinguished from the mechanisms of the discipline that emerged at the end of the eighteenth Century. This new configuration of power aims to take “control of life and the biological processes of man as species and of ensuring that they are not disciplined but regularized”.⁵ Biopolitics is juxtaposed in Foucault’s analysis to the power of sovereignty leading to the important distinction between them. He writes: “Biopower is the power to make live. Sovereignty took life and

⁴ M. Foucault, *Society Must Be Defended*, op. cit., p. 245.

⁵ *Ibid*, p. 246.

let live. And now we have the emergence of power that I would call the power of regularization, and it, in contrast, consist in making live and letting die”.⁶ Biopower makes use of two main techniques. Previously there appeared anatomopolitical power over the body whose aim was the integration of powers of the human organism with the systems of the efficient economic control. Around the middle of XVIII Century there appeared and developed biopolitics of population dealing with the regulation of the population processes (problems of the increase of the population, the length of human life, urbanization and migration processes). Those two techniques were still divided in the eighteenth Century. A discourse uniting them had not been developed yet. However, the nineteenth Century constitutionalized the next, consistent technology of power which Foucault called “dispositif de sexualite”. Biopower, being an integral element of the development of the economics of capitalism, classified and disciplined the human body with the help of social institutions (family, school, army, the police, collectivity administration, individual medicine). The new techniques of power aimed at the increase of human body’s usefulness, the increase of its efforts, and the inclusion of life into the machine of the capitalistic state’s structures. The result of the operation of the above-mentioned disciplining power was the “enslaved” individual (assujettissement), subjected to the power of norms and disciplines. As a result of the use of the techniques of enslaving, there appeared a new subject of power – a natural body, power medium and center of duration; the body which is susceptible to certain operations, and which has a specific order, time, internal conditions and constitutive elements. The body, by becoming the target of the attacks of the new mechanisms of power, opens itself towards the new forms of knowledge. The individual shaped in that way (or rather his life) becomes the object of the new economics. Biopower directs the human life processes, controls and modifies them. Hence, the individual is no longer the subject of law; rather, he is a living creature who is to be affected by the influence of biopower at the level of his life.

Biopower becomes a pastoral power. Nowadays the role of a pastor is taken by the state acting in the role of a guardian. “The well-known ‘welfare state problem’ does not only bring the needs or the new governmental techniques of today’s world of light. It must be recognized for what it is: one of the extremely numerous reappearances of the tricky adjustment between political power wielded over legal subjects and pastoral power wielded over

⁶ Ibid, p. 247.

live individuals”.⁷ After the analysis of disciplinary power, Foucault became interested in the mechanisms of political strategies of the mastery of biological aspects of human existence. At the Collège de France he delivered a series of lectures entitled *Sécurité, territoire, population (1977–1978)*.⁸

From January, 10 till April, 4 1979, at the Collège de France Foucault delivered a series of lectures entitled *Naissance de la biopolitique*.⁹ Apart from the expectations connected with the title, the term *biopolitics* appeared in the lectures only several times (six times). The reason was explained by the author himself at the end of his first lecture dated 10 January, 1979. Understanding of what biopolitics is requires the explanation of many issues connected with another term: *population*. He added: “Consequently, it seems to me that it is only when we understand what is at stake in this regime of liberalism opposed to *raison d’État* – or rather, fundamentally modifying it without, perhaps, questioning its bases – only when we know that this governmental regime called liberalism was, will we be able to grasp what biopolitics is”.¹⁰ Basically, all the lectures deal with the appearance and development of economic and social liberalism as well as the relations between liberalism and the theory of law. Comprehension of the appropriate character of the German ordoliberalism and structural changes of the bourgeois society does not only depend on the discussion of economic concepts of rivalry in the frames of the free market or the investigation of the sociological history of economics conducted by Weber. It demands the explanation of what it has been and what meaning it has in the German thought as a necessary guarantee of the individual rights in the conflicts with the organs of the public authority.

⁷ M. Foucault, *Omnes et singulatim: Toward a Critique of Political Reason*, (in:) M. Foucault, *Essential Works of Foucault 1954–1984*, vol. 3 Power, edited by James D. Faubion, The New Press, New York 2000, p. 307. Regarding Foucault’s pastoral power see M. Dean, *Governmentality. Power and Rule in Modern Society*, Sage Publications, London 2001, pp. 73–97. Regarding the concept of biopower see for example: M. Bertani, *Sur la généalogie du bio-pouvoir*, (in:) *Lectures de Michel Foucault. A propos de “Il faut défendre la société”*, vol. 1, ENS Editions, Lyon 2000, pp. 15–36; M. Colucci, *De la psychiatrie à la biopolitique, ou la naissance de l’état bio-sécuritaire*, (in:) A. Beaulieu (dir.), “Michel Foucault et la contrôle social”, Les Presses de l’Université Laval 2005, pp. 91–124.

⁸ For more information see: P. Patton, *Agamben and Foucault on Biopower and Biopolitics*, (in:) M. Callarco and S. DeCaroli (ed.), *Giorgio Agamben. Sovereignty & Life*, Stanford University Press 2007, p. 206.

⁹ Edition du Seuil/Gallimard 2004. In the text there is a reference to the English edition: M. Foucault, *The Birth of Biopolitics. Lectures at the College de France 1978–1979*, PALGRAVE MACMILLAN, New York 2008.

¹⁰ M. Foucault, *The Birth of Biopolitics, Lectures at the College de France 1978–1979*, PALGRAVE MACMILLAN, New York 2008, p. 22.

In England it was on the contrary: if administrative courts were necessary, the rules of law did not exist whereas functioning of such an organ as, for instance, the French Council of the State excluded the possibility of the rules of law. The concept of the rule of law is based on the possibility of judging the conflicts between the citizens and organs of the public authority through common courts. Nevertheless, Foucault is more interested in the role of the rule of law in shaping a liberal economic order. The role of the principles of the state under the rule of law is limited to the establishment of the legal basis of the state interventionism and the admissibility of limiting the free market. A formal economic legislation appears. Referring to Hayek (*The Constitution of Liberty*), Foucault states that “rule of Law, or formal economic legislation, is quite simply the opposite of a plan. It is opposite of planning”.¹¹ Nevertheless, Foucault was more interested in the relationship as a form of rule with individual freedom. In the philosophy of politics there is a common conviction that individual freedom is the most significant value of the liberal social order as well as the basis of democratic states’ functioning. However, liberalism has two faces. On the one hand, a liberal system of the rule is based on the freedom of human choices; that is why it requires the existence of free subjects. Individual freedom becomes the right to legal objection to the power abuse by the authority. It constitutes an integral elements of the very rationalism of liberal rules. Interpreted in this manner, liberalism is a system of limited rules. The limits of the state interference are marked by the principles of the state under the rule of law. On the other hand, liberalism hides a danger: in the name of the protection of freedoms and rights or safety of the state it is necessary to limit the freedoms and rights of particular individuals or groups. Liberal democracy may endanger freedom. That interpretation was developed by Agamben.

The continuation of the considerations regarding the nature and tools of biopower is revealed by the first Volume of History of Sexuality published in 1976. Foucault in his earliest works distinguished the juridical and political discourse on sovereignty from the disciplinary techniques employed in the seventeenth, eighteenth, and nineteenth Centuries. According to him, the emergence of the new biopolitical technology of power operates on different objects, at a different level and different scale, and with different mechanisms. These are: anticipations and statistical estimations; techniques whose aim will be to decrease the death rate, to increase life and to stimulate reproduction as well as regulation and optimization of life. There will appear “biopolitics of human population”. Biopolitics does not refer

¹¹ Ibid, p. 172.

only or most prevalently to the way in which politics is captured by life, but also, and above all, by the way in which politics penetrates life. Foucault concludes: "If one can apply the term bio-history to the pressures through which the movements of life and processes of history interfere with one another, one would have to speak of bio-power to designate what brought life and its mechanisms into the realm of explicit calculation and made knowledge power an agent of transformation of human life".¹² Once again and in a very precise way, Foucault indicates that the emergence of biopower from disciplinary power has been a necessary and indispensable element of the development of capitalism as the economic system. The consequence of the appearance of biopower has been the emergence of the normalization society. The role of law is taken by the Norm. The norm is not understood as a legal norm but as a rule, standard, or a discipline tool. Infra-law is being created which employs different forms of sanctioning: by practicing habits, repeating tasks, and also by rewards. "Standard" is the criterion of the evaluation. The aim is the correction of deviations from the norm. A new type of penalty, based on norms, appears. Normality, as a principle of compulsion, appears in education whereas in the health system and industry norms of hygiene appear. Apart from supervision, it becomes the main tool of power of the classic epoch.

Foucault's concepts of biopolitics and biopower in connection with the category of **bios 'bare life'** controlled by cultural, political and legal norms were used by the Italian philosopher Giorgio Agamben to describe the process of capturing 'bare life' by the norms produced by the modern political system of the end of the seventeenth Century. These and other events can only be understood against the background of the 'biopolitical vocation' of the modern nation-state. Both the totalitarianism and its democratic liberal counterpart remain trapped within a political horizon circumscribed by the convergence of biological and political life. In this condition, "once their fundamental referent becomes bare life, traditional political distinctions (such as those between Right and Left, liberalism and totalitarianism, private and public) lose their clarity and intelligibility and enter into zone of indistinction".¹³

¹² M. Foucault, *History of Sexuality*, vol I, trans. Robert Hurley, Vintage books, New York 1978, p. 143. Idem, *Bio-histoire et bio-politique*, (in:) "Dits et écrits II, 1976–1988", QUARTO GALLIMARD, Paris 2001, pp. 95–97. Also Roberto Esposito, *Bios. Biopolitics and Philosophy*, trans. Timothy Campbell, University Of Minnesota Press, Minneapolis 2008, pp. 13–44.

¹³ G. Agamben, *Homo sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, Stanford, CA, Stanford University Press, 1998, p. 122.

This inclusion of life ('bare life', as Agamben calls it) means its becoming consciously political. Arousing political consciousness in life is characteristic both of totalitarian and democratic states: "it is not possible to understand the 'national' and biopolitical development and vocation of the modern state in the nineteenth and twentieth centuries if one forgets that what lies at its basis is not man as a free and conscious political subject but, above all, man's bare life, the simple birth that as such is, in the passage from subject to citizen, invested with the principle of sovereignty".¹⁴ In the beginning Homo sacer formulated it even in a stronger way: "It can even be said that the production of a biopolitical body is the original activity of sovereign power".¹⁵ Again, he repeats: "fundamental acitivity of sovereign power is the production of bare life as the original political element and a threshold of articulation between nature and culture, zoe and bios".¹⁶

According to Agamben, politics is the ability of a sovereign and exclusive use of this mechanism of the including disconnection; this is the control of Nature in the cultural sphere. Nevertheless, Nature escapes the techniques of power. Hence, power should rule every sphere of the human existence including the pure human biology; it has to include human biology into the system of political and legal norms. This mechanism of inclusion is at the same time a mechanism of disconnection. Agamben uses the term "inclusive exclusion".¹⁷ It is not a simple relation inclusion/exclusion as it may seem. Sovereign power includes bare life into the sphere of culture, politics and law to subject it to the absolute and total control, hiding it carefully. By one gesture it gives a human subjectivity and human rights. At the same time, these are taken away by the decision of the introduction of the extraordinary state. Bare life becomes enveloped by politics which gradually acquires forms of biopolitics on a bigger scale, in the shape of the exception as something which is included only by exclusion. In his analysis Agamben aimed at this hidden threshold, a point where 'bare life' becomes included by the simultaneous exclusion into the sphere of politics (bio politics). At this point the legal and institutional model (Foucault would call it juridical) crosses a biopolitical model of power. Suddenly, the prevailing analysis of power of the western thought is not enough whereas Foucault's considerations on the subject require some complement. Foucault did not manage to describe the point where these models cross. However, in one of his latest

¹⁴ Ibid, p. 128.

¹⁵ Ibid, p. 8.

¹⁶ Ibid, p. 181.

¹⁷ Ibid., p. 35.

texts Foucault¹⁸ managed to spot that moment. That was the point where totalitarianism political techniques and individualism techniques of themselves meet to make one, being united by a modern democratic state.

Agamben's reformulation of Foucault's thesis continues by attributing to him the suggestion that the politicization of bare life constituted "the decisive event of modernity", and the further suggestion that this signaled "a radical transformation of the categories of classical thought". Agamben's argument consists of the claim that the entry of bare life into the sphere of political calculation and the exercise of sovereign power involved no radical transformation of political-philosophical categories. "The inclusion of bare life in the political realm constitutes – if concealed – nucleus of sovereign power".¹⁹ Nowadays, however, the character of these actions is different. "Bare life" and bios are at the center of the state authority's attention; what is more, it meets the political space. Now biopower, which uses hidden techniques of dominance and normalization whose subject has been the enslaved human body, comes to light.²⁰ It happens because the state of exception and the territory, where it is most visible, are becoming a modern paradigm of the western world. The camp becomes a paradigm: toward a paradigm of the extinguishing of differences. The state of exception becomes the norm, the norm becomes the state of exception. The setting of norms and the application of norms are no longer distinguishable. In the camp, this impossibility of differentiating shows its martial face. "The camp is the space of this absolute impossibility of deciding between fact and law, rule and application, exception and rule".²¹

The above-mentioned thesis requires some precision and indication of the supplementary theses. The first thesis is: a primary political relation of the modern state is the relation of throwing out (abandonment) which takes place in the state of exception. A state of exception is a zone of non-differentiation between what is external and what is external, between law and factuality. Agamben states that "a pair of notions fundamental for the western politics is not the pair friend-enemy; rather, it is bare life-political existence, *dzoē* – bios, inclusion – exclusion. Politics exists because

¹⁸ M. Foucault, *La technologie politique des individus*, (in:) idem, *Dits et écrits II 1976–1988*, Gallimard, Paris 2001, pp. 1645–1646.

¹⁹ G. Agamben, *Homo sacer*, op. cit., p. 6.

²⁰ Regarding the differences in the perception of biopolitics by Foucault and Agamben see: P. Patton, *Agamben and Foucault on Biopower and Biopolitics*, (in:) M. Calarco, S. DeCaroli, *Giorgio Agamben. Sovereignty & Life*, Stanford University Press, California 2007, pp. 203–228.

²¹ G. Agamben, *Homo Sacer*, op. cit., p. 173.

a man is a living creature who, in the language, exhales and opposes himself to bare life, at the same time remaining with it in the relation of the including exclusion”.²² The second thesis is rooted in the concept of biopolitics worked out by Foucault. Inclusion/exclusion of bare life is the result of the sovereign power’s actions which constitutes the threshold where Nature and culture meet, the threshold dividing into those, whose life has been recognized to be worth to be protected by law, and those, who can be killed without being punished.

It is a camp – a Nazi concentration camp as well as its modern equivalent, refugee camp or a camp for terrorists (the Guantanamo prison). This is “nobody’s land”. The state has been populated by the contemporary *hominis sacri*, who are now refugees or those who have been recognized as the ones endangering the welfare of the state. “The state of exception has now become, the rule is an intensification of its undecidability, but this also means that the state of exception is no longer able to fulfill the function Schmitt assigned to it in *Political Theology*: to define the normal situation. The state of exception is not meant to produce or confirm the rule – it tends, rather, to coincide with it, that is to say, to blut with it.”²³

The Agambenian thesis that an exception has become the rule is not brand new. The author himself mentions the works by Walter Benjamin and Guy Debord.²⁴ What is new is the interpretation and radicalization of the thesis. In the interpretation Agamben uses Carl Schmitt’s concept of sovereignty and Kant’s “bare form” of law. For Agamben, the Sovereign, empowered with the obligatory law, has the power to proclaim an exceptional state (here one should say a legal ability or the competence of introduction). Therefore, the Sovereign situates himself simultaneously beyond the limits of legal order and within its reach. Here Agamben follows Carl Schmitt’s analysis of sovereign as “he who decides on the exception”. For Agamben, the word “exception” “according to its etymological root refers to what is taken outside (*ex-capere*), and not simply excluded”.²⁵ In the legal language

²² *Ibid.*, p. 19.

²³ G. Agamben, *State of Exception*, trans. Giorgio Agamben and Kevin Attell, (in:) A. Norris (ed.), *Politics, Metaphysics, and Death. Essays on Giorgio Agamben’s Homo Sacer*, Duke University Press, Durham and London 2005, p. 293. See also: A. Norris, *Introduction: Giorgio Agamben and the Politics of the Living Dead*, (in:) A. Norris (ed.), *Politics...*, op. cit., pp. 2–8.

²⁴ W. Benjamin, *W sprawie krytyki przemocy*, trans. K. Krzemięniowa, (in:) idem, *Aniol historii*, Wydawnictwo Poznańskie, Poznań 1995; G. Debord, *Spoleczeństwo spektaklu*, trans. A. Paszkowska, Słowo/obraz terytoria, Gdańsk 1998. Agamben also refers to the essay by J. Derrida reflecting the interpretation of the text by W. Benjamin: J. Derrida, *Force of Law*, “Cardozo Review” 1990, nr 11.

²⁵ G. Agamben, *Homo Sacer*, op. cit., p. 18.

and the language of law there appear terms: state of war, state of exception and state of emergency. In Agamben's works translated into Polish there appears only "a state of exception". However, it is necessary to refer to the above-mentioned derivation of the notion as given by Agamben. In the English language these differences in meaning are captured. Describing the concept of the state of exception, Carl Schmitt uses the expression "state of emergency" which refers to the endangered welfare, boundaries, internal order of the State. In these circumstances, law gives a way to the state whose existence is acknowledged to be of a bigger value than the values of the legal norms.

A sovereign decision is completely arbitrary. The power of the sovereign is the power to make decisions whether a given state is normal. A sovereign, while creating the law, marks the boundaries of the legal order; he also defines external and internal systems of law. He makes decisions about the scope of obliging by legal norms referring to the "normal" relations between legal subjects. According to Schmitt, this decision regarding the establishment of the legal order is "independent of the legal norm and, paradoxically, power does not need law to establish a legal order". The establishment of the principles of the legal order enables the exception to appear; the situation which is beyond the positive law or, in other words, it is a state of exception. The exception makes the possibility of obliging by legal norms problematic. As Agamben notices, the exception is a kind of exclusion. It constitutes the state where a legal norm is not so much annihilated as it remains in a specific relation: it is suspended. The norm is applied to the exception; when it does not fit, it withdraws. A state of exception is a consequence of suspending the power of the legal order. When a sovereign takes the decision to proclaim a state of exception, a legal order is withdrawn and is replaced by the state of exception. What in a normal situation of the obligation of law remains beyond the system of law, in the state of exception it is temporarily included into it. What was thrown away (excluded) by the establishment of the legal order, is now temporarily included into it by the withdrawal of the power of the power of the legal order. Hence, the legal order escapes the exception; it abandons it, allowing for its existence. This is a "paradox of sovereignty". The sovereign stands outside the normally valid legal order and nevertheless belongs to it. This inside/outside is characteristic of the state of exception that creates a situation in which it is no longer to be decided whether a legal or a factual condition is the issue. Thus, both the fact and law become undecidable. "The sovereign decision traces and from time to time renews this threshold indistinction between outside and inside, exclu-

sion and inclusion, *nomos* and *physis*, in which life is originally expected in law".²⁶

Carl Schmitt writes: "For a legal order to make sense, a normal situation must exist, and he is sovereign who definitively decides whether this normal situation exists".²⁷ A state of emergency is a product of the collapse of the normal order, but the normal order itself is to begin with only the absence of the state of emergency.

Sovereignty is primary in its relation both to the constitutional power and the constituted power. The sovereign's violence appears twice. Firstly, when the sovereign power, which captures itself as the state of Nature, creates a legal order dividing chaos from normality. Secondly, when it takes a decision about the state of emergency in an arbitrarily and temporarily withdraws the previously established legal order. It withdraws creating a state of exclusion; it takes certain territory and certain groups of people (*homines sacri*) out from the scope of obligation and application of the legal norms which make the legal (juridical) order. What is more, it brings camps to life, the territories where the law and violence become one, integrated element.

The state of exception becomes a threshold between the legal order and chaos; it allows to differentiate what is situated beyond the legal order and the legal order itself. It is the "occupation of the external", the occupation of exception. In comparison to "normal" situations, where the decisions of the sovereign are marked by the obligatory legal norms, in the state of exception law becomes temporarily withdrawn and the two elements of the term "legal order" – law and order – exist separately, "in the opposition as separate terms".²⁸ In the state of exception "common" legal order loses a point of reference; it obligates purely as a possibility. A sovereign exception, being a sphere of indifferentiation between nature and law, constitutes the assumption of the existence of a legal reference in the shape of its withdrawal.

A basic question arises: what comes first: the establishment of the legal order aiming at the regulation of the state of nature and then in the constitution – the legal act of the highest power – the definition of the con-

²⁶ G. Agamben, *Homo sacer*, p. 27. see also Rainer Maria Kiesow, *Law and Life*, (in:) A. Norris, *Politics, Metaphysics, and Death*, op. cit., pp. 248–260.

²⁷ C. Schmitt, "Definition of Sovereignty" in *Political Theology*, trans. George Schwab, MIT Press, London 1988, p. 5.

²⁸ Z. Stawrowski, *Teologia polityczna Carla Schmitta*, (in:) R. Skarzyński (red.), *Carl Schmitt i współczesna myśl polityczna*, Dom Wydawniczy Elipsa, Warszawa 1996, pp. 57–60.

ditions under which a state of exception is proclaimed? Or perhaps it takes an opposite direction: the sovereign decides what is a state of exception; an “occupation of the external” takes place to establish the meaning and scope of what is recognized as normal and what should become a rule and consequently, what is to become the content of the proclaimed positive law? Carl Schmitt has pointed out that in the obligatory legal norm the definition of a precise situation justifying the proclamation of the state of exception is impossible. A legislator uses general clauses such as “a state of emergency”, “welfare state under threat”, and “public safety and order”. These clauses are highly under-defined; they do not refer to any specific legal norm; they rather refer to specific situations which may result in the decision regarding the proclamation of the state of emergency if they appear. The definition who is, at the moment, *homo sacer*, the introduction of the criteria of the classification of a given subject become both the norm and criterion of its application – the norm deciding about the fact of its application. It is the very appearance of such a state that puts a question regarding the subject of sovereignty and, therefore, regarding the essence of being a sovereign. At this moment the constitution with the power of its competence norm points out the organs to take a decision. Agamben writes: “the exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule. ... The sovereign decision of the exception is the original juridico-political structure on the basis of which what is included in the juridical order and what is excluded from it acquire their meaning”.²⁹ Although justified by its connections with the etymology given by Agamben himself, the decision regarding the state of exception would be rather the notion of the state of exclusion or exception; marking the boundaries between what is external and internal. On the external surface of the legal system (legal order in the positivist sense) there apparently exists a situation of exception (it remains excluded by the power of the establishment of that order). Within the legal norm the norms of the positive law remain which, at the same time, demonstrate the potential of excluding what is external (state of exception).

A legal norm regarding the state of exception is a part of juridical order. In the perspective of the juridical order the state of emergency law is still obligatory; in other words, it has not been excluded (withdrawn) completely and given time limits. In the traditional (positivist) legal terminology a de-

²⁹ G. Agamben, *Homo sacer*, op. cit., pp. 18–19; idem, *State of Exception*, op. cit., pp. 32–37.

cision regarding a state of exception is only the application of the obligatory legal norm referring to the situations which can be proclaimed by a constitutionally defined public organ. This is purely factual and real, taking a decision regarding the withdrawal of the duties (in Agamben's terminology – exclusion, abandonment). The law is understood ontologically and not as the law of the juridical order with the reference to certain existence situations and groups of people, called *homines sacri* by Agamben. A legal norm regarding the state of exception is formally obligatory but when it is applied, the law regarding the normality (law as the juridical order) is temporarily withdrawn. The decision regarding the state of exception results in the law being withdrawn from the state of "exception". The obligation of the juridical order, which refers to normal states, becomes withdrawn and that is why the law may define normal cases as a sphere of its obligation. Indeed, an exception is a kind of exclusion. A norm is applied to the exception; when it is not applicable, it is withdrawn. Thus, a state of exception is not a state of chaos preceding the juridical order but a situation of the withdrawal of that order. By the decision regarding the state of exception, the sovereign is trying to constitute what is external; at the same time, in the interior of the juridical order he interiorizes something which exceeds. A special power of law is revealed by its ability to remain in the relation with what is outside. Normalized factual states are the sphere of reference of the juridical order; they are included in its territory. On the other hand, the situation of the state of exception can be defined neither as a factual situation nor as a legal situation; it is only a relation between the law and the fact, being placed at the boundary of what is normal and what is an exception. "What emerges in the limit figure is the radical crisis of every possibility of clearly distinguishing between membership and inclusion, between what is outside and what is inside, between exception and rule".³⁰

By the decision regarding the state of exception, what remains outside is being included into the juridical order not by the prohibition but by the withdrawal of the obligation of the juridical order, by the approval of the juridical order being suspended or abandoned. It is not the exception that escapes the rule; it is the rule which is being suspended in favor of the exception; it enables the appearance of nihilism and that is why it constitutes as a rule. Agamben recalls the comprehension of the law as "nihilism of Revelation" following Gershom Scholem who captures it as "state which still preserves its position and obligates but it has lost its

³⁰ G. Agamben, *Homo sacer*, op. cit., p. 25.

significance”.³¹ It does not mean that the law, understood both as a legal order and Law, disappears or is absent. In the state of exception it is not able to perform. It opens the sphere where the law and fact, bare life and biopolitics, become integrated. In this way, the exception is precisely not the element of law that transcends the positive law in the form of its suspension. The exception is rather an element of the positive law itself. In *Homo Sacer* Agamben never gives a definition, or any theory of what he understands to be “law”.

In the state of exception homo sacer live under the rule of law which obligates but is insignificant. A specific duality appears. There is an obligatory law which is deprived of its significance or, in other words, a pure form of law beyond its content is preserved. At the same time, a state of exception, which is a rule, establishes the execution of the law in the act of violence; law is impossible to distinguish from life, which, in turn, should be regulated by it. It is impossible to distinguish law abuse from its execution. A behavior, which is in accordance with a legal norm, and a behavior, which abuses it, cross. A refugee, who is trying to leave his camp, abuses the norm whereas a guide, who stops him or kills him, executes this norm.

A camp is a territory which, by the power of the decision regarding the state of emergency, is excluded (taken out) from the scope of the legal norm obligation of the legal order. Legal norms of the “normal” system of law are not obligatory and applicable in this territory. They still obligate beyond it; in relation to it they are not significant. A state of emergency is a possibility (potential) of the “normal” legal order. Therefore, a new legal and political paradigm appears where the norm and exception are integrated to make one. In the territory of the camp it is the legal order of the emergency state that is “normally” obligatory. A differentiation between law and fact disappears. Here the exception becomes the norm – or, to be more precise, the distinction between the two is wholly effaced. “The camp is space of this absolute impossibility of deciding (decidere) between fact and law, rule and application, exception and rule, which nevertheless incessantly decides (decide) between them”.³² And He concludes: “When life and politics – originally divided, and linked together be means of the no-man’s-land of the state of exception that is inhabited by bare life – begin to become one, all life becomes sacred and all politics becomes the exception”.³³

³¹ W. Benjamin, G. Scholem, *Korespondencja*, trans. A. Lipszyc, “Literatura na świecie” 2003, nr 1–2 (378–379), p. 378.

³² G. Agamben, *Homo Sacer*, op. cit., p. 173.

³³ *Ibid*, p. 148.

The problem of legal validity or its lack in this state has no significance. A legal (political) subjectivity of an individual becomes integrated to make a whole with “bare life”. A decision regarding who in this specific situation and at this moment constitutes “bare life” (*homo sacer*) becomes the subject of the sovereign political decision.

Today, in the waiting rooms of the departure areas of the airports, harbors, train stations, in the ravines of the Balkans, Agamben sees the modern bare life of the lawless, of modern biopolitics. “In its extreme form, the biopolitical body of the West (this last incarnation of *homo sacer*) appears as a threshold of absolute indistinction between law and fact, juridical rule and biological life”.³⁴

By making use of the new threats, terrorism being among them, or creating their extraordinary danger for the existence of democracy, a modern state aims at making a state of exception the state of their permanent control of individual privacy. In contrast to a totalitarian state based on a perfect integration between the state interests with individual interests, which is one of the most significant elements, a modern state, with its displacement of political and private boundaries, aims at limiting functioning of the social institutions. A growing arbitrariness of power and the formation of dominant lifestyles (consumption of the consumption), done mainly with the use of the media, replace previous ideologies and aim at a hidden, though efficient, and total control over a human life starting from medical aspects and finishing with consumption. Not negating the needs of democracy and the rule of law, a modern state has greatly changed the perception of politics; what is more, politics has reached its limits – soft totalitarianism has appeared. Individuals may defend themselves only when post-modern *sacrum* is profaned; after they disagree to consume the consumption, after they stop pilgrimages to the places perceived as attractive (tourism) and after they free themselves from a manipulation power of the media. A political challenge for every single individual and global manhood is a separation of features which would enable them to survive. The only solution for people is to make a community which would aim at the neutralization of the mechanisms which have been created by authorities and dividing citizens into individuals who are worth living and *homines sacri*.

³⁴ *Ibid*, p. 187.