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FOUCAULT AND AGAMBEN: LAW AS INCLUSIVE/EXCLUSIVE DISCOURSE

I. Michel Foucault: The discourse of disciplinary power involves a code of normalization. An introduction to biopower

Michael Foucault used the notion of discourse in various meanings and contexts. He began his analyses with an archaeological study of discourse and its structures, and then he went on to study the genealogy of discourses and their relation to power and other forms of domination. Discourses, in his view, were mechanisms of excluding Aliens (i.e. those who do not fit the Norm). Foucault called his methodology of discourse analysis, which involved archaeology and genealogy, problematization.¹

Foucault's works from the end of the sixties and the beginning of the seventies, *The Order of Things: An Archaeology of the Human Sciences* (1966), *The Archaeology of Knowledge (and The Discourse on Language)* (1969, 1971), constitute his individual theory of discourse. During this period, Foucault was primarily concerned with "horizontal" relations that develop between various types of discourse, or groups of statements and which are characterized by their discontinuity. In later works, Foucault shifts his focus to vertical relations. These occur between empirical practices, such as the invention of hospitals, mental institutions, prisons, and their respective type of discourse – medical, psychiatric, and legal discourse.² *The Order of*

¹ M. Foucault, *Polemics, politics and problematizations: an interview*, (in:) P. Rabinow (ed.), *The Foucault Reader*, Penguin, Harmondsworth 1984, p. 388–390. D. Howard writes extensively on the evolution of meaning of discourse in Foucault's works in: D. Howard, *Discourse*, Open University Press, Buckingham – Philadelphia 2000. Works in Polish literature include: K. Stasiuk, *Krytyka kultury jako krytyka komunikacji. Pomiedzy dzialaniem komunikacyjnym, dyskursem a kulturą masowq*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2003, p. 106–166; H. Grzmil-Tylutki, *Francuska lingwistyczna teoria dyskursu. Historia. Tendencje. Perspektywy*, Universitas, Kraków 2010.

² M. Foucault, *Entretien avec M. Chapsal* (in) *Dits et écrits*, vol. I, *op. cit.*, 542–546.

Things: An Archaeology of the Human Sciences focuses mainly on the analysis of the episteme. The term itself, however, does not occur in Foucault's later works – in *The Archaeology of Knowledge*, he substitutes it with the terms: discursive formation and audience. The episteme is a group of social factors, which define and enable historically captured forms of discourse in times of the Renaissance, the Enlightenment, and Modernity. It is a set of a priori rules which determine the way knowledge constitutes itself in a given period. Each episteme had its own autonomously superior rule. The relations between different episteme were discontinuous, and the transfer from one episteme to another had a form of a splitting.³

Language forms the world and allows recreating the way in which a given object perceives the world. If we analyze how a culture uses language in a given period, we can reconstruct the ways of perception (the episteme) characteristic to it in that period. These are the fundamental codes of that culture, i.e., that which rules its language, its forms of cognition, ways of exchange, techniques, values, hierarchy of action.⁴ We come to all this through the analysis of statements. A statement (*enonce*) is a basic unit of discourse, which is neither a grammatical nor a logical sentence, nor is it a speech act. *Enonce* is a statement deeply rooted in its specific episteme. The episteme is explicated through a description of the correspondence between words and things, and by showing their order (*ordre*). Order is the internal law of things, a hidden web according to which things perceive one another, and it is something that exists only through perception, attention, and language. Foucault argues that the analysis of human existence is only possible through a change and turn of the analysis of representative discourse. The object, by naming things, gives the world meaning. Discourse orders (or, at least, attempts to order) the world of things. Foucault's intuition of the matter is well represented in the English title of the work: *The Order of Things*. An analysis of discourse, and discursive and non-discursive practices, lets the object relate intentionally and reflexively to the subject of the discourse. Discourse becomes then a form of organizing sense and as a directed reflection a form of its objectification. The reflexive attitude

³ For more detail on episteme, see: G. Gutting, *Michel Foucault's archaeology of scientific reason*, Cambridge University Press 1989, p. 181–260. Polish literature: M. Kowalska, *Dialektyka poza dialektyką, Od Bataille'a do Derridy*, Fundacja Aletheia, Warszawa 2000, p. 277–281. Cf: T. Komendant, *We władzy dyskursu. Michel Foucault w poszukiwaniu samego siebie*, Spacja 1994, p. 113–141.

⁴ M. Foucault, *The Order of Things. An Archaeology of the Human Sciences, Preface*, p. XX, Vintage Books A Division of Random House, Inc., New York 1994.

towards discourse and its subject allows the object to grasp their sense and meaning.⁵

In *The Discourse on Language* Foucault openly writes about controlling, selecting, limiting, and redistributing the products of discourse in society through specific procedures: “*There are many systems for the control and the delimitation of discourse, (...) they function as systems of exclusion. (...) Discipline constitutes a system of control in the production of discourse, fixing its limits through the action of an identity taking the form of a permanent reactivation of the rules.*”⁶ However, discourse itself is subject to limitation by those who participate in it and form its rules – rules of exclusion. Moreover, discourse does not include silence, which surely is an element of communication space. What is discourse, and what is its role? Foucault was not interested in the sole analysis of language, which clearly situated him outside structuralism. He says: “*My position exceeds that which is called structuralism because I am not that interested in the formal possibilities of a system such as language (la langue). Personally, the issue of the existence of discourses is what interests me more than anything only because the act of talking functions as actions connected with their source situation, and because discourses leave in their historic existence – except some remains which still exist and manifest themselves – a certain number of explicit or implicit functions.*”⁷ The history of the Western World is a constant game between knowledge (savoir) and power (pouvoir), and indeed, according to Foucault, these two words, knowledge and power, sum up everything:⁸ *And for this very reason, we must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable. To be more precise, we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated on, but as multiplicity of discursive elements that can come into play in various strategies. (...) Discourse transmits and produces power.*⁹

⁵ More in: P. Bytniewski, *Genealogia dyskursu. Problemy niehermeneutycznej koncepcji rozumienia*, Wydawnictwo UMCS, Lublin 2000, page 15 and on.

⁶ M. Foucault, *The Archaeology of Knowledge and The Discourse on Language*, transl. by A. M. Sheridan Smith, Vintage Books A Division of Random House Inc. New York, 2010, p. 220, 22.

⁷ M. Foucault, *Sur les facons d'ecrire l'histoire, entretien avec R. Bellour*, (in:) *Dits et ecrits*, vol. I, *op. cit.*, p. 623.

⁸ M. Foucault, *Verite et pouvoir* (in:) *L'Arc* 70, 1977, p. 18.

⁹ M. Foucault, *The History of Sexuality*, vol. 1: *An Introduction*, transl. by R. Hurley, Vintage Books A Division of Random House Inc. New York 1990, p. 100–101.

The discourses analyzed by Foucault: psychopathology (*Madness and Civilization: A History of Insanity in the Age of Reason*), medicine (*The Birth of the Clinic: An Archaeology of Medical Perception*), grammar, political economics (*Les Mots et les Choses*), were all characterized by unusual ways of organizing notions and ways of stating them, which constitute specific theories. Social practice is not only discourse – there is more to it. Discursive practices exist also on the edges of discourse, and are not the only ways of producing discourse: “*Les pratiques discursives se caractérisent par la découpe d’un champ d’objets, par la définition d’une perspective légitime pour le sujet de connaissance, par la fixation de norms pour l’élaboration des concepts et des theories. Chacune d’entre elles suppose donc un jeu de prescriptions qui régissent des exclusions et des choix. (...) Les pratiques discursives ne sont pas purement et simplement des modes de fabrication de discours. Elles prennent corps dans les ensembles techniques, dans les institutions, dans des schemas de compoement, dans des types de transmission et de diffusion, dans des formes pédagogiques qui à la fois les imposent et le maintiennent.*”¹⁰

Foucault abandons his former notion stating that power only controls, and, in some cases, excludes discourse. In *The discourse on Language* he writes: “*I am supposing that in every society the production of discourse is at once controlled, selected, organized and redistributed according to a certain number of procedures, whose role is to avert its powers and its dangers, to cope with chance events, to evade its ponderous, awesome materiality.*”¹¹ The procedures for exclusion are: prohibition, division, and rejection, truth and fallacy. The desire for truth produces a will to truth, which leads to a will to knowledge (*la volonté de savoir*). Foucault uses these two terms interchangeably. Truth was that which discourse was. The shift of truth into that which discourse states produced a dichotomy: true discourse/false discourse. The will to knowledge first appeared at the turn of the sixteenth and seventeenth century. “*This will to truth, like the others systems of exclusion, relies on institutional support (...) This will to knowledge, thus reliant upon institutional support and distribution, tends to exercise a sort of pressure, a power of constraint upon other forms of discourse.*”¹²

The issue of knowledge has significant connections with the issue of power. Possession of knowledge enables domination and gives power to sub-

¹⁰ M. Foucault, *La volonté de savoir*, (in:) *Dits et écrits*, vol. I, p. 1108–1109.

¹¹ M. Foucault, *The Archaeology of Knowledge and The Discourse on Language*, *op. cit.*, p. 216.

¹² *Ibid*, p. 219.

jugate; power-knowledge (pouvoir-savoir) comes into existence. J. Habermas uses the term “juridification of the”, that is, colonization by an increasing number of more and more specific legal norms.¹³ Foucault speaks about disciplinarization and normalization, the appropriation of the social world by disciplines, a new type of law. Contemporary power is disciplinary. That does not mean that “*law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.*”¹⁴

The disciplinarization of the world through production of knowledge corresponds with the disciplinarization of power as such. “*Disciplinary power displays itself in its ultimate mechanisms; it cannot function without shape, without organization and circulation of knowledge, or rather, knowledge devices (...). Disciplines have their own discourse. They are extremely ingenuous in ordering the tools needed for the formation of knowledge; they are also transmitters of discourse – but this is not, however, discourse of law, judicial discourse. It is not a discourse of rules, as the effects of the will of the sovereign. (...) It is the discourse of natural rules, one can say: norm. Disciplines define a code, which is not the code of law, but the code of normalization.*”¹⁵

Normalization of social behavior through the practices of disciplinary power excludes, seemingly, the grasp of discourse in categories of the procedures of resolving conflicting social norms, described by J. Habermas. The self-subjugated object, subjugated by disciplinary power, is not situated in discourse as an ideal speech situation, or the relations between power and knowledge. What is important are the techniques and rationale of rule, the ways of governing people and the state. The changes in inflicting punishment are accompanied by “swarming of disciplinary mechanisms”, or the increase in the number of mechanisms of controlling and using people. Exclusion is substituted with subtle methods of normalization and location of people in a given space. In guiding individuals to strive for optimum performance relative to some norm, disciplines do not have a sense of coercion.

¹³ J. Habermas, *Tendencje jurydyzacji*, trans. J. Czapska, *Colloquia Communia* 6/1988 – 1/1989, p. 136. Cf. T. Mendelski, *Habermas i Foucault: spory wokół wiedzy jako władzy*, *Colloquia Communia* 27/1985 – 28/1986, p. 101–120.

¹⁴ M. Foucault, M. Foucault, *The History of Sexuality*, vol. 1: *An Introduction*, *op. cit.*, p. 144.

¹⁵ M. Foucault, *Cours du 14 janvier 1976*, (in:) *Dits et écrits*, vol. II, p. 187–188.

In *Discipline and Punish* Foucault defines: “disciplinary power refers individual actions to a whole that is at once a field of comparison, a space of differentiation and the principle of a rule to be followed. It differentiates individuals from one another, in terms of the following overall rule: that the rule be made to function as a minimal threshold, as an average to be respected or as an optimum towards which one must move. It measures in quantitative terms and hierarchizes in terms of value the abilities, the level, the “nature” of individuals. It introduces, through this “value-giving” measure, the constraint of a conformity that must be achieved” and once again “the mechanisms of the disciplinary establishments have a certain tendency to become “de-institutionalized”, to emerge from the closed fortresses in which they once functioned and to circulate in a “free” state; the massive, compact disciplines are broken down into flexible methods of control, which may be transferred and adapted.”¹⁶ Foucault often uses the terms “power” and “power relations” interchangeably. “Power relations” lead to subjectification (assujettissement), or placing the subject in a given space. Those who do not fit or do not want to fit their given social roles (the insane, vagabonds, criminals, soldiers, students) are excluded. New and until then unknown institutions of individual control come into being: mental institutions, penal colonies, community homes, prisons, schools, barracks. Some act as a means of binary segregation (the insane, or, later, the mentally ill – the sane; the normal – the abnormal). Other train individuals, uniform and normalize them by diversifying distribution and subjecting them to constant supervision.¹⁷

The norms created by power “tear” the social body; a division into the normal and the abnormal comes into being. Although this division functioned before (sanctioned by medicine), the seventeenth century changed not only the scale of control (every aspect of bodily functions, moves, gestures, demeanors), the subject of control (the economics of body movements), but also modality. We now have to face a constant pressure establishing a definite course of action in accordance to codification, or regulations, which parcel time, space and gestures. “*The human body was entering a machinery of power that explores it, breaks it down and rearranges it. It defined how one may have a hold over others’ bodies, not only so that they may do what*

¹⁶ M. Foucault, *Discipline and Punish. The Birth of the Prison*, translated by A. Sheridan, Vintage Books A Division of Random House Inc., New York 1995, p. 181–182; 211.

¹⁷ On the origins of disciplinary power, see: S. Oliwniak, *Michel Foucault Genealogia dyscyplin. Wprowadzenie*, (in:) M. Błachut (ed.), *Z zagadnień teorii i filozofii prawa. Późnowczesność*, Kolonia Limited 2007, p. 97–110. Also, more in: John S. Ransom, *Foucault’s discipline. The Politics of Subjectivity*, Duke University Press, Durham and London 1997.

one wishes, but so they may operate as one wishes, with the techniques, the speed and the efficiency that one determines. Thus discipline produces subjected and practiced bodies, “docile” bodies.”¹⁸ New disciplines come into being, which are forms of general domination. Law to an increasing degree assumes a regulatory function; the role of normalization increases at the expense of a juridical system of law. Foucault continues in *Society Must Be Defended*: “The discourse of discipline is alien to that of the law; it is alien to the discourse that makes rules a product of the will of the sovereign. The discourse of disciplines is about the rule: not a juridical rule derived from sovereignty, but discourse about a natural rule, or in other words norm. Disciplines will define not a code of law, but a code of normalization, and they will necessarily refer to a theoretical horizon that is not the edifice of law, but the field of the human sciences. And the jurisprudence of these disciplines will be that of clinical knowledge.”¹⁹

Disciplinary power was quick to change its character (i.e., by the second half of the eighteenth century). Foucault comes to the conclusion that it was the time when a new – non-disciplinary – technology of power appeared. By using the formed, disciplined, self-subjugated human body, it transmits its actions into a different plane. Its object and subject is now the human, as a biological being. It wants to supervise, control, and exploit the corporate body of individuals, the mass, the population. Its scope of influence involves the population and, within it, birth, sexuality, productivity, and death of the previously individualized persons, now incorporated into a mass. Foucault notices: the period from the latter half of eighteenth century saw the development of state policy in relation to birth control and rate of birth. Other fields of intervention associated with biopolitics included the range of phenomena associated with old age, infirmities. Biopolitical government included various forms of control over the environment: water, swamps, and conditions of urban life. Biopower intervenes in “the birth rate, the mortality rate, various biological disabilities, and the effects of the environments.”²⁰

Disciplinary power transforms into biopower. The subject of sovereign power was the individual and society constituted by social contract of those

¹⁸ M. Foucault, *Discipline and Punish*, *op. cit.*, p. 138. Cf. J. Rouse, *Power/Knowledge*, (in:) *The Cambridge Companion to Foucault*, ed. G. Gutting, Cambridge University Press 1994, p. 92–111.

¹⁹ M. Foucault, *Society Must Be Defended*, *op. cit.*, p. 38. Cf. B. Golder & P. Fitzpatrick, *Foucault's Law*, a GlassHouse book Routledge 2009, p. 19–39.

²⁰ *Ibid*, p. 245.

individuals; the subject of disciplinary power was the individual and its body; however, in the case of biopower, its scope of influence is the population, where the process of events occur in series. Thus biopower introduces new mechanisms of power, different from those used by disciplinary power. These are: statistical estimates and forecasts; techniques for decreasing the mortality rate, improving longevity and stimulating reproduction, regulating and optimizing life.²¹

II. Giorgio Agamben: The state of exception has become a paradigm of contemporary democracy

For Foucault, biopolitics is another name for technology of power, a biopower, which needs to be distinguished from the mechanisms of 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.*”²² Now, while Foucault claimed that biopolitics first came into existence in the modern period, Agamben clearly points out that “bare life” has always been included in the sphere of politics, it has always been the object and the aim of state action, and has always been subjected to elaborate mechanisms of both inclusion and exclusion (as Agamben calls it: *inclusive exclusion*). One more difference between Foucault’s and Agamben’s terminology is the etymology of the word norm. The former devises it from the Latin *norma*, while the latter uses the Greek term *nomos* as the word of origin. This is crucial for understanding the difference in Agamben’s definition of the role of sovereign and the relations between law and bios. The modern form of law, in which bios is completely seized and controlled by law, is characterized by a crisis of normative as well as regulatory discourse. Catherine Mills notices that “*while Foucault’s conception of the integration of life and law in biopower maintains an ambivalence toward the role of sovereign power within the emergence of a normalizing society, tied as it is to a preoccupation with death as power over life, for Agamben, it is precisely the logic*

²¹ *Ibid.*, p. 242–247. I wrote more on Foucault’s view on biopolitics in: *Biopolitics and the rule of law*, (in:) *Axiology of the Modern State Under the Rule of Law. Selected Issues*, ed. By S. Oliwniak, H. Święczkowska, Studies in Logic, Grammar and Rhetoric 19 (32), Białystok 2009, p. 33–48. Cf: T. Lemke, *Biopolityka*, trans. T. Dominiak, Wydawnictwo Sic!, Warszawa 2010, p. 42–63.

²² M. Foucault, *Society Must be Defended*, *op. cit.*, p. 246.

of sovereignty constitutes the limit of the juridical, such that law only finds its force in the very life of men.”²³

Agamben addresses the issue of biopolitics in his 1999 essay, *Form-Of-Life*. “What is left unquestioned in contemporary debates on bioethics and biopolitics is precisely what before all else should be questioned – the very biological concept of life.”²⁴ In *Homo Sacer* he writes: “Only within a biopolitical horizon will it be possible to decide whether the categories whose opposition founded modern politics (right/left, private/public, absolutism/democracy, etc.) – and which have been steadily dissolving, to the point of entering today into a real zone of indistinction – will have to be abandoned or will, instead, eventually regain the meaning they lost in that very horizon.”²⁵

“Bare life”²⁶, or bios, is now in the center of attention of the state; indeed – it overlaps the sphere of politics. Biopower which uses covert domination and normalization techniques aimed at subjugation of the human body is now clearly in the open.²⁷ The reason for this is that the contemporary paradigm for the western world is the state of emergency, and the space in which this state is best visible. It is a camp, such as the Nazi concentration camps and its contemporary counterparts like refugee camps or terrorist detention camps (e.g. Guantanamo). The space is “no man’s land”, the camp is “the new biopolitical nomos of the planet.”²⁸ The state populates it with modern-day homines sacri who today are refugees, or those who are considered a threat to the state’s being. Thus originates the “*state of exception, in which bios and zoē are no longer separable – nor are right or fact – but instead enter into a zone of irreducible indistinction*”.²⁹ This implementa-

²³ C. Mills, *Biopolitics, Liberal Eugenics, and Nihilism*, (in:) *Giorgio Agamben. Sovereignty & Life*, ed. by M. Calarco, S. DeCaroli, Stanford University Press, California 2007, p. 189.

²⁴ G. Agamben, *Means Without End: Notes on politics*, trans. V. Binetti and C. Casarino, Minnesota University Press, Minneapolis 2000, p. 7.

²⁵ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen, Stanford University Press, Stanford 1998, p. 4.

²⁶ On the translation of Agamben’s “la nuda vita” into “bare life” and not “naked life”, and relations with „das bloße Leben” by Walter Benjamin see Leland de la Durantaye’s, *Giorgio Agamben. A Critical Introduction*, Stanford University Press, Stanford CA 2009, p. 200–205.

²⁷ For more detail on the different understanding of biopolitics by Agamben and Foucault, see: P. Patton, *Agamben and Foucault on Biopower and Biopolitics*, (in:) *Giorgio Agamben. Sovereignty & Life*, ed. by M. Calarco, S. DeCaroli Stanford University Press, California 2007, p. 203–228.

²⁸ G. Agamben, *Means Without End: Notes on politics*, *op. cit.*, p. 45.

²⁹ G. Agamben, *Homo Sacer*, *op. cit.*, p. 20; idem, *The state of Exception*, (in:) A. Norris (ed.), *Politics, metaphysics, and death. Essays on Giorgio Agamben’s Homo Sacer*, Duke University Press, Durham and London 2005, p. 293.

tion of “bare life” into the sphere of politics is indivisibly connected with sovereignty. This means, counter to Foucault’s beliefs, that biopolitics (and its techniques) is not a new concept. “*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.*”³⁰ Agamben adds in *Homo Sacer*: “*It can even be said that the production of a biopolitical body is the original activity of sovereign power.*”³¹ And once again: “*The fundamental activity of sovereign power is the production of bare life as originary political element and as threshold of articulation between nature and culture, zoē and bios.*”³²

Biopolitics is as old as the sovereign exception. The exception problematizes the possibility of legal norms being in effect. For Agamben, exception is a form of exclusion. It constitutes a state in which legal norm is not annihilated as such, but rather is still in a specific relation with the exception, which is suspension. The norm applies to the exception; however, when it does not, it withdraws from it. The state of emergency is a consequence of suspension of the power of the legal order. The sovereign decrees a state of emergency, and, by the power of this decree, the legal order withdraws with the state of emergency taking its place. That which is outside the law system in a normal situation, is temporarily included in the state of exception. That which was normally discarded (excluded), is by the suspension of legal order temporarily included into it. Thus, the legal order withdraws from the exception, allowing it to exist. The relation of the exception is similar to this: “*The original political relation is the ban (the state of exception as zone of indistinction between outside and inside, exclusion and inclusion).*”³³

The state of emergency is the threshold between legal order and chaos; it allows to distinguish that which is outside the legal order, and to distinguish the legal order itself. It is a “seizure of the external”, the occupation of the exception. The state of exception is only possible if the power of the legal order is suspended. Exception (*ex-capere*) refers to what is taken outside and not simply excluded (*Homo Sacer* p.18). If, under “normal” conditions, the decisions of the sovereign are limited by the current legal norms, than

³⁰ G. Agamben, *Homo Sacer, op. cit.*, p. 128.

³¹ *Ibid*, p. 8.

³² *Ibid*, p. 181.

³³ G. Agamben, *Homo Sacer, op. cit.*, p. 31.

in a state of emergency law is temporarily suspended, and the two elements of the term “legal order”: law and order, exist separately. In a state of exception, the “usual” legal order loses its reference; it exists only as pure possibility. Agamben writes: “*The state of exception is not a special kind of law (like the war law); rather, insofar as it is a suspension of the juridical order itself, it defines law’s threshold or limit concept.*”³⁴

The sovereign exception, being a sphere of indistinction between nature and law, is an assumption of the existence of a legal reference in the form of its suspension. The state of emergency becomes the norm; the norm becomes the state of emergency. 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.*”³⁵

The decision on the state of emergency, although, according to etymological reasons supplied by Agamben himself, it would be better to call it a state of exclusion or a state of exception, determines the boundaries between the external and the internal. Outside the legal system (the juridical order in the positivist sense) is the situation of exception (it is excluded by the force of the establishment of the order); inside the legal system are the norms of positive law which, at the same time, display a potency to include that which is outside (the state of emergency). Giorgio Agamben states that “*the paradox of sovereignty consists in the fact the sovereign is, at the same time, outside and inside the juridical order, but does not exclude the force of law from this rule*” (*Homo Sacer*, p. 15).

Exception is in fact a form of exclusion. The norm is applied to the exception, without applying it; the norm withdraws from it. The state of exception is not the chaos from a time before the juridical order, but rather a situation of a suspension of this order. The sovereign, through introducing a state of emergency, tries to constitute that which is external in the internal aspect of juridical order; he interiorizes that which goes beyond the order. A special power of Law is its ability to stay in relation with that which is external. The normalized factual states are the areas of reference of the juridical order, and are included into its scope. The situation of a state of emergency cannot, however, be defined as either factual or legal; it is a relation between Law and fact which is placed on the border of the normal and

³⁴ G. Agamben, *State of exception*, trans. by Kevin Atterel, The University of Chicago Press, Chicago and London 2005, p. 4.

³⁵ G. Agamben, *Homo Sacer*, *op. cit.*, p. 173.

the exception. Agamben argues: “*In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other.*”³⁶

The state of exception clearly shows the indistinction of the external and internal, life and law. Life is included into the sphere of law but can only be included in it by assuming its inclusive exclusion, and only in the frames of *exceptio*.³⁷ Through a decision of a state of emergency, that which is external is included into the juridical order not by means of prohibition, but rather by suspension of the force of the order; it is included by allowing the juridical order to abandon it precisely by withdrawing from it.

By writing about Agamben’s interest in Carl Schmitt’s theory of sovereignty, Steven DeCaroli shows the essence of this specific relation between sovereignty and law: “*the political distinction between inside and outside, inclusion and exclusion, structures the basic logic of sovereignty itself, insofar as sovereignty maintains a boundary not between the legal and the illegal, both of which participate fully in the logic of legality, but between the legal and the non-legal, that is, between the lawful and the outlaw, between the citizen and the exile.*”³⁸

In a state of emergency law is unenforceable. This allows a space where law and fact, bare life and biopolitics become indistinguishable. In a state of emergency, homo sacer lives under the rule of law which is in force, but is not enforced. “*The state of exception is an anomie space in which what is at stake is a force of law without law.*” (The state of exception, p. 39) Law without meaning is in force, or in other words, a clear form of law remains without its content. In the same time, the state of exception, being the rule, determines the execution of law through the act of violence – a law which is indistinguishable from law, yet should be regulated. It is impossible to discern a violation from an execution of law. Behaviors which correspond with the legal norm, and those outside it, converge. “*For law, this empty space is the state of exception as its constitutive dimension. The relation between norm and reality involves the suspension of the norm, just as in ontology the relation between language and world involves the suspension of denotation in the form of a langue*” (The state of exception, p. 60).

³⁶ G. Agamben, *State of exception*, *op. cit.*, p. 23.

³⁷ G. Agamben, *Homo Sacer*, *op. cit.*, p. 44.

³⁸ S. DeCaroli, *Boundary Stones: Giorgio Agamben and the Field of Sovereignty*, (in:) *Giorgio Agamben Sovereignty and Life*, Stanford University Press, Stanford CA 2007, p. 51.

The camp is a space which, by power of decision on a state of exception, is excluded (withdrawn) from the scope of legal norms in the current legal order. The legal norms of a “normal” legal system are not in force in this space and so they are not applied. They are in force outside the space, but in relation to it they are meaningless. The state of exception is a possibility (potency) of a “normal” legal order. This way a new political and judicial paradigm comes into existence; a paradigm in which the norm and the exception are one. In the camp the legal order of the state of emergency is “normal”. Law and fact are no longer distinguishable. Whether the state is in force or not is no longer an issue. The legal (political) subjectivity of an individual becomes one with “bare life”. To decide who at a given time and situation is a “bare life” (or *homo sacri*) becomes a subject of a sovereign political decision. It is a situation of “pure violence”. The camp is an absolute biopolitical space in which power is exercised not against juridical subjects but against biological bodies. It is a space in which sovereignty exists but law does not.

When Agamben describes the relations between anomy and law in the state of exception, he points to an interesting double paradigm. He writes: *“the real state of exception as the threshold of indifference between anomie and law. (...) hence a double paradigm, which marks the field of law with an essential ambiguity: on the one hand, a normative tendency in the strict sense, which aims at crystallizing itself in a rigid system of norms whose connection to life is, however, problematic if not impossible (the perfect state of law, in which everything is regulated by norms); and, on the other hand, an anomic tendency that leads to the state of exception or the idea of the sovereign as living law, in which a force-of-law that is without norm acts as the pure inclusion of life”* (State of exception, p. 73).

S U M M A R Y

The article is a preliminary analysis of the roles and functions of law as discourse in relation to the shifts of political power in modern, European culture of law. It presents the views of Michel Foucault and Giorgio Agamben on the transformation of disciplinary power into biopower, and the consequences of these processes. Foucault describes the change in the code of power and law, the change in the understanding of sovereignty. The juridical model of power and law from the Middle Ages is replaced by disciplinary methods, and then later by the rule of Norm and infra-law. Law is no longer a reflection of the Sovereign’s will, but is an element of the microphysics of power. Those who did not fit the role and space defined by the norm/norms became the object of exclusive discourse. In

contemporary democratic states this form of exclusion has been radicalized. The author presents Agamben's famous thesis: state of exception becomes a norm, a paradigm of western contemporary democracies. The state of exception is an anomic space in which what is at stake is a force of law without law. The law-in-force does not have meaning, or, in other words, it is a clear form of law beyond its content. At the same time, as the state of exception is the rule, it defines the execution of law in an act of violence; the law which, as it becomes indistinguishable from life, should be regulated. It is then impossible to distinguish a violation of law from its execution. Those who by arbitrary decision of the sovereign are described as Alien become the modern-day *homines sacri*.