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DOSSIÊ LIMIARES DESTITUINTES: POLÍTICA, DIREITO, TEOLOGIA E LINGUAGEM

RETHINKING LAW:

FROM COMMUNITY TO FORM-OF-LIFE AS DESTITUENT POWER*

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Abstract
The aim of this paper is to consider legal and political theories and, more broadly, social theoretical concepts that might in practice be consistent with the aims of Agamben's critique of power. As a first step, we will recall the importance of biopolitics and such fundamental concepts as community, bare life, form-of-life, state of exception, destituent power in Agamben's *Homo Sacer* project and in the context of his *oeuvre* from *The Coming Community*. Then, instead of looking for sites of resistance, we will consider the possibility of socio-political-legal relations that can ensure justice and equity based on human dignity, autonomy, mutual recognition and solidarity instead of domination and biopolitical governance. In relation to law, politics and power, Agamben pays particular attention to the ideas of Schmitt and Benjamin, but it is worth disrupting the system of thought based on the sovereign and the exceptional state, allowing the emergence and accentuation of different points of view, with the help of local justice, deliberative democracy, restorative justice, the insights of the community ethos, the philosophy of *ubuntu*, affective social theory, instead of neoliberal individualism.

Keywords
Philosophy of law, justice, community, biopolitics, form-of-life, destituent power.

REPENSAR LA LEY: DE LA COMUNIDAD A LA FORMA-DE-VIDA COMO PODER DESTITUYENTE

Resumen
El objetivo de este artículo es considerar las teorías jurídicas y políticas y, en términos más generales, los conceptos teóricos sociales que pueden ser coherentes en la práctica con los objetivos de la crítica del poder de Agamben. Como primer paso, recordaremos el significado de la biopolítica y conceptos fundamentales como comunidad, vida desnuda, forma de vida, estado de excepción, poder destituyente en el proyecto *Homo Sacer* de Agamben y en el contexto de su obra de *La comunidad que viene*. Entonces, en lugar de buscar espacios de resistencia, analizaremos la posibilidad de relaciones sociopolíticas y jurídicas que puedan garantizar la justicia y la equidad basadas en la dignidad humana, la autonomía, el reconocimiento mutuo y la solidaridad en lugar de la dominación y la gobernanza biopolítica. En relación con el derecho, la política y el poder, Agamben presta especial atención a las ideas de Schmitt y Benjamin, pero vale la pena alterar el sistema de pensamiento basado en el estado soberano y excepcional, permitiendo la aparición y acentuación de diferentes puntos de vista, con la ayuda de la justicia local, la democracia deliberativa, la justicia restaurativa, las ideas del ethos comunitario, la filosofía del *ubuntu*, la teoría social afectiva, en lugar del individualismo neoliberal.

Palabras clave
Filosofía del derecho, justicia, comunidade, biopolítica, forma-de-vida, poder destituyente.

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Introduction

Since the 1990s, the social dangers of globalisation and the expansion of neoliberal capitalism have become increasingly evident. Of course, not unrelated to this fact is the strong echo of Michel Foucault's analyses of new forms of power (including in the case of Giorgio Agamben) and the renewed prominence of the problem of power and the possibility of resistance, with an approach different from that of the New Left experiments of the 1960s. Agamben's work, starting with *The Coming Community*, has also increasingly focused on this issue, partly influenced by Foucault's concept of biopolitics, which links concepts such as sovereign power, the state of exception, bare life, as well as potentiality and destituent power. This conceptual framework implies a rethinking of law in line with the critique of power and social relations, without which Agamben's ideas cannot lead to significant changes in social practice. Agamben himself felt the need for rethinking, but his solution requires a critique, in terms of actual social praxis. (I am using the term praxis in the sense in which Jean-Paul Sartre's dialectical social ontology conceptualised it in the *Critique of Dialectical Reason*, often referred to as a theoretical starting point by Fredric Jameson.)[1] After recalling the main ideas of the critique of power in Agamben's *Homo Sacer* project, I will consider some of the theoretical concepts in philosophy of law and political theory as alternative forms of solidary social coexistence, such as *ubuntu*, responsive law, restorative justice and affective law, which can contribute to the practical realisation of the ethical intentions expressed in Agamben's notions of form-of-life and potentiality.

1. Biopolitics and power in Foucault and Agamben

Biopolitics has become a central and controversial concept in social criticism over the past three decades, often used as a synonym for (bio)power. First, it is worth clarifying the original Foucauldian meaning of these terms and the problematic Agamben's interpretation of them. Antonio Negri reminds us that the origins of the concept date back to the emergence of post-industrial society in the 1960s. The political dimension of exploitation and the forms of domination have also been transformed in the context of changing socio-economic conditions. The new ontology of biopower and biopolitics describes this situation.[2] The Foucauldian biopolitical perspective and the Deleuzian concept of the field of immanence seek to establish the possibility of change in society, finding the source of social agency against the overall domination in the subjectivity.[3] More precisely, it is a common praxis based on the singularity of human existence, on the diversity of subjectivities - as in Jean-Paul Sartre's phenomenological-existential conception of lived experience and praxis.[4] (As we will see, Sartre's thoughts on consciousness and lived experience are clearly haunting the writings of Foucault, Deleuze, and Agamben on subjectivity and bare life.)

[1] Jameson, *The Sartrean Origin*, p. 2.; Jameson, *Foreword*, p. xx.
[2] Negri, *At the Origins of Biopolitics*, pp. 49-51.
[3] Negri, *At the Origins of Biopolitics*, pp. 53-55.
[4] See Negri, *At the Origins of Biopolitics*, p. 63.

Foucault explains his conception of power in his 1976 *History of Sexuality* in relation to the specific knowledge of sex, emphasizing that this form of power is different from repression and law. It is worth quoting it in full:

> By power, I do not mean "Power" as a group of institutions and mechanisms that ensure the subservience of the citizens of a given state. By power, I do not mean, either, a mode of subjugation which, in contrast to violence, has the form of the rule. Finally, I do not have in mind a general system of domination exerted by one group over another, a system whose effects, through successive derivations, pervade the entire social body. The analysis, made in terms of power, must not assume that the sovereignty of the state, the form of the law, or the over-all unity of a domination are given at the outset; rather, these are only the terminal forms power takes. It seems to me that power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; as the support which these force relations find in one another, thus forming a chain or a system, or on the contrary, the disjunctions and contradictions which isolate them from one another; and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation – of the law, in the various social hegemonies.[5]

Biopower consists of "diverse techniques for achieving the subjugation of bodies and the control of populations".[6] The first involves discipline, with institutions such as the army and schools, and theoretical reflections on their objectives and methods. The second is embodied in the new demographic and statistical apparatuses. These two versions of biopower, in their multiple forms, serve "the controlled insertion of bodies into the machinery of production and the adjustment of the phenomena of population to economic processes".[7] In contrast to the power of the sovereign, biopower consists of "taking charge of life, more than the threat of death":[8] to govern, to administer, through "continuous regulatory and corrective mechanisms", for "distributing the living in the domain of value and utility".[9] In *The History of Sexuality,* Foucault presents biopolitics as a new form of domination and control, with the binary character (allowing or prohibiting and punishing) of sovereign power being obsolete in modernity. The terms biopower and biopolitics have a more or less synonymous meaning here; both describe the function and forms of disciplinary and regulatory mechanisms, that is, "the anatomo-politics of the human body" and "a biopolitics of the population".[10] (Nota bene, in the original French we have the word "bio-politique", which translates "biopower" or "biopolitics" as a noun, or "biopolitical" as an adjective.)[11] From 1978 onwards, Foucault used the terms governmentality, security and normalisation instead of the term "biopolitics of the population", which he focused on in his lectures at the Collège de France (*Security, Territory, Population*, 1977-1978; *The Birth of Biopolitics*, 1978-1979).

Foucault analyses the form of social regulation associated with modernity, characterised by the fact that "power no longer operates through violence imposed on

[5] Foucault, *The History of Sexuality*, pp. 92-93.
[6] Foucault, *The History of Sexuality*, p. 140.
[7] Foucault, *The History of Sexuality*, p. 141.
[8] Foucault, *The History of Sexuality*, p. 143.
[9] Foucault, *The History of Sexuality*, p. 144.
[10] Foucault, *The History of Sexuality*, p. 139.
[11] Cisney; Morar, *Introduction: Why Biopower? Why Now?*, p. 4.

subjects, but through apparatuses that regularize, administer, and foster the life of subjects through the normalization of life processes".[12] Foucault also emphasises that power is not centralised and hierarchical, embodied and mediated by institutions and the force of law, but rather a dispersed structure, that is, power relations exist throughout society, only partially embodied in institutions and ideologies. In the *Security, Territory, Population* lectures, he asserts: "What characterizes power is the fact that it is a strategic relationship which has been stabilized through institutions."[13] The following year, in his lectures on *The Birth of Biopolitics* (which in fact focused on governmentality and neoliberalism), he stressed that what he was trying to elaborate in the concept of governmentality was an analytical grid for analysing power relations, that is, "ways of conducting the conduct of mad people, patients, delinquents, and children", as well as economic policy or "the management of a whole social body".[14] This analysis of "micro-powers", of the procedures of governmentality "should be considered simply as a point of view" that can be applied to any sector or phenomenon in society.[15] Agamben, on the other hand, clearly sees biopolitics as a hidden constitutive technique (or, rather, a general logic) of subjugation; as in the introduction to *Sovereign Power and Bare Life* he claims that "the production of a biopolitical body is the original activity of sovereign power".[16] What makes Agamben's interpretation problematic is that in his *Homo Sacer* project he focuses on the critique of sovereign power, using the concepts of state of exception and biopolitics in parallel, in a systematic historical framework, in order to destroy (in a Heideggerian manner) the ontological machinery of exception and bare life in European philosophy (the inclusive exclusion) and political thought (the political mythologem of *homo sacer*) in one fell swoop. This may inevitably remind us of Ernesto Laclau's critical remark to Agamben: "his genealogy is not sensitive enough to structural diversity and, in the end, it risks ending in sheer teleology".[17] Although Agamben is obviously aware of the constitutive role of indeterminacy in Spinozian-Deleuzian immanence and of the dispersed nature of power relations, he cannot resist the urge to create a kind of intelligible and ontologically rigidifying systemic logic in which everything receives its own meaning and explanation.

Thus, Agamben considers law as an instrument of power and domination, and not as a guarantee of justice in the sense of social justice. In the *Remnants of Auschwitz*, Agamben states: "As jurists well know, law is not directed toward the establishment of justice. Nor is it directed toward the verification of truth. Law is solely directed toward judgment, independent of truth and justice."[18] This hierarchical and unethical approach has two consequences. First, it obscures the importance of horizontal and interpersonal relations (mutual recognition and solidarity) in resisting oppressive power. It also excludes ethical questions from the field of law, in the spirit of Hans Kelsen's legal positivism. (It is common to think of Kelsen and Carl Schmitt as adversaries, but in fact the relationship between their views on legal theory is much more complex. Indeed, Kelsen anticipates the conception of exception formulated by Schmitt and, later, by

[12] Mills, *Biopolitics and the Concept of Life*, p. 95.
[13] Foucault, *Sex, Power, and the Politics of Identity*, p. 169.
[14] Foucault, *The Birth of Biopolitics*, p. 186.
[15] Foucault, *The Birth of Biopolitics*, p. 186.
[16] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, p. 6.
[17] Laclau, *Bare Life or Social Indeterminacy*, p. 12.
[18] Agamben, *Remnants of Auschwitz*, p. 18.

Agamben.)[19] These aspects appear in writings related to Agamben's key concepts of ethos and form-of-life as rather general ethical principles, incompatible with the institution of law, with real social praxis. In contrast to Foucault, who after 1978 speaks clearly of global neoliberal capitalism and emphasises the role of the rule of law in the legal context,[20] Agamben's model of power and law is intended to be universal, with an inherent top-down structure - as Tom Frost points out in his critique.[21]

With regard to the possibilities of resistance to power, Agamben seems to be drawing inspiration from Foucault again. The later Foucault, in the 1980s, tends to find the sites of resistance in new subjectivities that encompass social relations (friendship and community) based on (alternative) identities, rescuing singularity and self-determination from the unifying structure of power. In a 1984 interview, Foucault describes it as an art of living that can also be the basis of a community:[22] "creation of new forms of life, relationships, friendships in society, art, culture and so on, through our sexual, ethical and political choices".[23] Agamben was also deeply concerned with practices of resistance, as can be seen in his reflections on inoperability, community, form-of-life, and destituent power. The main difference between the two philosophers lies in Agamben's skepticism regarding the possibility of transgressive freedom of new subjectivities. "The only resistance which is effective against the totalizing power of the *dispositif* is the construction of a form-of-life, a life which is lived immanently and therefore not reliant upon *dispositifs* to be constituted, nor any form of transcendence."[24] The fundamental ethical values and principles behind power relations should be mutual recognition and reciprocity in order "to play these games of power with as little domination as possible" (as Foucault defines *ethos*).[25] Meanwhile, for Agamben, the original political relation is prohibition, through the construction of bare life as the basis for exclusion from the (political) community.[26] Thus, Agamben ignores the mutual nature of social bonds, reducing them to bare life,[27] thus ignoring the fact that there is no power without resistance. As Laclau points out: "When a supreme will within the community is not confronted by anything, politics necessarily disappears."[28] The question is what kind of political and social system (including law) could enable the development of an ethos of solidarity and trust to enable members of society to resist this logic of power.

2. Bare life and indeterminacy of action

Bare life is a central concept in Agamben's theory of power, inspired by Foucault's biopolitics as well as the Deleuzian indeterminacy of absolute immanence. In the *Remnants of Auschwitz*, bare life is presented as an existential state of indeterminacy (between life and death, the human and the non-human) in the case of the desperate and

[19] Forzani, *The Power of Purity: Preliminary Notes for an Archaeology of Modern Jurisprudence*.
[20] Foucault, *The Birth of Biopolitics*, pp. 159-184.
[21] Frost, *Biopower and sovereignty in Foucault and Agamben*, pp. 7-9.
[22] Foucault, *Sex, Power, and the Politics of Identity*, p. 167.
[23] Foucault, *Sex, Power, and the Politics of Identity*, p. 164.
[24] Frost, *Law, Relationality and the Ethical Life*, p. 62.
[25] Foucault, *The Ethics of the Concern for Self as a Practice of Freedom*, 298.
[26] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, p. 181.
[27] Laclau, *Bare Life or Social Indeterminacy*, p. 16.
[28] Laclau, *Bare Life or Social Indeterminacy*, p. 16.

apathetic "Muslims" of the Auschwitz concentration camp. These unreflective, vegetative, and impersonal beings offer an opportunity to link bare life to impersonality and indeterminacy. The former clearly evokes Jean-Paul Sartre's phenomenological theory of consciousness (the conception of an impersonal, non-reflective field of lived experiences in *The Transcendence of the Ego*)[29] and the lived experience of passive materiality (in the form of a philosophical fiction about the young Gustave Flaubert in *The Family Idiot*).[30] The desubjectified, silent and indifferent *Muselmann* without dignity, is beyond all human values, wills and choices: he is bare life. "The bare life to which human beings were reduced neither demands nor conforms to anything. It itself is the only norm; it is absolutely immanent." – as Agamben puts it.[31] For him (after Wolfgang Sofsky), this is the "total triumph of power over the human being",[32] which is the essence of this extreme "state of exception" embodied in the Nazi camp. In the camp, where "the extreme situation becomes the very paradigm of daily life",[33]absolute immanence manifests itself.[34]

Agamben addresses the Deleuzian concept of absolute immanence in his 1996 essay in the Italian journal *aut aut*, one year after the publication of the first volume of *Homo Sacer*. Agamben makes it clear that it was the later thinking of Michel Foucault and Gilles Deleuze that inspired him to take the concept of life as a philosophical starting point. Both wrote their last texts on life, Foucault's *La vie*: *l'expérience et la science*, the first version of which was written in 1978, was published in 1985. Deleuze's *L'Immanence: une vie...* was published in 1995. Agamben emphasises that Foucault displaces the subject from the realm of cogito and consciousness to the dimension of life, which could be the third pillar of Foucault's biopolitics, alongside knowledge and power.[35] Foucault refers here to two possible approaches, one being the phenomenological discourse marked by the names of Jean-Paul Sartre and Maurice Merleau-Ponty, and the other being the tradition in the philosophy of science that, for Foucault, is marked, alongside Canguilhem, by the work of Jean Cavaillès, Gaston Bachelard and Alexandre Koyré. Sartre's name is mentioned in the company of Merleau-Ponty in his work *The Transcendence of the Ego*, from 1936. Foucault obviously considers the idea of the impersonal transcendental field and of pre-reflective consciousness to be noteworthy in Sartre's work - although he then builds his thought on the other tradition mentioned. Agamben then turns to Deleuze's writing, which, through the concept of immanence, leads him to the indeterminacy that appears in the absolute immanence of mere life and to the exceptional condition in parts of the *Homo Sacer* project in the 1990s. Agamben points out that Deleuze, at the beginning of *L'Immanence: une vie...*, refers to immanence - which is the immanence of itself in motion, without referring to an object and without belonging to a subject - as a transcendental field, devoid of the transcendence of subject and object. (The origin of this concept is to be found in Deleuze's *The Logic of Sense*, where he first refers to the concept of consciousness as expounded by Sartre in *The Transcendence of the Ego*.)[36] For Deleuze, as he elaborated in his book on Spinoza, the only possible way to eliminate transcendence

[29] Sartre, *The Transcendence of the Ego*, pp. 12-14.
[30] Sartre, *The Family Idiot*, pp. 15-23.
[31] Agamben, *Remnants of Auschwitz*, p. 69.
[32] Agamben, *Remnants of Auschwitz*, p. 48.
[33] Agamben, *Remnants of Auschwitz*, p. 49.
[34] Agamben, *Remnants of Auschwitz*, p. 50.
[35] Agamben, *Absolute Immanence*, p. 221.
[36] Agamben, *Absolute Immanence*, p. 224.

in phenomenological thought is immanence, which is the movement of the infinite, behind which there is nothing, it encompasses everything, in its whirlwind of external and internal, making all distinction and hierarchy impossible.[37] This indeterminacy is characteristic of the bare life of the *Muselmann*, as well as of the camp, which is the paradigm of the state of exception.

If one accepts that this indeterminacy is linked to sovereign power and its ability to reduce all members of society to bare life, thus depriving them of their humanity and their capacity for self-determination, what possibility of resistance can be imagined in practice? As Laclau points out, Agamben's reductionist logic excludes the possibility of reciprocal effects in the relationship between society and power, and therefore necessarily leads to the assumption of totalitarianism.[38] From this point of view, there is only one way to resist biopower: to render inoperable the biopolitical machine, the distinction between bios and *zoe*, the transformation into bare life – states Agamben in *The Kingdom and the Glory*.[39] In the next chapter, we will examine Agamben's proposed solution, which is based on the concepts of form-of-life, ethos and community, through which plurality, potentiality and freedom of self-determination can be affirmed.

Several different approaches to the possibility of resistance derive from a more nuanced view of power and human relations. We mentioned above Foucault's thesis on dispersed power and the possibility of resistance present in all power relations, as well as his idea of the importance of new subjectivities. Laclau's idea is slightly different, but essentially similar: "There is a molecular process of partial transformations which is absolutely vital as an accumulation of forces whose potential becomes visible when a more radical transformation of a whole hegemonic formation becomes possible."[40] The common point is the rejection of a single, unilateral conception of power and its reduction to a distinction between *zoe* and bios, which cannot ground social agency.

As much as Agamben perceives the theoretical potential of the indeterminacy of immanence, his theory of power and the ontological machinery of Western thought is essentially totalising and generalising. This theoretical incongruity, which may arise from a kind of logocentrism, or at least from a conception of totalising ideology (from Marx's 'false consciousness' to Debord's 'spectacle') is evident in comparison with Deleuze and Guattari's critique of capitalism, whose basic concepts are singularity, relativity, multitude, rhizome, diversity, deterritorialisation. As for the possibilities of resistance, it is instructive to compare Agamben's thought with the post-Marxist theory of Hardt and Negri, who also have Deleuze's conceptual toolkit and biopolitics as an important basis for their approach. For them, the spectacle of global capitalism, the Empire, also offers a potential for liberation,[41] emerging from the power of the global multitude" itself,[42] which can subvert "the hegemonical languages and social structures and thereby reveal an alternative ontological basis that resides in the creative and productive practices of the multitude".[43] They claim that these activities, resistances, wills and desires, this "plural

[37] Agamben, *Absolute Immanence*, p. 233.
[38] Laclau, *Bare Life or Social Indeterminacy*, pp. 16-17.
[39] See Frost, *Biopower and sovereignty in Foucault and Agamben*, p. 12.
[40] Laclau, *Bare Life or Social Indeterminacy*, p. 17.
[41] Hardt; Negri, *Empire*, pp. 43-46.
[42] Hardt; Negri, *Empire*, p. 46.
[43] Hardt; Negri, *Empire*, p. 47.

multitude of productive, creative subjectivities of globalization (...) form constellations of singularities and events that impose continual global reconfigurations on the system".[44]

It would be worthwhile to analyse the influence of Debord's spectacle on Agamben in terms of the totalising character of power. Here we can only briefly refer to this possible connection. Agamben refers to Debord several times, in *The Coming Community* and in *The Kingdom and the Glory*,[45] as well as in *The Sovereign Power and Bare Life*, emphasising the post-democratic and totalitarian character of spectacular society.[46] Drawing on Marx and Engels's theory of ideology and Adorno and Horkheimer's conception of the culture industry, Debord also characterises the spectacle as a worldview that is a means of domination and commodification through the totality of a pseudo-world of representations.[47] Similarly, Agamben seeks a general and unified logic in the functioning of society, of power, that is, of the government machine. Agamben states:

> What is in question is nothing less than a new and unheard-of concentration, multiplication, and dissemination of the function of glory as the centre of the political system. What was confined to the spheres of liturgy and ceremonials has become concentrated in the media and, at the same time, through them it spreads and penetrates at each moment into every area of society, both public and private.[48]

Agamben reminds the reader that the original Greek word for 'glory' (also used by Debord to describe the totalising nature of the spectacle)[49] is *doxa* that today also designates 'public opinion'. Nota bene, in the European epistemic tradition, since Plato, doxa as cognition of what seems, of appearance[50] is the opposite of knowledge (*episteme*) as the correct representation of truth. The conception of ideology as *camera obscura* and false consciousness[51] echoes this distinction, complemented by a crautitique of capitalist exploitation and domination. Agamben inserts himself in this tradition when he stresses that the idea of consensual democracy (e.g. the Habermasian communicative action) is in fact related to the functioning of the oikonomic governmental machinery that he identifies with the Debordian 'society of spectacle'. It "absolutizes itself to an unheard of extent and penetrates every area of social life",[52] writes Agamben, just as Debord points out that "The spectacle presents itself as a vast inaccessible reality that can never be questioned."[53] Similarly, in *The Coming Community*, he refers to the Debordian conception centred on total domination ("absolute and irresponsible sovereignty over all social life")[54] in capitalism: "After having falsified all of production, it can now manipulate collective

[44] Hardt; Negri, *Empire*, p. 60.
[45] Agamben, *The Kingdom and the Glory*, pp. 255-259.
[46] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, p. 10.
[47] Debord, *The Society of the Spectacle*, p. 2.
[48] Agamben, *The Kingdom and the Glory*, p. 256.
[49] "It is the sun that never sets over the empire of modern passivity. It covers the entire surface of the globe, endlessly basking in its own glory." (Debord, *The Society of the Spectacle*, p. 5.)
[50] See Debord about the spectacle: "Considered in its own terms, the spectacle is an affirmation of appearances and an identification of all human social life with appearances. (...) Its sole message is: What appears is good; what is good appears." (Debord, *The Society of Spectacle*, p. 4.)
[51] Similarly, Debord writes: "In a world that has really been turned upside down, the true is a moment of the false." (Debord, *The Society of Spectacle*, p. 4.)
[52] Agamben, *The Kingdom and the Glory*, p. 259.
[53] Debord, *The Society of Spectacle*, p. 4.
[54] Agamben, *The Coming Community*, p. 78.

perception and take control of social memory and social communication, transforming them into a single spectacular commodity (...)".[55]

3. Community: *ethos* of usage and form-of-life

Let us then look at the possibilities that Agamben envisions for the independence of the all-encompassing power machine of biopolitical governmentality, the apparatus. Before discussing the form-of-life that renders the biopolitics of bios and *zoe* inoperative, it is worth recalling *The Coming Community*'s thoughts on community, singularity and ethos. Here, Agamben starts by analysing example/exemplary related to the question of community, as "being-called".

> Exemplary is what is not defined by any property, except by being-called. Being-called – the property that establishes all possible belongings (being-called-Italian, -dog, -Communist) – is also what can bring them all back radically into question. It is the Most Common that cuts off any real community.[56]

The example escapes the antinomy of the universal and the particular; it is a singular object that presents itself as such. The example "is always beside itself, in the empty space in which its undefinable and unforgettable life unfolds".[57] Likewise, replacing oneself with another "no longer knows a place of its own, but the taking-place of every single being is always already common – an empty space offered to the one, irrevocable hospitality".[58] This substitution is made possible by the ontological specificity of man, insofar as he is any being, who constantly oscillates between the common and the proper, the particular and the general. Agamben calls the manner "in which it passes from the common to the proper and from the proper to the common is called usage or ethos".[59] We can see this as an ontological basis of empathy, recognition of otherness, and solidarity. And the use of the term reciprocal substitution suggests the idea of a community based on mutual recognition, on reciprocity, which provides everyone with the potentiality and freedom inherent in singularity.[60] In Agamben's ontological argument, "the experience of taking-place in a whatever singularity",[61] the "innermost possibility of not-being"[62] is the condition of love, which brings with it the ethical intention of ethos or habitus that consists in the "free *use of the self*".[63] (It is interesting that the freedom to realise one's own potential is apparently reminiscent of Sartre's existentialist anthropology and ethics.) For Agamben, "the only ethical experience (...) is the experience of being (one's own) potentiality, of being (one's own) possibility".[64] The difference is that Agamben defends the character of a "common and absolutely exposed singularity",[65] instead of the search for

[55] Agamben, *The Coming Community*, pp. 78-79.
[56] Agamben, *The Coming Community*, p. 9.
[57] Agamben, *The Coming Community*, p. 9.
[58] Agamben, *The Coming Community*, p. 23.
[59] Agamben, *The Coming Community*, p. 19.
[60] Agamben, *The Coming Community*, p. 24.
[61] Agamben, *The Coming Community*, p. 24.
[62] Agamben, *The Coming Community*, p. 31.
[63] Agamben, *The Coming Community*, pp. 27-28.
[64] Agamben, *The Coming Community*, p. 43.
[65] Agamben, *The Coming Community*, p. 64.

one's own identity, "the already improper and senseless form of individuality",[66] being a pure externality, an "event of the outside",[67] an *ek-stasis*. For Agamben, indeterminacy can make subjectivity capable of "entering a community without presuppositions and without subjects", realising a "new planetary humanity".[68] This is an ontology and a political vision at the same time, in which, in addition to the Deleuzian singularity and indeterminacy, - in terms of ethics - mutual recognition, empathy and solidarity make resistance to power possible.

The potential of this whatever-being or ethos is later, in other writings, called form-of-life, which can only render the biopolitical apparatus inoperative. The form-of-life eliminates the division of life into *bios* and *zoe*, deactivates the logic of biopolitics. However, this ontological idea is difficult to interpret on a socio-political level, in praxis. All the forms of this immanent life or form-of-life in Agamben's writings serve only as illustrations for this ontological concept of the reappropriation of human existence.) The "glorious body" stripped of its functions and opened to new use in *Nudities*; objects of desecration and play in *Profanations*; and Franciscan monasticism in *The Highest Poverty*.)[69] This contemplative programme, focused on the potential of immanent life, does not ground social agency in praxis.[70] Even if its intention is to open up space for new political interventions based on the indeterminacy of the life-of-form, in its full potential, the concept of pure "means without end" is nothing more than (a desire for) the negation, the rejection of the existing biopolitical machinery. Ontology is a way of thinking that is the study of what is (from the Greek *to on*) and is therefore only suitable for sustaining normative and messianic visions at the level of logical argumentation. Consequently, for Agamben, law can only be something to be deactivated. We can call it political nihilism, as Laclau did, or utopianism, as some other critics of Agamben do.[71]In Agamben's theory, it is the concept of destitutive potential (or power) that aims to bridge the gap between logical-ontological reasoning and social reality. As Fusco stresses:

> For Agamben, something like a coming (emancipatory) politics is not the teleological accomplishment of a planned process, nor the destruction/reconstruction of a world or a form of life but consists in rendering inoperative all those forces shaping human life, opening them to a different purposeless use.[72]

Agamben's concept of destituent power aims to render the machinery of biopolitics inoperative, starting with the metaphysical concept of the subject. However, it is obvious that Agamben's concept of immanent life (ethos, form-of-life) as a destituent power cannot ground the real possibility of emancipatory action, of social agency against the domination of biopower, partly due to his reductionist concept of law. His concepts of destituent power and law are largely influenced by Walter Benjamin's *Critique of Violence*, drawing on a conception of the state, power and law related to modernity, and which also sets limits to their validity; see, for example, Benjamin's idea of a general strike capable

[66] Agamben, *The Coming Community*, p. 64.
[67] Agamben, *The Coming Community*, p. 66.
[68] Agamben, *The Coming Community*, p. 64.
[69] Frost, *Law, Relationality and the Ethical Life*, p. 105.; Frost, *Biopower and sovereignty in Foucault and Agamben*, p. 12.
[70] Frost, *Law, Relationality and the Ethical Life*, pp. 106-107., p. 109.
[71] Durantaye, *Agamben*, pp. 349-351.
[72] Fusco, *Form of life*, p. 56.

of overthrowing the legal order.[73] The main problem is not that it is not conceived within a paradigm of constitutive political change,[74] but that the reality of the emergence of a new subjectivity, a form of life, based solely on ontological arguments, is also completely unfounded. Unless we consider it as an awareness of the logic of biopolitical apparatuses among the few who are more receptive to philosophy than captives of the spectacle.

4. Law and society: practices and subjectivities

We have two alternative conceptions of power and law, whether we start from a more unified modernity or from the pluralistic life of our time. In the first paradigm, power is, above all, domination, subjugation, exercised through organs of violence, legal and political institutions. Liberation, resistance, in this case, is a struggle directed towards well-defined objectives and opponents. According to the second approach, power relations are omnipresent in social and human relations, involving the possibility of resistance. Tom Frost recalls that Foucault, in the 1980s emphasises: power relations themselves depend on resistance, since the plurality of resistance is inscribed in power, and "liberation from domination only gives way to new power relationships, which must be controlled by practices of freedom".[75] Thus, unlike traditional central repressive power, these do not necessarily conflict with political philosophical values such as the public interest and justice, but can operate in opposition to them. Likewise, law is not necessarily an instrument of oppression, an ideological apparatus of the State, but potentially a set of conventions, rules, principles and practices that aim to ensure social trust, solidarity and well-being (in Agamben, a happy life) based on the principles of reciprocity and equity. But for Agamben, power is totalising, subjects are produced and dominated by the operation of the oikonomic governmental machine – as Frost points out.[76] From this perspective, law could only be part of this machinery of domination.

The second alternative, by its very nature, offers the possibility of resisting domination not only through reflection but also through solidarity. It is clear that in order to promote solidarity and justice in society, we must first rethink the entire theoretical and institutional system of law from the perspective of individual differences. Formal justice (equality before the law), as the cornerstone of the liberal concept of the rule of law, cannot take into account individuality. And we must understand that without recognition of difference, there is no empathy, mutual recognition, reciprocity or solidarity. As Amartya Sen points out in *The Idea of Justice*, if the aim is to change real injustices and inequalities, we must also take into account the actual lives of people and their social relationships. "The nature of the society that would result from any given set of institutions must, of course, depend also on non-institutional features, such as actual behaviours of people and their social interactions."[77] – he says. This approach is consistent with social theories of affectivity, as well as with theories of law that emphasise the importance of the citizen's perspective rather than that of the state, and the need for flexibility rather than legal objectivity. Sen describes this as the difference between an arrangement-focused

[73] Fusco, *Form of life*, pp. 59-60.
[74] Fusco, *Form of life*, p. 61.
[75] Frost, *Law, Relationality and the Ethical Life*, p. 53.
[76] Frost, *Law, Relationality and the Ethical Life*, pp. 57., 61.
[77] Sen, *The Idea of Justice*, p. 6.

conception of justice and an realization-focused understanding, the latter "concentrate on the actual behaviour of people, rather than presuming compliance by all with ideal behaviour".[78] Sen's argument against rational choice theory and the all-powerful concept of homo oeconomicus derives from the tradition of moral sentimentalism that posits a certain moral sense, based on instinctive feelings, such as the sense of justice as a universal human capacity. He reminds us that Adam Smith, who is "often wrongly thought to be a proponent of the assumption of the exclusive pursuit of self-interest",[79] in fact, considered sympathy, generosity and public spirit as very important motivations of human conduct. In other words, empathy and solidarity, pro-social behaviour (help, sharing, cooperation) and the pursuit of the common good are constitutive elements of social life.

Another theoretical approach to power and resistance may be the Hegelian theory of mutual recognition, which encompasses subjectivity (identity), personal relationships and attitudes, rights and solidarity. It is well known that the principle of intersubjectivity and mutual recognition of the Hegelian tradition[80] in social philosophy (including Jürgen Habermas, Axel Honneth or Jean-Paul Sartre) goes back to the psychological need for respect (although it overestimates the role of reason in the constitution of mutual recognition and solidarity in a society). For Honneth, as he states in his *Struggle for Recognition*, "the reproduction of social life is governed by the imperative of mutual recognition, because one can develop a practical relation-to-self only when one has learned to view oneself, from the normative perspective of one's partners in interaction, as their social addressee".[81] Every human being is a social being and, as such, needs recognition from others to develop self-confidence, self-respect and self-esteem, as a possibility for the formation of identity. The precondition for self-confidence recognised by loving and caring for others; self-respect develops from recognition by others as a person responsible for their actions, that is, as a morally responsible member of society; finally, self-esteem is a consequence of the experience that others recognize our competences as an important contribution to the well-being of the community.[82] This recognition, if mutual, leads to a feeling of solidarity, as Honneth states, based on the concept of a fused group in Sartre's *Critique of Dialectical Reason*.[83]

Looking beyond the Euro-Atlantic perspective, it is worth remembering that solidarity is also a central concept in the African philosophy of *ubuntu*, which is based on mutual acceptance and support, allowing for a subjectivity that places greater emphasis on cooperation than competition, unlike European individualism. In the subjectivity defined by the community-based approach of *ubuntu*, emotional attachment and affective relationships play a more important role than rational calculation. It is based on the virtues of empathy, respect, compassion and forgiving. *Ubuntu*'s main insight is the interconnectedness between persons, encapsulated in the Nguni proverb "umuntu ngumuntu ngabantu" ("a person is a person through other persons").[84] It appears to resemble the logic of Honneth or Sartre, but when compared with the Hegelian tradition of intersubjectivity, it becomes clear that *ubuntu*, with its focus on family, friendship and

[78] Sen, *The Idea of Justice*, p. 7.
[79] Sen, *The Idea of Justice*, p. 185.
[80] See Honneth, *The Struggle for Recognition*, pp. 31-63.
[81] Honneth, *The Struggle for Recognition*, p. 92.
[82] Honneth, *The Struggle for Recognition*, p. 129.
[83] Honneth, *The Struggle for Recognition*, p. 128.
[84] Gade, *A Discourse on African Philosophy*, p. 5.

kindness, presents a more affective and communal vision. Although *ubuntu*, as a political ideology, can also be a tool for abuse of power,[85] it also generates notable inclusive social and institutional practices that genuinely promote acceptance and mutual recognition, in terms of transitional justice (restoration and reconciliation rather than retributive-punitive penal policy),[86] education, community development, mental health and even management. One example is the Friendship Bench programme in Zimbabwe, a community mental health intervention that creates safe spaces and a sense of belonging.[87] In terms of education, several projects and institutions apply the core values of *ubuntu* to develop skills such as self-awareness, communication, empathy and cooperation. A typical *ubuntu* pedagogical method is Lovemore Mbigi's Collective Fingers Theory (the five fingers symbolise survival, spirit of solidarity, compassion, respect and dignity), which promotes cooperation, solidarity, respect, inclusion and social cohesion.[88]

In Agamben's ontology, judgment and therefore law are necessarily beyond immanence.[89] Based on the notion of guilt, it is transcendent and, as such, has nothing to do with openness and pure potentiality. Agamben can only think of law as an apparatus, in the context of Schmittian theoretical decisionism, related to the decision on the state of exception.[90] In *The Kingdom and the Glory*, Agamben focuses on administrative power, as Foucault did in 1977, and on the officials who economically administer, execute, and police the law, "authorized by what they presuppose (but conceal) as an empty throne of sovereign or transcendental power and law" rather than on absolute sovereign power—as Zartaloudis points out in his book on Agamben.[91] However, this new paradigm of law continues to be totalising and hierarchical, not being "directed to justice but to judgment, independent of truth and justice",[92] far from being the means of social trust and solidarity. As Fusco points out: "Agamben revived and radicalised the idea of law as an organised administration of coercion through violent means."[93] In the next part of the chapter, we mention some alternative theoretical and practical legal paradigms that can contribute to the reformulation of this one-sided totalising Agambenian concept of law, which is not in line with its own original ethical objectives. These paradigms essentially reflect the same ethical principles as Agamben's destitutional intention regarding law.[94] but with a view to social practice.

If we start from the plurality of social practice and the singularity of subjectivities (at least as an ethically normative ideal), then we should think of diverse principles and practices rather than a unified vision of ideal institutions, both in society and, more specifically, in law. Such perspectives can be provided by James Scott's contextualist approach, the theory of responsive law, and the practice of restorative justice, among others.

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[85] Gade, *A Discourse on African Philosophy*, pp. 12-14.
[86] Gade, *A Discourse on African Philosophy*, pp. 22-24.
[87] See https://www.mhinnovation.net/innovations/friendship-bench
[88] Ngubane; Makue, *Ubuntu pedagogy*, pp. 2-3.
[89] Frost, *Law, Relationality and the Ethical Life*, p. 68.
[90] Hardt and Negri accept this approach of law and biopolitics, placing it to the core of the global imperialism. See Hardt; Negri, *Empire*, pp. 38-40.
[91] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism*, p. xv.
[92] Frost, *Law, Relationality and the Ethical Life*, p. 79.
[93] Fusco, *Form of life*, p. 104.
[94] Fusco, *Form of life*, pp. 104-105.

James Scott, in his book *Seeing Like a State*, points out that it is worth taking into account the potential for resistance to uniformity in local knowledge and practices, including the plurality of perspectives on law. He criticises the utilitarian-scientific self-justification of centralised, and authoritarian government-bureaucratic control and management ("social engineering") in late modernity, which deprives individuals of autonomous self-determination, along with local specificity.[95] Scott suggests that embracing diverse local social practices and knowledge can be a means of resisting the power hegemony of imperialism. He stresses the role of practical knowledge, informal processes, and improvisation in individual cases rather than the universality of theories. Scott also emphasises the importance of the human scale, of personal involvement, using the example of traditional local units of measurement.[96] Standardisation, on the other hand, serves central control and exploitation, and law is an important instrument for this.[97] Scott – although he rarely refers to Foucault, and mostly to the *Surveillance and Punishment*, never to the later works of Foucault – analyses the same problems as Foucault, Agamben, Hardt and Negri, without using the terms biopower, governmentality, apparatus and subjectivity. His approach to state power and individual autonomy is still partly linked to modernity, but his emphasis on plurality and the recognition of the role of diverse practices in the formation of the subject/subjectivity place him, in relation to resistance, at the heart of the discourse we are discussing. This parallel is particularly evident in the critique of the formal equality of the rule of law.[98] "Our ideas about citizenship, public-health programs, social security, transportation, communication, universal public education, and equality before the law are all powerfully influenced by state-created, high-modernist simplifications."[99] – he stresses. Emphasising practical knowledge, Scott uses the Aristotelian notion of metis, as opposed to the deductive logic of systems: in some cases, we cannot rely on a system of universal laws to make practical choices; we must improvise skilfully according to the circumstances.[100] Law as a set of written laws, a systematic set of rules, precludes dialogicity, responsiveness, the involvement of interested parties as participants.[101]

Similarly, a contextualist approach to legal theory is represented by the concept of responsive law. The ideas of Philippe Nonet and Philippe Selznick are similar to Scott's in terms of exploring the possibility of resistance to the oppressive power of a centralised, rule-following government. In their 1978 book: *Law and Society in Transition: Toward Responsive Law*, the authors criticise liberalism's notion of equality, in line with the Marxist tradition, including the supposedly objective and impartial nature of law, and the autonomous and inflexible nature of law as a means of justifying power, separated from real social life. Responsive law, that is, law that seeks to respond to social problems and needs, must be flexible, open, aware of its own political and moral insertion, in contrast to the positivist conception of law. The central element of the idea is that it seeks to ensure social order and cooperation not through subordination, but through negotiation and cooperation (the emphasis on negotiation draws parallels with similar ideas in Rawls and

[95] Scott, *Seeing Like a State*, p. 349.
[96] Scott, *Seeing Like a State*, pp. 25-26.
[97] Scott, *Seeing Like a State*, pp. 35., 65.
[98] See Foucault, *The Birth of Biopolitics*, pp. 174-179, and Hardt; Negri, *Empire*, p. 26.
[99] Scott, *Seeing Like a State*, p. 340.
[100] Scott, *Seeing Like a State*, p. 322.
[101] Scott, *Seeing Like a State*, p. 323.

Dworkin, and with the central procedure of argumentative and discursive ethics, also introduced at the same time by Karl Otto Apel and Jürgen Habermas).

It is worth mentioning the concept of restorative justice as an alternative set of legal techniques to retaliation and control. Punitive criminal justice policy is one of the repressive manifestations of neoliberal state power, based on retribution. It is based on the assumption of moral equilibrium, but this type of reciprocity does not necessarily result in a constructive motivational basis or arouse a sense of responsibility. Indeed, as Lode Walgrave argues "Behavioural-cognitive programs that appeal to the active responsibility of the offender are more effective than other treatment or punitive approaches."[102] Walgrave's argument is based on the concept of "common self-interest",[103] indicating that, given the interdependence of individuals in society at any given time, the affirmation of individual autonomy and respect for human dignity cannot be imagined without cooperation and cohesion. The trust and acceptance, which are the prerequisites for this, are what any system of norms, including the legal system, aims to create and maintain. When we speak of restorative techniques, we are talking about restoring trust and creating the conditions for successful social cooperation.

Finally, we refer to the different affective approaches to law, which emphasise the role of emotions, personalities and empathy. One example is Markus Dubber, who discusses the peculiar and nebulous epistemic function of the jury in contemporary American law: it expresses "the community's sense of justice", representing the idea of self-government in a bottom-up approach, contrary to traditional decisionism.[104] He stresses that the sense of justice is a form of a more general phenomenon, empathy, which is one of the most important social bonds. Dubber defines empathy as cognitive empathy, that is, the ability to take perspectives, distinguishing it from sympathy and solidarity. "The sense of justice is empathy among moral persons as such, abstracted from incidental characteristics that define the person's membership in some group or other. It's the ability and the willingness among persons to place themselves in each other's shoes, to see things from each other's point of view."[105] For Dubber, it is the sense of justice and mutual respect between equals that makes solidarity possible in a modern pluralistic society.[106]

Conclusion

In Agamben's thought, there is an inherent discrepancy between the search for a kind of intelligibility of (sovereign) power in the Western metaphysical tradition and the effort to ground the possibility of resistance in social praxis, in the plurality of experiences. The concepts of the state of exception and bare life, at the heart of his *Homo Sacer* project, derive from the perspectives of Walter Benjamin and Carl Schmitt, and from Foucault's early version of biopolitics and biopower (elaborated in the first volume of *The History of Sexuality*), all rooted in the lifeworld of modernity. But, as Foucault, among others, recognised from the late 1970s onwards, in the post-industrial society of the globalised neoliberal capitalism (Hardt and Negri call it Empire) the plurality, multitude, and

[102] Walgrave, *Investigating the Potentials of Restorative Justice Practice*, p. 114.
[103] Walgrave, *Investigating the Potentials of Restorative Justice Practice*, p. 117.
[104] Dubber, *The Sense of Justice*, pp. 64-68.
[105] Dubber, *The Sense of Justice*, p. 71.
[106] Dubber, *The Sense of Justice*, pp. 75-76.

singularity are the basis of thought and lived experiences, as well as of social relations. This requires the affirmation of Deleuzian absolute immanence, indeterminacy, singularity and plasticity in thinking about power and resistance, as well as about society and law. In Agamben's thought, the emphasis on bare life as absolute immanence signals the recognition of the problem, but in *Homo Sacer* this is overcome by a totalising tendency and an insistence on the conception of power as sovereign power. However, in *The Kingdom and the Glory*, *The Highest Poverty* and the *Use of Bodies*, one can find the alternative line of thought that had its antecedent in *The Coming Community* and its continuation in *Means without End*, in relation to community, ethos and, above all, the form-of-life. Nevertheless, Agamben's reinterpretation of law in the light of the social practice of our time and of new subjectivities has very limited results, as far as concrete human relations and social practices are concerned. Resistance to the dispersed power of governmentality needs a diverse set of tools at the level of theoretical critique as well as at the level of subjectivities, everyday relations, practices and social institutions, from *ubuntu*, through restorative justice, to responsive law, all based on the principles of mutual recognition and reciprocity, thus offering the possibility of controlling the mechanisms of power.

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