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Defending our legal practices: a legal critique of Giorgio Agamben's 'State of exception'

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REVIEWS:

**DEFENDING OUR LEGAL PRACTICES: A LEGAL CRITIQUE
OF GIORGIO AGAMBEN'S STATE OF EXCEPTION**

STATE OF EXCEPTION

G. Agamben (trans. K Attel)
University of Chicago Press 2005
104 pages, ISBN: 9780226009254

*Bas Schotel**

Introduction¹

“Why are you jurists silent about that which you concerns?”² (viii) With this provocative question (of course, first in Latin, *noblesse oblige*) Giorgio Agamben opens his third book in the *Homo Sacer* series.³ And for the first time in this series, Agamben overtly calls on lawyers to break the silence. If this were not enough for the legal profession to deal with, Agamben also declares legal culture bankrupt.⁴ In short, as Agamben's work enjoys a growing audience of academics (including legal scholars), there is plenty at stake for the legal profession. Though some pertinent critical comments on this book have appeared in *legal* journals, they still have been too sympathetic to Agamben's overall claims.⁵ Hence, in this essay I will defend current legal culture and practice against Agamben's methods and substantive claims. In spite of his good intentions and the pertinence of his concerns, Agamben presents us an account of the law that is deeply flawed. In fact, since he ultimately advocates a sell-out of current legal practice, his thesis may be even dangerous.

Others already have summarised adequately the main arguments of this book.⁶ Still, to set the stage for my critique and for purposes of bringing

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¹ Bracketed numbers in text of this essay refer to page numbers of the book under review.

² I have not succeeded in tracing Agamben's source.

³ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford: Stanford University Press 1998; G. Agamben, *Remnants of Auschwitz: the Witness and the Archive*, New York: Zone Books 1999.

⁴ “(...) an indication not only of the complete separation between philosophical and legal cultures, but also of the latter's decline.” (37)

⁵ S. Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception', 17 *E.J.I.L.* 677 (2006); V. Kanwar, 4 *Int'l J Con Law* 567 (2006).

⁶ Humphreys 2006, *supra* note 5; Kanwar 2006, *supra* note 5. See also P.A. Passavant, 'The Contradictory State of Giorgio Agamben', 35 *Political Theory* 147 (2007); M. de Wilde and

some clarity in how the different chapters of the book tie into each other, I will provide a reconstruction of the central tenets.⁷ In sections I to IV, I will discuss Agamben's concern, the problem it poses, its cause and his solution. In the final section I will develop my critique. The basic strategy is to show that Agamben's methodology and descriptions of law are too far removed from our legal practices. As a result, his account of law is not only untenable, but adopting his view may even be dangerous: after Agamben there may be nothing left of our law.

I. Agamben's Concern and Problem: the Killing Machine and New Paradigm of Government

Agamben expresses a legitimate concern about how today "the juridico-political system transforms itself into a killing machine" (86). He raises the alarm because "[t]he normative aspect of law can (...) be obliterated and contradicted with impunity by a governmental violence" (87). A case in point of this 'governmental violence' is of course the treatment of the Guantanamo prisoners (3-4). In fact, we are living on "a threshold of indeterminacy between democracy and absolutism" (3).

The problem is that "the state of exception today has reached its maximum worldwide deployment" (87). The state of exception has become the paradigm of government (2). According to Agamben we should understand the state of exception not as a simple generic term for the different forms of martial law or emergency law. What is specific about the state of exception is that it constitutes a state of non-law. It is a situation where the law is suspended and is replaced by a zone of indeterminacy or indecisiveness. So, for Agamben the problem is not so much the occurrence of specific emergency laws and measures as such. What matters to him are the consequences for the legal order at large.

Consequently, when Agamben gives us a brief historical account of how the state of exception became the paradigm of government he concentrates on the moments where the exceptional transgresses into the normal (11-22). Since the French Revolution, several types of transgression have taken place more or less structurally. Where initially the need for rapid action would justify the executive branch of government making laws bypassing parliament, the business of lawmaking has shifted now almost entirely from parliament to the executive.⁸ More generally legal orders got acquainted with suspensions of basic rights and liberties (such as *habeas corpus*). The transgression lies here primarily in the absence of judicial review on whether the suspension conditions applied in the particular cases. In other words,

W. Veraart, 'In de ban van Guantanamo. Een kritische beschouwing van Giorgio Agambens soevereiniteitstheorie' 5 *Krisis. Tijdschrift voor empirische filosofie* 2 (2004), pp. 53-69.

⁷ The upshot being that it makes transparent how I understand and perhaps misunderstand Agamben.

⁸ We will see below how according to Agamben the legal concept 'force of law' plays a pivotal role in this respect.

there were no real restrictions on the suspension. Another important kind of transgression was the extension of the regime of war and its discourse beyond military matters. So military tribunals have been granted jurisdiction over civilians, and martial law remained in force even when hostilities have ended. Also, political and social problems are increasingly equated with a state of war. This picture is reinforced by a tendency among officials to derive the competency to fight these fictional wars from the people or the '*res publica*' rather than from legal norms.

II. The Cause of the Problem: Absence of an Adequate Theory

Rather than understanding the expansion of the state of exception as a matter of abuse of law, contempt of law, *détournement de pouvoir*, bad faith, corruption of power, etc. Agamben believes that the cause of the problem is something deeper, something philosophical. The current state of affairs is due to the fact that "there is still no theory of the state of exception in public law" (1). To date, theorists have failed to address the impossible relation between the state of exception and law. Instead they tried to establish a *singular and/ or unproblematic* connection between the state of exception and law (directly or indirectly). By doing so they granted the state of exception the status of law, which in turn rendered the law so powerless against the killing machine. By contrast, Agamben sees it as his task to investigate precisely "this no-man's-land between public law and political fact" (1) and lift "the veil covering this ambiguous zone" (2).

When trying to account for the nature of the state of exception, theorists have missed its peculiarity. Most of them run into the problem of the incapacity to overcome the imminent transition from commissarial dictatorship to sovereign dictatorship. According to Carl Schmitt the first form of dictatorship means that the law is still in force but its application is temporarily suspended so that the dictator can take the necessary measures to restore the order. By contrast, the sovereign dictatorship does not seek to restore the application of the existing order. His aim is to put a new order in place (33, Chapter 2). The theorists can only refer to the definition distinguishing between the two forms of dictatorship. But they are not capable of "defining and overcoming the forces that determine the transition from the first to the second form of dictatorship" (8). As a result if they cannot really tell the one from the other, their theories cannot even tell us what is legal and what is not. So, according to Agamben Carl Friedrich cannot do better than rely on "the people's own determination" to avoid the destruction of the legal order (8). Not a very satisfying thesis in terms of *legal* theory.

Equally unconvincing according to Agamben are Clinton Rossiter's eleven criteria for distinguishing between commissarial and sovereign dictatorship, for they also fail to define a substantial difference between the two forms of power (9). Another version of the failure to grasp the distinction between law and not-law, is adopted by the scholars of public law. They contend that the

state of exception is either outside the law even though it may have legal consequences or it is inside the law as it is grounded by necessity which is an autonomous source of law. But according to Agamben this simple *topological* distinction begs the question: where is it decided in the first place what belongs to the inside and outside (22-23)? Similarly, the reference to the notion of necessity will not do the job either. It displaces the problem without solving it. For if a measure is taken out of necessity is already legal why does it need ratification? And if a measure taken out of necessity is only fact - until ratification- how come it can have retroactive legal effect (29)? More importantly, the mere determination of what is necessary is elusive. Necessity is not an objective situation. Necessity boils down to a decision that is "something undecidable [sic] in fact and law" (29-30).

Agamben gives credit to Carl Schmitt for precisely putting so much emphasis on the decision (of what is necessary, what lies inside and outside). According to Agamben's reading of Carl Schmitt⁹, the law consists of two elements: norm and decision (34). Under normal conditions the norm is dominant and the decision is reduced to a minimum. By contrast, under a-normal conditions, the decision is paramount and the norm is annulled (34). And this is exactly what happens in the state of exception: the norm is suspended or rather the entire order is suspended in order to make room for the decision. And it is this suspension of the order that should make the application of the norm possible again. This norm may be part of either the existing yet suspended order or a new order (35-36). In other words, even when a new order is put in place what Schmitt previously would call sovereign dictatorship the state of exception may still keep a solid connection with law.

Schmitt's way out is his distinction between constituted and constituent power. The latter is minimally yet intimately related to law precisely because it seeks to establish a legal order, which ultimately enables again the application of norms (36). Agamben is not satisfied with this account of the state of exception. Though Schmitt abandons a singular or one-way relation between law and the state of exception, he still does not pay due respect to the complexity and ambiguity of the state of exception. Agamben explains how Walter Benjamin points out the difficulty for the sovereign to actually make the decision (Chapter 4). What is there to decide? From what perspective can the sovereign decide? Benjamin shows that even Schmitt underestimates the radical 'indecisiveness of the state of exception. For sure, Schmitt recognises that the state of exception is needed to allow for ultimate decisions in order to get the law off the ground, but in Schmitt's theory the environment in which these decisions are to be made seems still contaminated with law. In Schmitt's view, even in the state of exception, the

⁹ Agamben omits the third and most important element of law according to Schmitt: order. See the chapter 'Carl Schmitt, the Exclusion Thesis and Immigration', in: B. Schotel, *Protecting the Alien's Interest in Immigration. Arguments from Law and Political Theory for Changing our Admission Laws and Practices*, (doctorate thesis) October 2008.

law still plays as a point of orientation or reference. This is not good enough for Agamben. A more radical position seems inevitable.

III. A More Radical Diagnosis: A Non-Relation between Two Forces

Schmitt was able to think in terms of opposites such as: norm and its realisation, constitutive and constituent power, order and its suspension. Yet these constructs cannot grasp the extreme ambiguity of the state of exception. A more radical political theology is needed. One should think the state of exception in terms of a meaningful ‘nothing’, or rather a non-relation that still makes sense. In order to illustrate what is needed for an adequate theory of the state of exception Agamben discusses several ‘legal’ phenomena that reflect the strangeness of the state of exception: ‘force of law’ (Chapter 2), *institium* (Chapter 3), the carnival (Chapter 5) and authority (Chapter 6). What all these phenomena have in common is that they show how two forces are continuously at work: (i) the law is trying to capture the non-law, the violence, the anomic, and (ii) the anomic is trying to break loose from the law. The true problematic nature of both law and anomie, is that the two can only be understood in their (non-)relation. The law needs anomie to posit itself, like the anomic needs the law. The aporia that Agamben tries to address is that if one of the two forces takes over the other, both will vanish. For if law were to fully capture anomie, the law has no point to separate itself from. We simply could not tell anymore whether we are in a state of law or total anomie. Therefore, law must display – not as a matter of its shortcoming, a failure or imperfection – remnants or elements of violence and anomie. By the same token, anomie cannot exist without reference to the normal.

According to the simplistic explanation of ‘force of law’, legal directives issued by the executive branch may have the legal force or effect as if they were statutes, i.e. legal directives issued by parliament. Taking cue from Derrida, Agamben pushes the notion much further. The state of exception is precisely the point where the seemingly unproblematic notion of force of law becomes highly controversial. The state of exception can capture two situations coevally: the norm is in force but not applied, and the act that does not count as law, acquires force of law. This means – hence the controversy – that force of law can be claimed by both state authority (acting as a commissarial dictatorship) and revolutionary organisation (acting as a sovereign dictatorship). As a result the state of exception is “an anomic space in which what is at stake is a force of law without law” (39). The zone is without law because either the norm is not applied (because suspended) or there is no norm at all, only something that should be counted “as if law”. To depict this relation to non-law, or the non-relation to law, Agamben suggests we should write “force-of-law”. (39) Through this deeper understanding of “force-of-law” we can come to understand why the current practice of the executive governing by measures having “force-of-law” amounts to a state of exception.

In another attempt to illustrate the peculiarity of the state of exception Agamben goes back to a very old (allegedly) legal phenomenon: *iustitium*. According to Agamben this institution of the times of the Roman republic constitutes the archetype of the state of exception (41). When there was a serious crisis at hand – *tumultus* – the senate would issue an ultimate *senatus consultum* that was not directed at the consuls on their own, but Roman society at large. It called on all to see to it that no harm is done to the republic. This *senatus consultum ultimum* amounted to an *iustitium* which according to Agamben should not be understood as a ‘court holiday’, but literally as a standstill of the law, a suspension of the law. The *iustitium* is a great source of uncertainty and ambiguity. Contrary to the dictatorship the *iustitium* is not based on a law. In fact it lacks formal legally binding effect. It mixes law with violence where it calls on citizens to act as if they were vested with *imperium* of the magistrates and the magistrates are reduced in terms of their powers to ordinary citizens. Most strikingly is the absolute ambiguity about the acts committed – e.g. the intentional killing of a Roman citizen deemed to be threat to the republic – pursuant to the *senatus consultum ultimum*. “[Those] actions (..) are mere facts, the appraisal of which, once the *iustitium* is expired, will depend on the circumstances. But, as long as the *iustitium* lasts, they will be absolutely undecidable, and the definition of their nature (..) will lie beyond the sphere of law” (50)

While the *iustitium* showed the peculiarities of the state of exception, its occurrence was too rare to demonstrate how the state of exception is permanently related to the legal order. To establish how the two forces are permanently operating in the law, Agamben ties the state of exception and the anomic to the sovereign. The later and more current meaning of the *iustitium* was public mourning following the decease of the king. According to Agamben the use of the *iustitium* as mourning is simply remnant of the fact that when the ruler died it was as if the order was suspended. It is proof of the fact that order cannot do without the anomic: it must show its anomic remnants. Similarly, the feasts of saturnalia and carnival are not so much the reflection of an agrarian calendar, rather they remind us of how anomic keeps the law alive and vice versa. The feasts are almost like pushing the ‘refresh’ button that allows the order to show its other face again – or rather to manifests itself *tout court* (Chapter 5). The ultimate recognition of how the state of exception and anomie are tied to the sovereign and thus the legal order is the notion of authority (Chapter 6). Agamben showed how both under Roman and mediaeval law, the quintessential property of the sovereign was his non-legal power. It was the authority of the sovereign that was needed to make the order complete. Authority was in a sense the mystical element of non-law that grants the legal order precisely its full legal character beyond formalism. Essential feature of this authority is that it does not spring from the legal norm, but from the person of the prince. Authority springs from life, the anomic. But if so, this also posed a serious problem of instability and continuity of authority as it was tied to the person of the sovereign, his life. To this effect mechanisms were designed to maintain the

continuity of the authority, e.g. return of authority to the senators and the two bodies of the deceased king. What matters to Agamben is that both Roman and mediaeval constitutionalists were fully aware of this necessary anomic ingredient for order and that they were keen to distinguish – institutionally – between authority and legal power. And it is precisely here where it goes wrong today. Facilitated by constitutional scholarship from the 1930's, authority was again recognised as a legal concept but immediately conflated with legal power. In other words, rather than untying the two forces, life and law, they are concentrated in one state organ. As a result the very legal order it sought to substantiate vanishes.

“As long as the *two elements* remain correlated yet conceptually, temporarily, and subjectively *distinct* (as in republican Rome's contrast between the Senate and the people, or in medieval Europe's contrast between spiritual and temporal powers) their dialectic (...) can nevertheless function in some way. But when they *coincide* in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine.” (86) (emphases added)

IV. The Solution: Pure Law

Having diagnosed the problem, what does Agamben proscribe as a therapy? It is clear to Agamben that the state of exception is inescapable. There is no point in taming the state of exception by bringing it under the aegis of the law. This conflation is what precisely created the killing machine. By contrast, the way out is to recognise and unmask these forces. And by that same operation these forces may be reused in order to create different meanings of life and law. But how is this possible? From where do we get the instruments to move the forces around, instead of the forces moving us? How can we stop the machine?

First, since law and life are only understandable thanks to their non-relation, it follows that there is no true life or true law pre-existing law and life. Though effective, the two forces and their creation of the order are – literally – a fiction. Yet, this fiction has potential, or rather presumes and requires potential. According to Benjamin, precisely because law and life can only be understood in their non-relation it follows that there is a way of understanding life and violence as a purely relational manifestation. It means that there is an instance of violence where on forehand the content is not predetermined, it will depend on the way one uses it. To put it differently, since it is all a matter of fiction one needs building blocks, instruments to construct it. Like Lego blocks, which do not serve any predetermined end or form, but which are pure means. But if there is a possible pure violence, Agamben thinks that there is equally a pure law. This law that has deposed of a particular connection with a particular violence and life, holds the potential or promise of a different relation to violence (63). Hence, it is the means to a different meaning of life and law. In other words, the moving of the elements is possible because there are conceptual instances where we can untie the law from life (and vice versa) so they become mobile again. As a

result, an open space of pure human praxis is created where we can play with the elements and be truly politically active (88).

VI. Critique

Let us return to Agamben's provocative questions directed at lawyers. According to Agamben we are silent about the killing machine, which concerns us because it is inherently tied to law: the state of exception. Our legal culture is in radical decline, because we have not come up with an adequate theory of the state of exception. We have been incapable of addressing the two forces at work: law and life. We have not been able to create an open space where we can play with the elements and create new meaning of life and law. These accusations do not hold. In earlier reviews it has been correctly pointed out that lawyers are not silent and that especially in court lawyers have raised their voice, which Agamben totally omits in his thesis. Reference to those excellent reviews should suffice, if they would not have conceded already too much to Agamben's thesis.¹⁰ These misrepresentations (or outright omissions) of what lawyers are doing are not harmless or innocent omissions. They constitute a dangerous move away from a contextual understanding of law as practice of practical reasoning. Instead Agamben moves us to a kind of ontological and even metaphysical notion of law.

To appreciate my concern one may simply ask one question: what is left – in concrete and practical terms - of the law if we adopt Agamben's thesis? What are lawyers doing when Agamben will have it his way? In spite of all his good intentions and legitimate concerns, Agamben covertly advocates a 'selling out' of our legal practice. So rather than giving Agamben a charitable reading, and tolerate the 'often alien tenor'¹¹ of his work, I will show its fundamental inadequacy to provide a plausible account of the current legal practice and law in general. Both his methods to describe law as the descriptions of it are deeply flawed.

VI.1 Law Has Normative Force

At the outset of his thesis Agamben runs into fundamental difficulties. His concern is the impunity of violations of international law by governments that nevertheless still claim to be applying law. If we take Agamben's diagnosis and his solution seriously, there is actually no way we can tell whether there are violations of international law in the first place. The only

¹⁰ Humphreys pertinently pointed out Agamben's omission to say anything on judicial review and practices. Still, he believes the book to "constitute a radical and hopefully controversial challenge to predominant account of modern law's expansion as a simple and necessary global extension of the rule of law". Humphreys 2006, *supra* note 5, p. 687. In another excellent and more critical review, Vik Kanwar argues that in spite of Agamben's misrepresentation of the lawyer's silence in terms of a theory of the state of exception, Agamben presents us an ethically compelling argument: "we must abandon the expectation that security can be achieved by making others insecure". Kanwar, *supra* note 5, p. 575.

¹¹ Humphreys 2006, *supra* note 5, in his abstract.

thing Agamben can claim is that killings, incarcerations, infliction of hardship, in short violence acts are taking place. But under his theory there is no legal standard available to qualify these acts as violations. This is probably the greatest danger of his theory. It cannot identify outright abuse of the law and bad faith, while this is clearly what was going on with the Bush government.¹²

By giving too much credit to the discourse of these governments and taking this discourse as his starting point, there is no concern for him to deal with. The simple fact that violence is used could not concern him as such. It may only worry him if there is a normative standard according to which this violence is wrong, unjust illegitimate, or illegal. In other words, Agamben is in blatant contradiction. The simple fact that he believes that governments are violating current international and domestic law means that they have normative force. It means that they are supposed to be obeyed and that as such they constitute reasons for action. If so, then already this simple but fundamental point makes Agamben's enterprise practically obsolete. It seems that he realises this contradiction, since he hardly ever speaks of violations, abuses and misuses of the law.

VI.2 Lawyers Are Not Silent

Agamben's failure to recognise his own need to rely on the normative force of existing law explains why he cannot or does not want to hear the lawyers. Yet lawyers are far from silent. For sure, they may not engage in philosophical inquiry into the genealogy and etymology (!) of obscure phenomena of Roman law, they have been raising their voice in the context of a particular practice, i.e. legal practice. Just to take the example of the treatment of Guantanamo detainees: lawyers of all ranks, affiliation and function have been fighting the violations of international and domestic law. From the justices of US Supreme Court and professional human rights defence lawyers,¹³ law clinic students¹⁴, to Pentagon officials, and former military defence lawyers.¹⁵ The lawyers are equally talkative when it comes to theorising the state of exception. As Kanwar nicely shows, constitutionalist produced "a great deal of legal writing" on the issue, they may not have reached "any consensus on these issues, but that is not the same as remaining silent"¹⁶ In short, as long as the legal practice can assert that violations of law

¹² See D. Bromwich, 'The Co-President at Work', *The New York Review of Books*, November 20, 2008.

¹³ See *Boumediene v. Bush* 553 U.S. __ (2008); *Hamdan v. Rumsfeld*, 548 U.S. __ (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁴ B. Goldstein, *Storming the Court: How a Band of Yale Law Students Sued the President - and Won*, New York: Scribner 2005.

¹⁵ Senior legal staff in the Pentagon issued numerous legal objections against the treatment of Guantanamo detainees. See A. Lewis, 'Official American Sadism', *The New York Review of Books*, September 25, 2008.

¹⁶ V. Kanwar, *supra* note 5, p. 574, and pp. 572-574 giving us an triggering view how a real debate with the constitutionalist would sound like.

are taking place, the law has normative force. In other words, Agamben's philosophical concern seems to vanish and his first accusation has been proven false.

VI.3 The Law Is Being Applied

Agamben may object to my previous points that all those lawyers that are raising their voice are only referring to a law that is formally in force but not applied: "force-of-law". Again, he is wrong from an empirical perspective. The Supreme Court cases cited earlier show that gradually but progressively the Guantanamo practices are invalidated.¹⁷ But let us, for argument's sake, concede that gross violations are taking place with impunity to the effect that the law is actually not-applied. This empirical claim raises important methodological and normative issues. What is the level of compliance needed for a law to be qualified as 'applied'? What do we measure: the quantity or the quality of the compliance? Or do we only measure the violations? What Agamben needs are standards to evaluate whether or not a law, a set of laws or even the law itself, is bankrupt. But this means that he has to provide us with an account of the functions and capabilities of law. Obviously, he fails to do so. This alone should already dismiss his claims. For it shows a categorical refusal to account for even the most minimal features of a phenomenon he seeks to criticise, even revolutionise.

Let me briefly illustrate how one's definition of the functions of law matters to determining law's effectiveness.¹⁸ If the focus is on guiding behaviour, then failure to comply with the law will sooner amount to its ineffectiveness. By contrast, if the function of the law is more a matter of restorative justice then violations do not really affect its effectiveness. What matters is whether sooner or later the norms are – *ex post* – enforced on the violators. Of course, law is more complex and may have a variety of functions. But this goes just to show that one should distinguish between different branches of law, because often the functions change accordingly. Also, we must consider the experience of the law with applying particular norms. For example, some human rights are quite old while others very recent. One cannot expect the new right to be as effective as the older one.¹⁹

¹⁷ See for a treatment of *Rasul v. Bush* and British case law on executive emergency measures, Humphreys 2006, *supra* note 5, pp. 684-687. Further to the invalidation of the executive measure suspending *habeas corpus* by the Supreme Court in *Rasul v. Bush*, government sought to legalise the suspension by Congressional legislation. *Boumediene v. Bush* in turn invalidates this attempt.

¹⁸ See for example Tom Campbell's categorisation of the functions that rules may perform. His main divide is between coordination and control rules. The coordination rules can be broken down into facilitative rules, convenience rules, distributive rules and output rules. T.D. Campbell, *The Legal Theory of Ethical Positivism*, Aldershot: Dartmouth 1996, pp. 50-52.

¹⁹ For example, *habeas corpus* being an old legal right has become a very effective human right. By contrast, the rules prohibiting genocide are still extremely new – in terms of (criminal) law. The courts and the legal profession in general have very little experience with applying these laws. Interestingly the same goes actually for *habeas corpus* outside the traditional jurisdiction of the state (see *Boumediene v. Bush*). Hence, the importance of distinguishing also within areas of the law.

VI.4 Law Cannot Be Understood through a Paradigm and Genealogical Inquiry

Maybe I have overstated my fears for Agamben's work. By the mere fact of using the instrument of the 'paradigm' and the method of genealogical inquiry he gives up any pretension of offering us a far reaching insight into the law.²⁰ So he is harmless after all. But just to be sure let me briefly indicate why Agamben's methodology can tell us so little about the law (*qua* law).

First, since his enterprise is not at all sociological he has no regard for the actual practice and contexts in which certain legal concepts were used. As a result he cannot actually say whether a certain legal arrangement was actually seriously practiced at all, let alone found relevant. For a genealogy this does not pose any problem. This also explains why Agamben can bring to the stage without any embarrassment extremely obscure legal arrangements such as the *iustitium* in combination with the *senatus consultum ultimum*. In fact, Roman law seems to Agamben just as relevant as US constitutional law. In fact, as Kanwar pointed out, US constitutional does not seem at all relevant to Agamben. Similarly, the disregard for practice explains why he can omit one of the greatest practices of modern legal systems: judicial review. The reason is simple: because social facts do not matter only the aspects are withhold that fit the paradigm. The same happens with all the authorities that do not fit Agamben's paradigm. Rather than questioning his paradigm he rejects the authority.²¹ However, the grounds for the rejections are unclear or rather absent. Often he cannot do better than etymology. In any event, the rejections cannot be based on a more plausible, complex and contextualised understanding of the particular practice in which the legal concept was used. For practice does not matter to Agamben. This maybe a well accepted methodology in the art of aesthetics, it is not acceptable for understanding practices of collective action and discourse such as politics and law.

His contempt of practice, and the necessary singular focus of the paradigm, drive Agamben into a dangerous ontological, and at the same time metaphysical, exercise. This paves the way for an essentialist and – indeed – singular understanding of law. Ultimately everything can be traced back to

²⁰ Agamben: "But I am not an historian. I work with paradigms. A paradigm is something like an example, an exemplar, a historically singular phenomenon. As it was with the panopticon for Foucault, so is the *Homo Sacer* or the Muselmann or the state of exception for me. And then I use this paradigm to construct a large group of phenomena and in order to understand an historical structure (...) But this kind of analysis should not be confused with a sociological investigation." (footnotes omitted) Ulrich Raulff, 'An Interview with Giorgio Agamben', 5 *German Law Review* 609 (2004), p. 610.

²¹ In this respect, it is surprising that he mentions Saint-Bonnet's work, but does not use it. Further to an analysis much more comprehensive that Agamben's Saint-Bonnet argues that the *senatus consultum ultimum* does not entail a suspension of the law, and the acts committed pursuant to the *consultum* were simply illegal if in violation of existing law. F. Saint-Bonnet, *L'État d'Exception*, Paris: PUF 2001.

the state of exception. And since the law is defined as the state of exception and social facts are not to be accounted for, it is impossible to refute this account of the law. As he deprived the law of all its complexities, diversity, openness and at the same time constraints (and thus normativity), no wonder why Agamben wants to get rid of the law. Agamben has 'put up a straw man'. First he erects up the straw man of an outdated legal formalism, as if lawyers still believed that the application of the norm could be derived exclusively from the norm. Hardly any legal positivist will hold this view. Of course there is a decision in both law making and law applying. Big deal! You do not need Schmitt anymore to make this point. And you certainly need not jump from the 'decision' to an omnipresence of the state of exception.²² What matters is to see that even - or precisely - the decision is must be subjected to legal constraints. The second straw man is a law confined to a simplistic struggle between law and life. Obviously, when presented with such an arid and binary view of law, we need metaphysical constructs such as 'pure law' and 'open space of human praxis'. Instead, if we put aside this straw man, and abandon a foundationalist and essentialist view of law, a myriad of actual legal concepts surfaces.²³ And each of these concepts can create constraints for governmental legal actions. Of course, none of these concepts can rule out governments abusing the law and acting in bad faith. But they make it difficult for them. And today our current legal practices can actually hold the individual officials accountable.²⁴ For sure, this takes time. But the law must hesitate and take its time, for the law needs to make a multitude of connections. In fact, without the necessary hesitations the law may even become suspect of coinciding with self-evidence and common sense.²⁵

²² I will not cite here the works of Paul Scholten, Ronald Dworkin or Gadamer (quoted but not really used by Agamben).

²³ A case in point is the proportionality principle. With origins dating back even further than Agamben's obscure *ius tium*, this crucial legal concept –which is actually practiced - shows the richness of law's own practices of constraining government. Elements of this concept go back to Greek, Roman and Byzantine law, and it became a dominant movement among 19th century German legal scholars through the likes of Jhering (of course at this stage, the focus was on the necessity criterion). F. Wieacker, *Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung*, *Festschrift für Robert Fischer* 867 (1979), at 878. Another salient legal phenomenon which Agamben cannot account for is the protective aspect of legal personality (*Rechtssubjektivität*). A.C. 't Hart, *Recht als schild van Perseus. Voordrachten over strafrechtstheorie*, Arnhem: Gouda Quint 1991; R. Foqué & A.C. 't Hart, *Instrumentaliteit en Rechtsbescherming. Grondslagen van een Strafrechtelijke Waardendiscussie*, Arnhem: Gouda Quint, 1990. Agamben's singular focus also prevented him from considering other concepts of Roman law that challenged his understanding of the state of exception, e.g. *fides*. See M. de Wilde and W. Veraart, *supra* note 6.

²⁴ Cf. the incredible progress in the cases brought against general Pinochet.

²⁵ See for the importance of hesitation and making connections: B. Latour, *La Fabrique du Droit: Une Ethnographie du Conseil d'État*, Paris: La Découverte 2002.

Conclusion

What to make of it all? For sure, Agamben has written an intelligent book. Furthermore, his concerns about the gross violations of international and domestic law combined with the arrogance of the governments' claim to be applying law are very legitimate. But this is as good as it gets in terms of the book's relevance for law. Agamben's account of the law, through a genealogical inquiry of the state of exception is untenable. The so-called intimate non-relation between law and life adds little to our current understanding of the law and its imminent dangers. The decisional aspect and even the 'underdeterminacy' of law have already been recognised by legal scholars and practitioners alike. And it does not take high-brow analytics to see that the law may degenerate into a totalitarian system due to its decisional nature. Yet it takes more analytics to see that the decisions must be subjected to legal constraints if it wants to benefit from the authority of law. Fortunately, other legal scholars and especially practitioners are aware of this. Therefore, legal practice can do much better than Agamben's ontological, metaphysical and ultimately essentialist depiction of law. Obviously unsatisfied with this straw man account of the law, he can only bring back the richness and complexity to the law (which the law currently has) through new mythical notions: pure law and an open space of human practice. Now, there is nothing wrong with applying a bit of mythology and genealogy to the law. Yet if we start taking these exercises seriously, we should answer a very simple question: what is left of the law after Agamben? To put it a bit more concrete. Imagine you are detained in Guantanamo. What should your lawyer be doing? Should she be arguing in court that according to precedents and legal doctrine current practices are simply illegal? Alternatively, should she be wandering around in an open space of human praxis.