

The Structure of the State of Exception: From Schmitt to Agamben

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Abstract: This article examines the concept of the state of exception in the works of Carl Schmitt and Giorgio Agamben, with particular attention to its role in understanding the relation between law and life. Drawing on Michel Foucault's analysis of biopolitics, it addresses the problem of how different modalities of power intersect in modern political theory.

While Schmitt defines sovereignty through the decision on the exception, thereby grounding the legal order in a moment of political decision, Agamben reinterprets the exception as a structural relation in which law and its suspension coexist. The article argues that Agamben radicalizes Schmitt's theory by transforming the exception from a decision into a structure that mediates the relation between sovereign power and individual life. Through an analysis of the Roman institution of *iustitium*, it shows how the exception produces a zone of indistinction in which life is included in the juridical order through its exclusion.

In doing so, the article demonstrates how Agamben's theory provides a framework for understanding how modern power captures life.

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Introduction

In modern political theory, discussions of sovereignty have increasingly focused on the relation between law and life. Within the framework of biopolitics, Michel Foucault has shown that modern power operates through the management of life. Yet in his analysis, power appears to unfold along two distinct trajectories. On the one hand, there is the study of political techniques, such as governmentality, through which the state integrates individual life into its core mechanisms of governance. On the other hand, there is the analysis of technologies of the self, through which individuals are bound to their own identities and consciousness, while at the same time being incorporated into broader structures of power. Although these two trajectories intersect at various points, their point of convergence remains insufficiently clarified in Foucault's work².

Giorgio Agamben suggests that a crucial point of intersection must exist between these two trajectories, namely a moment at which the disciplining of subjects and the overall functioning of power enter into a zone of indistinction. In this article, this zone of indistinction is understood as taking the form of the state of exception.

Agamben's understanding of the exception is rooted in the work of Carl Schmitt, who defines sovereignty as the power to decide on the state of exception. For Schmitt, the exception reveals the essence of political authority, insofar as it shows that the legal order ultimately rests on a sovereign decision that cannot itself be reduced to legal norms.

Building on Schmitt's formulation, Agamben reinterprets the state of exception within the framework of biopolitics. While he retains Schmitt's emphasis on the exception, he shifts the focus from decision to structure, arguing that the exception constitutes a zone of indistinction between law and life. What is at stake here is not merely an extraordinary situation, but a structural relation in which law and non-law are constituted through the logic of the exception.

This article argues that Agamben radicalizes Schmitt's theory of sovereignty by transforming the state of exception from a moment of decision into a structural relation between law and life. To demonstrate this claim, the article first examines Schmitt's concept of sovereignty and its relation to the exception. It then analyzes Agamben's reinterpretation of this concept, with particular attention to the Roman institution of *iustitium* (the suspension of law). Finally, it clarifies the fundamental difference between Schmitt and Agamben and highlights the significance of this difference for understanding the relation between law and life in modern political theory.

Schmitt on Decision and Legal Form in Political Theology

Schmitt defines the state of exception as a situation of unlimited authority, one that permits the termination of the entire existing order. In such a situation, the state continues to exist, while the law recedes into the background. Because the state of exception is not a condition of anarchy or chaos, a juridical order still prevails, although it is no longer the ordinary one³. The exception thus arises from an urgent and unpredictable situation—one that threatens the existence of the state and cannot be governed by pre-existing norms. Since ordinary laws cannot foresee every

² Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 5.

³ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005), 6-7.

contingency, their applicability depends on a sovereign decision that determines the correspondence between the norm and the factual situation. The sovereign decides not only whether the norm applies, but also what the situation is.

This idea is expressed most clearly in Schmitt's well-known formulation: "All general norms require a normal situation for their factual application... The norm requires a homogeneous medium. This effective normality is not merely a 'superficial presupposition'... A legal order requires a normal situation, and it is the sovereign who definitely decides whether this normal situation actually exists"⁴. This passage not only clarifies how law is applied but also reveals a structural feature of law itself. Both ordinary legal norms and emergency provisions presuppose a background situation appropriate to their application. Even the extraordinary situation must be rendered into a kind of recognizable "normality" through decision, so that it may be incorporated into the juridical order. A situation that is wholly undefined and lacks any decisive framing would remain outside the grasp of the law. Hence decision is the indispensable element that connects law to life.

Furthermore, Schmitt argues that sovereignty does not follow from the fact of rule; rather, the power of decision is what constitutes the sovereign. This is especially evident in the state of exception, where "the competence in such a case cannot be limited... The constitution can at best indicate who is entitled to act in such a situation"⁵. If this action is no longer subject to the usual controls and checks, "then it is clear who is the sovereign." Schmitt insists that this conclusion holds even in the constitutional state. In *Constitutional Theory*, he notes that from the concept of constitution there arises the concept of "breaking the constitution": a provision that deviates from the norm in a particular case, while presupposing the continued validity of the constitution as a whole. As such, this "violation of the constitution" is only a temporary measure, not a norm, and therefore not law in the sense of the constitutional state; its necessity arises from exceptional circumstances⁶.

Thus, the determination of a situation as one of emergency—and the application of special measures within it—is the result of a sovereign decision. This decision is the mark of sovereignty because it establishes who holds absolute power in the exception. Since decision both constructs the legal structure and suspends it in the state of exception, the sovereign must monopolize the power of decision: "Every legal prescription is 'situational law'... The sovereign creates and guarantees the entire situation. The essence of the state's sovereignty must therefore be defined as the monopoly on the decision, not the monopoly on coercion"⁷.

We can now see that, for Schmitt, the state of exception belongs to the field of law precisely because it is produced by decision and because the exception is the condition of possibility for the normal functioning of law. From a structural point of view, exception and norm stand in a mutually constitutive relation: the decision that a normal situation exists simultaneously establishes its outside—the exception. The norm cannot justify itself; only the exception confirms its validity⁸. As Schmitt puts it, "The exception reveals most clearly the essence of authority... Authority proves that to produce law it need not be based on law"⁹. Decision, like

⁴ Schmitt, *Political Theology*, 13.

⁵ Schmitt, *Political Theology*, 7-8.

⁶ Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press, 2008), 154.

⁷ Schmitt, *Political Theology*, 13.

⁸ Schmitt, *Political Theology*, 12-13.

⁹ Schmitt, *Political Theology*, 12.

the exception, stands on the threshold of the legal system: it founds law while remaining external to it.

In Chapter II of *Political Theology*, “Sovereignty as a Problem of Legal Form and Decision,” Schmitt clarifies the function of legal form. Since legal ideas cannot realize themselves, they require specific organizational forms to become effective—whether in the formation of positive law or its application in judicial or administrative institutions¹⁰. Legal form thus mediates between legal idea and legal reality. It embodies the translation of the idea of law into concrete norms, a process that is itself decisional. Hence the problem of legal form concerns the tension between who decides and what is decided.

For Schmitt, law cannot itself determine who has the authority to decide; decision is prior to law. The exception produced by decision cannot be contained within the framework of ordinary judicial institutions. Because the basic unity of the political community—rather than the constitution—is the precondition of law, the legal system is ultimately constructed through the authority of sovereign decision. In the exception, the sovereign creates new norms that, while not ordinary laws, nonetheless acquire a form of legal force through their subordination to the highest political authority¹¹. Decision is thus the true foundation of law, and legal form is not static but varies with historical and factual circumstances.

Agamben’s Interpretation of the Exception and Sovereignty

Having sketched Schmitt’s decisionism, we may now turn to Agamben’s appropriation of this theory. As Agamben writes in *Homo Sacer*, the exception not only makes the rule possible, but the rule lives only by virtue of the exception¹². Decision establishes the “normal” situation within which law can apply; the exceptional situation is included within the juridical order precisely through its exclusion. The etymology of “exception” already indicates this paradoxical structure of being “outside”—a form of inclusion through exclusion. Exception is not a factual situation but the form through which law relates to fact. The norm applies only to the normal situation it presupposes, and it is the exception that delineates this domain of application¹³.

Hence Agamben identifies, in Schmitt’s decisionism, a topological structure linking law and life, inside and outside. Law maintains itself in relation to an exteriority; this relation finds its extreme form in the state of exception. In the exception, a domain outside the law is nevertheless captured by the law. Under sovereign power, then, two interconnected spaces emerge—the normal and the exceptional. Exception is a space outside ordinary legality yet inside the field of sovereign power, where the sovereign appears to create new norms that, though not legal in the usual sense, acquire a form of legal force. Agamben’s analysis of historical states of exception shows that what appears when the law is suspended is not a natural chaos but a form of anomic force¹⁴.

To understand the overall structure of the exception and the force operative within it, we must return to the classical juridical concept of “necessity” (*necessitas*). It is in the name of necessity

¹⁰ Schmitt, *Political Theology*, 20-30.

¹¹ Schmitt, *Political Theology*, 5-10.

¹² Agamben, *Homo Sacer*, 18.

¹³ Agamben, *Homo Sacer*, 18-19.

¹⁴ Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 39-47.

that law is suspended and that sovereign decision acquires a legitimacy not derived from the law itself. Necessity thus provides the fundamental juridical framework of the state of exception¹⁵.

Agamben's reading of the Gratian dictum—"necessity has no law" (*necessitas legem non habet*)—begins from the canonical observation that, within the *Decretum*, the maxim does not establish necessity as a positive source of normativity, but rather signals that "many things are done from necessity that go against the rule (Gratian, *Decretum*, C.16 q.1 c.1)"¹⁶. For Agamben, this means that necessity confers a peculiar form of legitimacy upon acts that transgress ordinary norms; such legitimacy cannot derive from the law itself but presupposes an authority capable of deciding when the rule may be suspended. Hence necessity appears as a form of exception: it is not the source of the rule, but the space in which the rule is rendered inoperative by a sovereign decision.

This is why Agamben foregrounds the distinction—already implicit in Roman and canon law—between *legge* (statutory law) and *diritto* (juridical order). As the English translator notes, *legge* refers to specific binding norms, whereas *diritto* denotes the overarching order or domain of law¹⁷. The state of exception occupies the threshold between the two: it suspends statutory provisions while still claiming to belong to the juridical order. Thus *status necessitatis* constitutes an indeterminate zone in which "a fact that exceeds the law" nevertheless produces "the effect of juridical order". In this sense, the suspension of *legge* becomes itself a juridical operation at the level of *diritto*.

At this juncture, Agamben's argument intersects directly with Schmitt's decisionism. Schmitt's theoretical aim is to inscribe the exception within the legal context by showing that "the decision reveals the essence of the authority" and that the legal order ultimately rests on a decision that cannot be grounded in law¹⁸. In the exception, statutory law (*legge*) becomes inoperative, but the juridical order (*diritto*) remains effective insofar as it is upheld by the decisive act of the sovereign. Decision is thus not a legal norm but the condition of possibility for any legal order, a function whose authority derives from the political unity of the state¹⁹.

Agamben accepts this Schmitt's insight but radicalizes it. For him, the exception becomes central to the theory of sovereignty not because the sovereign embodies a pre-existing political unity, but because decision itself establishes the relation between law and juridical order. It is the decision that determines whether *legge* applies and whether *diritto* holds. Hence the one who decides acquires sovereign attributes. Yet, unlike Schmitt, Agamben does not assume that this decisional authority must belong to a concrete political person. This raises the crucial question: if the decision grounding the force or non-force of law cannot derive from law, then from where does it obtain its authority?

Iustitium

The modern paradigm of the state of exception is generally traced back to the Roman juridical institution of *iustitium*. When the Senate recognized a situation that threatened the survival of

¹⁵ Agamben, *State of Exception*, 96.

¹⁶ Agamben, *State of Exception*, 24-26.

¹⁷ Agamben, *State of Exception*, 6.

¹⁸ Schmitt, *Political Theology*, 5-6.

¹⁹ Schmitt, *Constitutional Theory*, 75.

the Republic, it issued the *senatus consultum ultimum*, authorizing magistrates to take whatever measures were deemed necessary to save the state. The basis of this decree was the formal proclamation of a *tumultus*. Agamben's analysis shows that although the causes of *tumultus* could include (but were not limited to) external war, the term was specifically used to designate the state of disorder and internal unrest produced in Rome as a consequence of such events²⁰. Hence, the prerequisite for declaring *iustitium* was not a legal assessment but a factual interruption of order; *iustitium* was conceived as a means to restore this disruption and to act decisively in a moment of crisis.

Agamben points out that *iustitium*, in its literal sense, means a suspension of the law : *Il termine iustitium - costruito esattamente come solstitium - significa letteralmente «arresto, sospensione del diritto»: quando ius stat - spiegano etimologicamente i grammatici - sicut solstitium dicitur (iustitium si dice quando il diritto sta fermo, come [il sole nel] solstizio); ovvero, nelle parole di Aulo Gellio, iuris quasi interstitio quaedam et cessatio (quasi un intervallo e una specie di cessazione del diritto). cioè, una sospensione non semplicemente dell'amministrazione della giustizia, ma del diritto come tale.*²¹

From this passage, it becomes evident that, in Agamben's usage of terms—— ‘arresto, sospensione del diritto’, *una sospensione non semplicemente dell'amministrazione della giustizia, ma del diritto come tale*——What is suspended and set aside in the *iustitium* is not merely the *legge* but the juridical order in its entirety, so that within the space created by the *iustitium* there is only un vuoto giuridico—a juridical void, a “vacuum” outside the legal order. This immediately raises a question: if in the state of exception there exists a rule, and if this rule is not of a juridical nature, then what is it? Agamben notes that Theodor Mommsen, in his description of the exception, emphasized precisely this point: “On the contrary, we cannot judge these senatus consulta from the standpoint of law; it was necessity that established law, and the Senate, as the highest authority of the community, by proclaiming the state of exception, merely added the following recommendation: to organize, as an emergency measure, the necessary means of personal defense.”²²

Here, what must be highlighted is the concept of form of law. In cases where necessity is said to “establish law,” the decree of the Senate (*senatus consultum ultimum*), summoning magistrates and even the citizen body as a whole, did not in fact possess the form of law. It arose instead from the necessity of safeguarding the Republic at all costs in moments of turmoil. As Agamben puts it: “...in which any and every citizen seems to be invested with an imperium that is floating and ‘outside the law.’”²³

Yet, for Agamben, this interpretation does not yet touch the heart of the matter. He recalls Adolph Nissen's study, which examined the situation more directly: in the exception, the legal constraints placed upon the actions of magistrates were removed : “No Roman citizen, whether a magistrate or a private citizen, now has legal powers or duties.”²⁴

Thus, in the moment of turmoil that produced the exception, it was not that magistrates or citizens were empowered beyond ordinary law, but rather that the laws and orders constraining

²⁰ Agamben, *State of Exception*, 136.

²¹ Giorgio Agamben, *Stato di eccezione* (Torino: Bollati Boringhieri, 2003), 42.

²² Agamben, *State of Exception*, 44-45.

²³ Agamben, *State of Exception*, 45.

²⁴ Agamben, *State of Exception*, 45.

them in normality were canceled or suspended. As a result, they in fact possessed “unlimited power”: “The state of exception... is a void, an emptiness, the suspension of law.”²⁵

Force of Law

Consequently, every decree issued in this space lacked the form of law, but was nevertheless effective. Agamben refers to this as the force of law. The concept of force of law can be traced back to Roman and medieval jurisprudence, but it was renewed in modernity. Modern legal theory distinguished between validity (the formal correctness of a law) and efficacy (its practical effectiveness). Yet Agamben’s use of the term force of law appears to blur this distinction. In both ancient and modern doctrines, legal efficacy in the strict sense did not designate “law” itself, but those orders and decrees that administrative authorities were authorized to issue under certain circumstances (especially in the state of exception), which nonetheless carried the force of law. In this sense, the concept of legal efficacy defines the binding force or applicability of norms apart from their formal essence: rules, orders, and measures lacking the form of law nonetheless retained their efficacy²⁶.

In other words, legal efficacy is ordinarily understood as the conjunction of juridical form and practical effect. In the state of exception, however, since law is suspended, the decrees that remain effective are separated from juridical form. Their efficacy derives from the fact that, “because they conform to the will of the sovereign, they have the force of law.” They differ from the form of the constitution but become an illegal force of law precisely insofar as they belong to sovereign command. Thus Agamben insists that, by virtue of their formal difference, they should be written as force of law, like an unrealized potentiality or a formless matter, which nonetheless acts without form. In the space of exception, law operates in the mode of potentiality. It is this decree—devoid of legal form yet retaining efficacy—that constitutes the “rule” operative within the exception.

From this discussion, one central problem emerges: the validity of legal efficacy derives from the will of the sovereign. But here Agamben diverges from Schmitt. He does not, like Schmitt, ground the sovereign decision in the higher position of state authority. Rather, through the question of the origin of sovereign power, Agamben opens up another paradoxical structure.

He notes that Romanists and legal historians have never adequately explained the semantic evolution by which the term *iustitium*, originally denoting an exceptional suspension of law, later came to signify “public mourning” for the death of the sovereign or members of his household. Agamben rejects the psychological explanation of terror *anomico*—the notion that the sovereign’s death produces a panic-induced internal anomie. Although turmoil during funerary ritual is historically attested, he argues that the connection does not lie in sovereign manipulation but in a structural overlap between sovereign death and the suspension of order²⁷. This becomes especially evident in the case of Augustus: the sovereign, understood as a *iustitium vivente* (a living state of exception), reveals at the moment of death his inner relation to anomie, releasing disorder into the city²⁸.

²⁵ Agamben, *State of Exception*, 48.

²⁶ Agamben, *State of Exception*, 38.

²⁷ Agamben, *State of Exception*, 193.

²⁸ Agamben, *State of Exception*, 193.

Thus, the constitutional innovation of the Principate can be understood as the direct linkage of the state of exception to the person of the sovereign²⁹. The sovereign begins to detach himself from all subordination to law and proclaims himself legally unbound. If the sovereign's death corresponds to the exceptional moment, then his role as the embodiment of the law implies that his disappearance opens a juridical void. As Agamben emphasizes, the decision simultaneously institutes both normality and exception; normality is founded on the exclusion of the exception yet must maintain a relation to it in order to connect law to life. This returns us to the fundamental paradox: how can the sovereign be both inside and outside the law? When the sovereign exists as a living embodiment of law, both law and anomie coincide in his person; upon his death, the bond between law and its "exceptional body" is severed, plunging the city into anarchy.

Agamben argues that this moment must be ritualized and controlled: the exception becomes public mourning, and mourning becomes *iustitium*, thereby restoring the political community's governable boundary.

The Sovereign as the Living Law

To understand how the sovereign comes to embody "living law," Agamben emphasizes a semantic problem that Roman historians and legal scholars have never satisfactorily resolved: the profound transformation of the concept of *auctoritas* during the transition from the Roman Republic to the Principate. This transformation provides the key to understanding how the state of exception becomes tied to the person of the sovereign. In other words, in order to grasp why the sovereign's death reveals an anomic space, or why the sovereign in life functions as a "living *iustitium*," we must return to the division and subsequent recomposition of *auctoritas* and *potestas* within Roman constitutional history.

During the late Republic, *auctoritas patrum* (the authority of the Senate) and *potestas* (the legally defined powers of magistrates) operated on distinct planes. As Agamben—drawing on Mommsen's classic interpretation—notes, the Senate could not act on its own; it could only approve, ratify, or lend validity to an external action, whether of a magistrate or an assembly. For this reason its acts were termed *senatus consultum* ("advice" or "counsel") rather than binding commands³⁰. In both private and public law, therefore, *auctoritas* did not create an action but conferred efficacy upon one. This corresponds to its etymology *augeo*, meaning "to augment," "to increase," or "to bring to completion": *auctoritas* is never self-sufficient but always presupposes an external act that it empowers or validates³¹.

This structure undergoes a decisive shift with the collapse of the Republic and the rise of the empire. When Octavian was granted the title Augustus, what he received was not a new *potestas*, but—as Dio Cassius famously remarks—a kind of radiance or prestige of *auctoritas*³². Newly discovered documents from 1924 confirm Augustus' own claim that he possessed no greater *potestas* than his fellow magistrates; what set him apart was solely his *auctoritas*³³. Similarly, the title princeps, derived from the traditional princeps *senatus* ("first among

²⁹ Agamben, *State of Exception*, 193.

³⁰ Agamben, *State of Exception*, 77.

³¹ Agamben, *State of Exception*, 76.

³² Agamben, *State of Exception*, 81-82.

³³ Agamben, *State of Exception*, 81-82.

equals”), indicates a status grounded not in office but in personal preeminence. Augustus explicitly described his position as that of the *optimi status auctor*—the supreme bearer of *auctoritas*.

Yet Augustus did not merely appropriate senatorial *auctoritas*; he also accumulated virtually all significant *potestates*, especially those with exceptional or emergency character—the *tribunicia potestas perpetua* and the *imperium proconsulare maius et infinitum*. In him, *auctoritas* and *potestas*—formerly assigned to different constitutional actors—were concentrated and fused. This is why Agamben insists that the Roman Principate is not a magistracy derived from *imperium*, as the later term “emperor” might suggest, but an extreme and unprecedented form of *auctoritas*³⁴. Through this fusion, the declaration of the state of exception becomes inseparable from the sovereign’s own person: the exceptional becomes annexed to life, and the sovereign appears as the one who stands beyond legal subjection yet founds the juridical order through his very being.

Thus the transition from Republic to Empire constitutes not merely a political transformation but a fundamental rearticulation of the relation between law, power, and life. The sovereign’s living person becomes the locus where legality and anomie intersect; his life guarantees order, while his death releases a zone of lawlessness that must be ritually managed as public mourning. In this historical mutation, we see clearly how the state of exception emerges as the privileged site where *auctoritas* and *potestas* converge, and where the legal order exposes its dependence on a life that is simultaneously inside and outside the law.

The Difference between Schmitt and Agamben

Thus, within the structure of the political, two elements are always present: *auctoritas* and *potestas*. The former may be understood as a form of anomie, while the latter represents its opposite, namely the domain of strict juridical normativity. As Giorgio Agamben observes, “authority as a force suspends the law where it is in force and reactivates it where it is not; it is a power to suspend or reactivate the law, yet it does not possess formal validity in the way the law does”³⁵. By employing the term “anomie,” Agamben seeks to designate a force devoid of any juridical-normative form, yet one that nevertheless retains legal force insofar as it corresponds to the will of the sovereign. In his analysis, the legitimacy of juridical norms derives from authority, whereas the legitimacy of authority itself does not stem from any legal authorization; rather, it is intimately bound to the person of the sovereign, who holds this force precisely by virtue of his sovereign will.

Accordingly, authority and this anomic force of the sovereign appear to stand outside the law; yet at the same time, insofar as they determine the conditions of the juridical order, they also remain within it. Moreover, since authority lacks its own normative form, it can only manifest itself in the act of suspending or applying norms—that is, in decision. It thus becomes evident that at the center of what Agamben calls the “arc of power” lies the state of exception: fundamentally, an empty or void space in which “a human action without relation to law confronts a norm without relation to life.” If it is possible to interrupt this apparatus and expose the fictive nature of its center, it is precisely because “there is no substantial relation between violence and law, between life and norm”³⁶. In other words, the relation between norm and life

³⁴ Agamben, *State of Exception*, 82.

³⁵ Agamben, *State of Exception*, 238.

³⁶ Agamben, *State of Exception*, 238.

is produced through the exclusion of the exception: the normal functioning of the legal order presupposes a non-law, while this non-law in turn presupposes the possibility of the law's normal application. What emerges here is not a direct or substantial connection, but a circular structure. This is also the essence of sovereignty: insofar as sovereignty is constituted through the decision on the exception—and thus on what counts as a normal situation—it ultimately rests on a structure devoid of any substantial core. As a form of illegal violence, sovereignty must continuously produce the state of exception in order to come into contact with concrete life.

It is at this point that the fundamental difference between Carl Schmitt and Agamben becomes clear. Schmitt's conception of sovereignty, together with the notion of a "personalized authority" that makes decision possible, may at first appear similar to Agamben's account of sovereign will. Yet for Schmitt, sovereignty originates in a determinate political subject, and its "personal" character necessarily refers to the concrete existence of the state itself³⁷. "Strictly speaking, only something that exists concretely can be sovereign." This concrete existence is the political existence of the people. The validity of the Weimar Constitution rests on the fact that "the German people have given themselves this constitution"³⁸; that is, the constitution as a unified normative order presupposes the concrete existence of the people as its original foundation, and the authority of the constituent will derives precisely from this existence. In this sense, constituent power and sovereign power tend to converge.

When Schmitt distinguishes between "violation" and "amending" the constitution, he repeatedly emphasizes that the former constitutes an exceptional and temporary decision made under extraordinary circumstances, aimed at preserving the political whole, and thus remains consistent with the constituent will³⁹. This is the proper form of sovereign decision. By contrast, constitutional amendment is a competence granted by the constitution itself—that is, by sovereignty—but it is not itself sovereign. It does not possess the power to suspend the constitution. Even when an amendment is used to produce a measure that contradicts the constitution, such an act, though it may resemble a sovereign decision, must be regarded as an apocryphal act of sovereignty⁴⁰, since the authority behind it lacks legitimacy and stands in opposition to the constituent will.

From this, it becomes clear that although Schmitt understands sovereignty as a form of personal authority, as a manifestation of will, such a will must originate in the totality of a political community, rather than in partial institutions endowed with specific constitutional powers. It must be grounded in a concrete and existing entity.

By contrast, for Agamben, the core of sovereignty is a void. Although he too speaks of the manifestation of the sovereign will, the decisive point is that sovereignty comprises two heterogeneous elements: "authority as a personal force" and "power as exercised." Authority is attached to the person of the sovereign, yet this does not mean that it originates from the sovereign himself. On the contrary, we perceive authority in the sovereign only because he presents himself as such through the suspension and reactivation of power. More precisely, the idea that sovereignty is the manifestation of the sovereign will is merely an external appearance

³⁷ Schmitt, *Constitutional Theory*, 59-60.

³⁸ Schmitt, *Constitutional Theory*, 65.

³⁹ Schmitt, *Constitutional Theory*, 154.

⁴⁰ Schmitt, *Constitutional Theory*, 55/155.

of the structure of sovereignty. Sovereignty does not arise from any concrete being; rather, it is founded upon the concealment of its own fundamental emptiness.

Conclusion

This article has argued that Agamben, through the concept of the state of exception, reveals that the relation between sovereign power and individual life is not directly given, but is instead mediated by a structural relation grounded in exclusion. In other words, law can be applied to life only insofar as life is placed within the exception. Sovereignty is realized through the decision on the exception in the very act of governing individuals, while individuals are captured within this mechanism of power and reduced to bare life. It is precisely through the continuous production of bare life that sovereign power conceals the void at its center.

In sum, the analysis of the exception brings to light a mechanism of governance structured by exclusion and inclusion, within which law and anomie, order and disorder, are related not through any substantive connection but through a structural relation. In this sense, Agamben is able to show that, within the Western legal tradition, constituent power and administrative action—two seemingly opposed forces—jointly constitute the foundation of the juridical order through this structure. On this basis, he develops the core framework of his theory of biopolitics and explains how and why power captures individual life. In this perspective, the production of bare life is not contingent, but an intrinsic result of the operation of power.

References

- Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford: Stanford University Press, 1998.
- Agamben, Giorgio. *State of Exception*. Translated by Kevin Attell. Chicago: University of Chicago Press, 2005.
- Agamben, Giorgio. *Stato di eccezione*. Torino: Bollati Boringhieri, 2003.
- Norris, Andrew. "Sovereignty, Exception, and Norm." *Journal of Law and Society* 34, no. 1 (2007): 31–45.
- Schmitt, Carl. *Constitutional Theory*. Translated and edited by Jeffrey Seitzer. Durham: Duke University Press, 2008.
- Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Chicago: University of Chicago Press, 2005.
- Zartaloudis, Thanos. *Giorgio Agamben: Power, Law and the Uses of Criticism*. London: Routledge, 2010.