

Book Review – Misery Knows no Law. Giorgio Agamben thinks the State of Exception

By *Ulrich Raulff**

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Giorgio Agamben, *Ausnahmezustand (Homo Sacer II.1)*. German translation from the Italian by Ulrich Möller-Schöll. Suhrkamp Verlag, Frankfurt 2004, 113 pp., € 9,--

„Homo Sacer“, the book that made Giorgio Agamben famous, ended with the constitutive connection between the concentration camp and the state of exception. “The camp”, according to Agamben, is the space that opens up when the state of exception turns into a normality.” The state of exception signifies a temporary (*zeitliche*) abrogation (*Aufhebung*) of the rule of law, and the camp gives a spatial expression to this state of exception, even if this expression remains outside of the normal order. As the camp renders the state of exception steady, it creates the paradox of normality which is identical with the anomy: the camp brings about a new juridical-political paradigm in which the norm becomes indistinguishable from the exception. At the same time, it renders law's boundaries fluid: “The camp is a hybrid of law and fact (*Faktum*) in which both have become indistinguishable.”

In his new book, “*Ausnahmezustand*” (state of exception), itself one volume of a four-part project on *Homo Sacer*¹, Agamben deepens this figure of thought through

* Culture Editor, *Süddeutsche Zeitung*, <http://www.sueddeutsche.de>.

¹ Please see for more references the editorial notes in the Interview between Giorgio Agamben and Ulrich Raulff, also in this issue of *German Law Journal*.

a series of minutious explorations into legal theory and the philosophy of law. In his book, we meet the Italian philosopher as a sharp critic of the present, as the analyst of the state of siege (*Belagerungszustand*) that the US American *pax americana* has cast over the world. At the same time, Agamben personifies a first rank legal philosopher who transports the lessons learned in many years of studying Heidegger, Benjamin and Foucault into the realm of legal terms. And as we observe Agamben pushing the boundaries of legal speech to its limits and closely watching the emanation of its very terminology, we recognize the inspiration by the historian Ernst Kantorowicz.

The state of exception, following Agamben, is “the legal form of that which cannot take on legal form: a legal category describing the absence of law. It is in the state of exception that law relates to *life* – being the second polar category in Agamben’s elliptical theory – by bringing about its own suspension. The state of exception, therefore does not mean a special legal order (*Sonderrecht*) as, for example, public international law. Instead, the state of exception suspends the legal order as such and in total; it is from this angle that we recognize the state of exception as being a boundary, a threshold. By arguing that in today’s political discourse, the state of exception increasingly presents itself “as the dominant paradigm of governing”, Agamben introduces a time index into this situation of a constitutive and structural paradigm. What had been thought of as a temporary displacement of law, has gradually been becoming the normal practice of governance. The *military order* and the *US Patriot Act* that were enacted by the Bush administration after September 11, 2001, serve Agamben as examples of this development. The camp, we read in “Homo Sacer”, is the paradigm of political modernity.

Schmitt, the Neutralizer

As in his previous writings for the Homo Sacer project, Agamben designs a theory in *Ausnahmezustand* that allows both for a philosophical-structural and a historical grasp. With the present held in between these pliers, Agamben comes across as an avid pupil of Walter Benjamin. 1940, shortly before his death, Benjamin wrote in his ‘*Geschichtsphilosophische Thesen*’ that the “state of exception in which we live, is the rule.” Benjamin left it open to speculation whether he thereby alluded to the acute suspension of law since 1933 or to a metaphysical state beyond the historical realm.

Agamben gives proof of his qualities as legal historian in two historical explorations. The first one is dedicated to the emergence and use of the concept and its forerunners (“state of siege” – “*Belagerungszustand*”; “state of emergency” – “*Notzustand*”) since the French Revolution, including an analysis of the juridical term of “emergency” (*Not*). Italy appears as a particularly interesting political-juridical laboratory, the First War being the great hour of disseminating governmental dis-

positions of exceptions (*gouvernementale Ausnahmedispositive*). The other explorations targets on one Roman institution that may well be regarded as the archetype of the modern state of exception: the *iustitium*: a state during which the law stands still as during the solstice (*solstitium*).

Instead of tying back the notion back to this “dark paradigm” of Roman law, Carl Schmitt and the theoreticians of the state of exception of the 20th Century, they unfolded their conception of the setting aside of the law with reference to the institution of dictatorship – unjustifiedly, according to Agamben. Agamben, in his “*Ausnahmezustand*”, dedicates another brilliant excursion to Carl Schmitt: Agamben is capable of turning the old and conundrical story of Benjamin’s reference to Schmitt around: now Schmitt appears as the reader of Benjamin’s early essay *Zur Kritik der Gewalt* of 1921. The ensuing “secret debate”, as Agamben calls the discrete connection between Benjamin and Schmitt, is now being dominated by Schmitt’s attempt to neutralize the pure and anomical force that Benjamin had sketched in his text in order to bring it back into the law.