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THE DOOR OF LAW: THE TERM WITHOUT MEANING OF HUMAN RIGHTS AND SOCIAL IN THE STATE OF EXCEPTION

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Abtract: This paper intends to broaden the discussion on the state of exception today, outlining an approach to the (non-) place of human rights in the void of law established by the state of exception. The survey was devolped through literature search was conducted using deductive approach provided the theoretical framework of theory agambeniana the state of exception. Human rights are conceived as consensually recognized and accepted internationally and the point became self-evident that no longer put seriously in question, especially from the point of view of its effectiveness. In this respect, the theory of the state of exception states that the law as simple or seizure of their strength originates in the development of power in the West. The intent is to show that the conditions (which should be) exceptional impose the law a pure term meaning, in other words, an opening that prevents the entry itself.

Keywords: state of emergency, human rights, form of law, the force of law.

À PORTA DA LEI: A VIGÊNCIA SEM SIGNIFICADO DOS DIREITOS HUMANOS E SOCIAIS NO ESTADO DE EXCEÇÃO

Resumo: Este trabalho pretende ampliar a discussão sobre o estado de exceção na atualidade, traçando uma abordagem sobre o (não-)lugar dos direitos humanos no vazio de direito instaurado pelo estado de exceção. A pesquisa desenvolveu-se por meio de pesquisa bibliográfica, pelo método de abordagem dedutivo, desde o referencial teórico da teoria agambeniana do estado de exceção. Os direitos humanos são concebidos como consensualmente reconhecidos e aceitos no plano internacional e a tal ponto se tornaram autoevidentes que deixaram de ser postos seriamente em questão, sobretudo do ponto de vista de sua efetividade. Nesse aspecto, a teoria do estado de exceção expõe que o direito como simples forma ou a apreensão de sua força é originário do desenvolvimento do poder no Ocidente. O intento é mostrar que as situações (que deveriam ser) excepcionais impõem à lei uma pura vigência significando, em outros termos, uma abertura que impede a própria entrada.

Palavras-chave: estado de exceção, direitos humanos, forma de lei, força de lei.

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Introduction

The eagerness to release men from the confines of nature and the willingness to raise him to a superior station, in conjunction with the development of an instrumental rationality, capable of transforming all knowledge in a useful tool, used towards the expansion of capitalism led to "benefits and prosperity gloriously combined" (ADORNO, HOKHEIMER, 1985, p. 17).

However, the fear makes the temple of knowledge shake when physics makes it possible for a nuclear war that would put an end to human existence; when gas chambers and concentration camps are build in a developed nation, where a democratically established constitution remains in place, despite anti-Semitism and Nazi extremism[1]; when the rule of law gives way to a state of exception.

Considering this paradoxes, Agamben establishes some paradigms around which he will criticize power-related notions in the West, pointing to questions that go to the basis of many things taken as assumptions, these days.

In this achievement, Agamben betakes Benjamin's thought according to which the state of emergency would have lost its exceptional profile to become the rule, so that it became the standard and, hence, a rule strategy. Carl Schmitt's concept of sovereignty, with the possibility of identifying the ruler through his decision about the state of emergency, is reviewed by Agamben to showing the capture of life by power, making nude the biopolitical aspect that nourishes the category of sovereignty.

Hence, Agamben states that "political culture in the West does not realize it has lost the principles that created it" (AGAMBEN, 2011, p. 33) and goes on to research the origins of the state of exception as a fundamental element in judicial order.

The contradiction and, at the same time, the needed coexistence between law and anomy are presented, showing the state of emergency constitutes the so called rule of Law. Weimar Republic's history carries the incongruity of a Constitution - whose prestige social rights conferred it noteworthiness - in spite of what was allowed by art. 48, § 2, that is, the occurrence of events so ignoble that marked the twentieth century.

[1] "Holocaust" was an unfortunate choice of words, whose origin refers to an attempt to justify the unjustifiable. "The term not only implies an unacceptable equation between crematory ovens and altars, but it holds an anti-Semitic connotation" (AGAMBEN, 2010b, p. 40). Who makes use of this term " shows ignorance or insensitivity (or both) " (AGAMBEN, 2010b, p. 40).

The safety policy - which had a particularly meaningful transition from the army domain to the economic one -, alongside the spread of fear, supports the take of exceptional measures and the suspension of rights; and, furthermore, it converts itself into an assumption of governance. In this scenario, the relativization of human rights by the U.S. policy in the post-September 11 world gains even more importance. The suspension of the existing order made possible by the fight against Terrorism opens a wide gap introduced by exception - the suspension of human rights.

1 State of exception

The paradox of the self-evidence[2] of human rights and of its conceiving as an object of a certain consensus should allow investigating the scheme of exception as a constituent of the West Power, in which human rights are inserted.

Lynn Hunt, in a survey about the genesis of human rights, questions that the declaration of independence elaborated by Thomas Jefferson had considered self-evident that the man was already born with his right to life, to freedom, to search for happiness. In France, in July 14th, with the fall of the Bastille, the French Revolution effectively begins and it is imposed the necessity of a formal declaration. The 24 articles outlined by Lafayette were object of an extensive deliberation that, because of avoiding the approach of other emerging questions, ended with the trial of 17 articles (HUNT, 2009).

The final text didn't make any reference to the king, nobility or the church; it removed any birth-privileges and it was full of general expressions like “man”, “every man”, “citizen”, “every citizen”, “people”, “society”, suppressing the only reference of the french people (HUNT, 2009).

[2] Declaration of Independence. <http://www.wdl.org/pt/item/109/view/1/1>.

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Almost two centuries later, the guarantees alleged in the Declaration of the Rights of Man and of the Citizen were reflected the Universal Declaration of Human Rights, firmed by the UN in 1948. However Hunt questions what is the importance of these files if they did not surpassed the political intentions that scored their births, if they did not prevent the instauration of many governments and constitutions that did not preserve the rights they had consecrated? (HUNT, 2009)

The sphere of incidence of the concept of man as a subject with universal and self-evident rights showed itself, to many people who claimed them, paradoxically restricted. Some few ones were considered "every men" and slaves, free black men, religious minorities and women were not among them. Thomas Jeferson, owner of slaves, and Lafaiette, aristocrat, represent the perplexity of how some rights had been conceived in such improbable places. "We should not forget the imposed restrictions against rights by men of the 16th century, but stopping at this point, greeting our own comparative 'advance', is to not comprehend the main point" (HUNT, 2009, p. 17).

The alleged self-evidence of human rights does not hide its tax origin to the Natural Law School. Therefore, Hunt points that the Universal Declaration reproduced this self-evidence tone of the rights. But if they are self-evident, why they should be claimed and they were so just in specific moments and places? How could them be treated as universal if they were not recognized everywhere? The self-evidence dismisses discussion (HUNT, 2009).

After the totalitarian regimes of the 20th century, human rights become the legal measure to fix the inhumanity allowed by law, so that, since the post-war, human rights become an object of consensus and panacea of political speeches.

Thereby, the attempt of using the concept of state of exception to ideate human rights fits to break their fake "self-evidence" and the questionable consensus, in order to rethink which is the real condition of human rights in the political structure and in the domain of public law.

The issue about the state of exception has not been at the forefront of judicial debates and, despite its "essential relation" to sovereignty, highlighted by Carl Schmitt (AGAMBEN, 2011, p. 11), it remains at the fringes of legal theory. However widespread it may be, the concept of state of exception has only been discussed in factual grounds, since some authors[3] believe there is no room for law in it.

[3] Biscarerri, Balladore-Pallieri,Carrede Malberg are some of these authors. On the other hand, there are those that discuss the state of exception as part of positive law, since the necessity is an autonomous

It is in respect to the adage - Necessitas lege non hebet[4] - that some authors consider the state of necessity as a basis to the state of exception, which, in turn, could not take up judicial form (AGAMBEN, 2011). The necessity demands the urgency of decisions when law cannot be invoked. If political crisis demand political solutions, the resource to the state of exception, as a legal measure, highlights its internal contradiction and the problem of the (so-called) duality between law and fact.

The new structure of the state of exception "may have, only today, reached the pinnacle of its development" (AGAMBEN, 2011, p. 27). To answer the question ever-so present in West's political history of "what is to act politically?" it is necessary to uncover the so-called difference between the political fact and the judicial fact.

2 When the state of exception becomes the norm

The exception establishes the boundaries between law and politics. It refers to the unbalance between public law and political fact – from the moment a legal answer is giver in terms other than judicial ones, the state of exception presents itself as the legal body of something it can't be (AGAMBEN, 2011). Agamben, however, argues for the essentially judicial character of this issue and attempts to find meaning, room and ways it relates to the law (AGAMBEN, 2011).

The exception is not simply an open space, in which conflict establishes itself in a normative setting, through non-regulation. The state of exception is not:

> an absence in the law that should be filled by the judge; it refers to an interruption of the legal order to ensure its existence. Far from referring to a legislative hole, the state of exception presents itself as a fictitious gap in the legal order with the goal o safeguarding the norms and its applicability. […] It is as if the law contained a gap between the establishment of the norm and

source of the law, as Santi Romano, Hauriou, Mortati; and there are those that consider self-preservation a State right, such as Hoerni, Ranelletti, Rossiter (AGAMBEN, 2011).

[4] The necessity has no law. This adage carries two interpretations: that necessity rules over anomie and that necessity creates its own set of rules, laws (AGAMBEN, 2011).

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> its enforcement and that, only in extreme cases, it can only be filled by the state of exception, when the law, as such, remains in place (AGAMBEM, 2011, p. 48).

The theory of exception will only emerge when necessity makes it essential that a specific fact be singled out among others to evade normative application. The necessity is not, therefore, the source of the law, neither does it interrupt its application. As a matter of fact, exception presupposes a will to protect the legal order, because if it does not accomplish its objectives, there is no point in preserving it. Necessity creates the need for a rupture between law and reason, and, consequently, between law and force.

Necessity is not, however, an objective data; it only exists when it is declared so. It is, therefore, a moral or political decision, made by the rules who will decide on the need to suspend the current legal system.

Civil war, insurrection and resistance are intimately connected to the state of exception because they take occur when reality and law confront each other, making it difficult to get a clear sense of things (AGAMBEN, 2011).

The state of exception became known in article 48, §2º of the Weimar Constitution, which dates back to August 11th 1919, where it is possible to find the paradox of its raison d'être: to protect the constitution, it has to be suspended.

> In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary using armed force. In the pursuit of this aim he may suspend the civil rights described in articles 114, 115, 117, 118, 123, 124 and 154[5].

The same constitution that made large strides in the social rights issue, anticipated its suspension.

The state of exception is called upon when the normal state of affairs is compromised. Normalcy is a pre-condition to the application of the norm, in as much that exception creates a situation not previously anticipated. But when anomie spills up to outside of the boundaries of an exceptional situation, it takes over the rule of law and totalitarianism shows its face. To preserve democracy, authoritarian measures are adopted. But in the normative gap, there are no guaranties that these measures will serve only this purpose.

[5] English version available at: <http://www.zum.de/psm/weimar/weimar_vve.php#Third Chapter>.

The paradox is effectively shown in the Nazi situation, which was aptly described as "civil legal war": as soon as power was given to him, Hitler suspended – through a decree that was never revoked – the articles of the Weimar Constitution which referred to individual liberties, establishing a state of exception that lasted twelve years: The Third Reich (AGAMBEN, 2011).

This provision has allowed several governments to declare state of exception and to approve emergency decrees in over 250 occasions, in which an unknown number of communist militants have been imprisoned and courts have been created in order declare capital punishment (AGAMBEN, 2011).

Article 48 was also employed when Germany's currency collapsed. This way, the state of exception acquires a specific economic and financial connotation and the Executive branch's chief gains powers to pass decrees that have law-like status (SCHMITT, 2007), “reaffirming a modern trend of coinciding political-military emergencies and economic crisis” (AGAMBEN, 2011, p. 29).

However, "it is important to keep in mind that the modern state of exception is the creation of the democratic-revolutionary tradition, not of the absolutist tradition" (AGAMBEN, 2011, p. 16). In Switzerland, for example, the state of exception was created in 1914, by giving the Federal Council unlimited powers "to ensure the safety, integrity and neutrality of Switzerland" (AGAMBEN, 2011, p. 30).

When questioned over the unconstitutionality of this provision, Swiss scholars attempted to extract the legitimacy of the exceptional powers from the Constitution itself, from the right of existence of the State itself or even from a gap in the law that should be filled by exceptional provisions, such as those (AGAMBEN, 2011).

Insurrection also holds important connections to the state of exception, since it is based on necessity and present themselves as fact, that will only become law in a posterior moment (AGAMBEN, 2011). It is reminiscent of the issue of the original constitutive powers, of the revolution that establishes a new constitutional order, whose

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rupture with the previous one does not taint the new order's legality, because it creates new law, which, in turn, will manifest itself through a new constitution and new institutions. They are acts that violate the law, that confront the principle of legality, but that cannot be considered illegal unless,

> From the point of view of the State's positive law, which does not mean, from a different standpoint, that it is not an organized movement, regulated by its own law. What it does mean is that is an order that should be classified in the category of original legal orders, in the known sense of the term. […] revolution is violence, but legally ordered violence (ROMANO apud AGAMBEN, 2011, p. 45).

Resistance, much in the same way, relates to the state of exception because of its extralegal aspects, as subterfuges of defense of democracy, since "both in the right of resistance, and in the state of exception, what is really at stake is the judicial meaning of an action that is, in essence, extrajudicial" (AGAMBEN. 2011, p 24). Both have a place in the argument over the possibility of inserting, in the legal texts, elements that cannot be regulated by positive law. In the right of resistance, such as in the state of exception, it is the protection of a democratic regime that confers them the legitimacy to act beyond the strict boundaries of State rules.

It is in the place of the state of exception – inside or outside the law – that rests the debate over the (im)possibility of a legal order containing a state of exception. But if the suspension of the legal order is the problem with the state of exception,

> How can this suspension still be understood inside the legal order? How can an anomie be inserted in the legal order? And if, on the contrary, the state of exception is simply a factual reality and, as such, it is distant or contrary to the law; how is it possible for the legal order to have a gap exactly on such a crucial matter? And what is the meaning of this gap? (AGAMBEN, 2011, p. 39)

Giorgio Agamben, therefore, finds itself in the "benjaminian" conception that there is no "outside" or "inside" the legal order, in which the state of exception may be inserted, but a space of complete confusion between law and anomie.

The road trailed from the adoption of emergency measures called for by a specific situation to the suspension of the legal order is explained by Carl Schmitt through the distinction between commissary dictatorship and sovereign dictatorship or, in another way, between constitutional and unconstitutional dictatorship. Commissary dictatorship is temporary, it goes beyond the norms and overruns the constitution in

order to preserve it (ASSMANN; LEIS, 2010). It refers to a delegation from an established power (Parliament).

Sovereign dictatorship, on the other hand, is long-lasting and revolutionary, because it violates a constitution in order to establish a different order and sovereignty – it derives from a power with constitutional claim (ASSMANN; LEIS, 2010). Hence, it is clear that the distinction between commissary dictatorship and sovereign dictatorship does not refer to the essence of these forms of dictatorship, but rather to the intensity in which they present themselves.

If the commissary dictatorship (constitutional) aims at saving democracy, the sovereign dictatorship (unconstitutional) eliminates it. The big difficulty lies in trying to identify and control the forces that turn a commissary dictatorship into a sovereign dictatorship. In other words, in trying to understand why these tools, created to save the democracy, turn themselves against it.

It is ordinary, in public law, to consider Totalitarian regimes from the 20th Century dictatorships. However, neither Hitler, nor Mussolini resorted to a coup d'état in order to take power. Mussolini was given the position of Head of State by the king of Italy and Hitler was named Chancellor by the Reich's President (AGAMBEN, 2011).

> What is common to both the fascist regime and the Nazi regime is that they both allowed for the ruling constitutions to remain in place (the Albertine constitution and Weimar constitution), creating a second structure – following the "dual State" paradigm – that, even though it was not formalized, could exist next to the original power structure, thanks to state of exception.

The impetus of terror leads the totalitarian regime to distinguish itself from a normal dictatorship exactly because it does not turn only against its enemies, but also against its supporters – it fears all forms of power, even the power in the hands of its friends (ARENDT, 1985). "The climax of terror is reached when the police State begins

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to devour its own offspring, when the executioner of yesterday, becomes the executed today"(ARENDT, 1985, p. 30). Terror in the totalitarian government is not, therefore, the extreme power play aimed at putting an end to chaos and opposition, as is for dictatorships, but the usual way in which the regimes of the people work, when they become tractable.

Agamben highlights the conclusions that were reached through research on the state of exception:

1) The state of exception is not a constitutional dictatorship, but a space of anomie, in which juridical definitions have been made irrelevant. Hence, it is without merit the doctrines that aim at inserting the state of exception under the cloak of the theory of necessity. Also without merits are the doctrines that set out to insert exception into the Law, such as Schmitt, distinguishing the norms from its application, the constitutional power from the constituted power, and the norm from the decision. "The state of necessity is not "rule of law", but a lawless rule" (AGAMBEN, 2011, p. 79).

2) The gap established by the exception is necessary to the judicial order, which should hold a relation to the anomie that sinks it.

3) The central issue that arises out of the suspension of rights is the nature of the actions performed in this interim. These actions are not subject to judicial definition and find themselves in a no-men land.

4) From the absence of definition it follows the idea of law-like power. "It is as if the suspension of the law releases a power, a mystical element like a judicial manna […] of as much power as their opponents, as the constituted power and as the constitutional power attempts to take ownership" (AGAMBEN, 2011, p. 79-80).

Here, lies the issue of the definition of what is "politics".

3 The politics of US-exception after 9/11

The attacks against the United States in 2001 represented a legitimate reason for American politics to reaffirm and expand the control and safety mechanisms, which had lost steam once the arms race came to an end. The War Against Terror, formally declared when a state of emergency was established in September 14th 2001[6] makes clear the "biopolitical" facets that have the concentration camps as paradigm.

[6] Available at: <http://www.fas.org/irp/news/2001/09/fr091801.html>.

The military order issued in 2001 by the President allowed for indefinite detentions and created military commission, in charged with handling proceedings (AGAMBEN, 2011), which enlarged the place of exception and conferred upon the President the position of sovereign ruler. The USA Patriot Act, passed in the Senate that same year, allowed for citizens to be indefinitely imprisoned if they are considered a threat to "national security" (AGAMBEN, 2011).

US politics evidences, therefore, the unyielding presence of "biopolítica" in the state of exception, in which the human body is captured in the form of its exclusion. In Guantanamo, Taliban detainees, captured in Afghanistan, represent the apex of the indetermination of nude life[7], since they are neither "prisoners nor are they accused, just detainees, objects of domination, in an unknown detention, both relation to time-period, and to its very essence, since it is completely outside the scope of the law and judicial control" (AGAMBEN, 2011, p. 14).

Guantanamo is "the most symbolic evidence of the complete disregard and disrespect for the international human rights and humanitarian rights regime, in the last sixty years" (GÓMEZ, 2008, p. 268).

Notwhistanding several attempts, made by the US government, to feign justice and to cover the obvious violence and the illegality of its actions, when faced with international and domestic pressures and with resistance from Guantanamo (GÓMEZ, 2008), in January 2013, US President Barack Obama signed into law the National Defense Authorization Act (NDAA), a federal law that itemizes the expanses made by the Department of Defense in 2013. It holds important implications when it comes to civil liberties – it increases the executive branch's ability to detain an

[7] Nude life as the individual life exposed to the control of the state activity. The biological life becomes part of the power circles.

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individual and reduces the possibility the President will uphold his promise[8] to close Guantanamo Bay prison[9].

This law delays for another year the possibility Guantanamo detainees will be transferred back to the United States because it prohibits the use of government funds for these proceedings. Besides, the NDAA imposes similar restrictions on the transfer of detainees to other countries[10].

This policy, justified by the counterterrorism struggle, puts a hamper on "the individual judicial statue, who becomes an unclassified and unmade judicial being" (AGAMBEN, 2011 p. 14). What arises is a denial of the "right to have rights" and of the right to belong to a political community, which is essential for the enjoyment of any human rights, because, differently from the literal meaning, being human does not guarantee anything; being a citizen does (ARENDT, 1998).

4 Before the law: the (i)legitimacy of a text in place without effect

The fragility of the institution of human rights can be detected since its spread and the recognition of the logic which gave subsistence to it. Legal literature distinguishes human rights and fundamental rights, in order to distinguish the protection of the same rights under a national or international point of view.

From the point of view of state law, the protection of human rights, considered as fundamental ones, is mediated by the category of citizenship. The ones who could not be protected by the State, who could not appeal to the status of citizen in order to have their rights assured, they could have human rights at their disposal. Nevertheless, the possibility of claiming for those rights showed off the nakedness and the rethorical of the human rights speech, which became unworkable when they were not linked to a State that could assure them. At this point, the criticism of Arendt already showed itself pungent, as well as embarassing, to the idea of human rights:

> Rights of Men, supposedly inalienable, showed itself unworkable - even in countries where constitutions were based on them - always when people who

[8] In 2009, President Barack Obama enacted, in the third session of a decree, that the detention installations of Guantánamo would be closed as soon as possible and, at the latest, one year from the date of the mentioned decree. It was enacted also the implantation of human conditions of imprisonment in 30 (thirty) day. This decree can be found in: <http://www.whitehouse.gov/the-press-office/closure-guantanamo-detention-facilities>. Seen in feb 2013.

[9] Available at: <http://www.aclu.org/blog/tag/ndaa>. Seen in feb 2013.

[10] Available at:<http://beta.congress.gov/bill/112th-congress/house-bill/4310 >. Seen in feb 2013.

> were not citizens of some sovereign State appeared. It can added to this fact, which is embarassing for itself, the confusion created by the numerous attempts of shaping the concept of human rights towards defining them with some belief, in contrast with citizen's rights, which are clearly outlined (ARENDT, 1989, p. 327).

Hannah Arendt shows this logic was already contained in the wording of the Declaration of the Rights of Man and of the Citizen in 1789, since it left dubious if the expression "of Man and of the Citizen" would name two different categories, or if it would refer to an assumption that the human being protection implies the belonging to a National State through citizenship (ARENDT, 1989). The situation of refugees and stateless people, however, ends the doubt about the ambiguity, once the human being protection solely based on the condition of a human being was a blank. In the moment when citizenship and any relation with a National State were lost, just the condition of human being remained, in other words, the loss of the status of citizen threw one in the condition of being purely and simply a man and, because of this, someone without any link with a State, who did not have anyone to ask for the guarantee of the rights related to his condition of human being (ARENDT, 1989).

At this point, Agamben shows that human rights insert, finally, the nude life in the sovereignty structure. Birth, as a defining point in the consolidation of nationality and of citizenship, becomes an object of the sovereign authority and life is left under the power of suspending rights of the sovereign power (AGAMBEN, 2010a). That is why Agamben alleges "sovereignty is, indeed, this 'law besides the law to which we are abandoned'" (AGAMBEN, 2010a, p. 64)

The situation in which a rule is in place, but not in effect is a consequence of the (i)legitimacy of the law, presented by Agamben as the full text of tradition (AGAMBEN, 2010a). This "pure empty revelation" (AGAMBEN, 2010a) refers to the judicial gap established by a normative inflation that makes political proposals

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undistinguishable among themselves and norms an empty vase. Law gives way to other measures, that have law-like strength.

> All societies and all cultures (no matter if they are democratic, totalitarian, conservative or progressive) have entered a legitimacy crisis, in which the law (meaning the whole text of tradition, in its regulatory aspects, be it the Hebrew Torah, the Islamic Shariah, the Christian tenets and the profane nómos) is in effect as the "nothing of Revelation" (AGAMBEN, 2010a, p. 57)

To this respect, Agamben invokes the Kafka's legend "Before the Law" in which Kafka's negative relationship with law is evidenced. The legend speaks of a peasant who finds himself on the door steps of the law, which is always open and whose entry is only prevented by a guardian who alerts of the presence of other guardians in other rooms ahead (KAFKA, 2002). "The peasant did not expect this much difficulty; the law should be easily accessible to all, he thought" (KAFKA, 2002, p. 188). The peasant sat by the door and waited, for several years, for his entry to be allowed, but only in the end of his life, when his eyesight abandoned him and "a gleam of light scintillated through the door of the Law" (KAFKA, 2002, p. 189) did he call the guardian and asked what had been disturbing him for so long:

> "If everyone aspires to the Law – said the man – how is it that, after all these years, no one, but me, has asked to enter?
> The guardian, noticing that the men was in the end of his life, shouted: - Here, no one else, but you, can enter, because this door was made specifically for you. Now, I will go and can finally close this door (KAFKA, 2002, p. 189).

As it relates to this, Agamben repeats Jesus's first warning to the Pharisees, as told by Luke: "Alas for you lawyers who have taken away the key of knowledge! [other versions refer to the key that open the door to the House of Wisdom] You have not gone in yourselves and have prevented others from going in who wanted to" (BIBLE, Luke, 11:53). This is also related by Matthew (BIBLE, Matthew 23:13) when Jesus confronts religious leaders that took pride in interpreting the law – which the key represents – to the point of emptying its meaning in favor of meaningless rites (CHAMPLIN, 1995). It refers to a interdiction impose despite its very access.

In this aspect, the legend, for Agamben, rescues the pure form of the law, because it does not imposes anything on the peasant but its own openness and it is

precisely in this non-anticipated form that one can find the strength of the law (AGAMBEN, 2010a).

This situation, in which the law is in place, but not in effect, refers to the purity of the law, to the moral action, as described by Kant (AGAMBEN, 2010a). The form of the law does not necessarily carry a connection to its content; it refers to the staleness of the empty, under the veil of the law, of the state of exception disguised as a democratic rule of law. To relegate the exceptional into a normative gap leads to a discussion about the ruler, after all, who is the ruler?

Besides eliminating the separation of power (legislative, executive and judicial), the state of exception exposes the mystical foundations of the law in as much as the law exists because of the power, because it is power authorized. (DERRIDA, 2010).

In 1989, Derrida delivered a speech entitled "Force de loi: le fondement mystique de l'autorité". This mystical foundation, about which Derrida speaks, the strength of the law, it all lies in the distinction between law and justice, established by Montaigne: "Well, laws are credible, not because they are just, but because they are laws. It their mystical foundations, and they have no other" (MONTAIGNE apud DERRIDA, 2010). Hence, if anyone obeys the law because it is just, they are doing it for the wrong reasons (DERRIDA, 2010).

The problem that arises is the following: law is based on this mystical foundation, but the strength of the law may be extended to other acts that are precisely laws. This is what justice requires, but not only justice.

> In extreme cases, thus, the "strength of the law" fluctuates as an undetermined element that may be claimed by state authorities (in the name of a commissary dictatorship) or by a revolutionary organization (acting as a Sovereign Dictatorship). The state of exception is an autonomous space where what is in play is the strength of the law without law (that should be written as strength of the ~~law~~) (AGAMBEN, 2011, p. 61).

This way, the law may face a concrete situation defined by the ruler as an emergency and be stripped of its "strength" to deliver it to an act that may contain this

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emergency e restore the order, so the laws can be effectively applied. If the state of emergency is to be mollified, it this is possible or convenient and if the strength of the law will be placed far away from the actual law; these are the problems with the state of exception.

When the common welfare, the public order or democracy are in danger, the emergency arises and so does the state of exception. What is common welfare, the public order or democracy? When are they being violated? Doesn't the exception itself put them in risk? The suspension of rights as the most important aspect of the state of exception has become the norm in terms of law and politics, displaying the permanent suspension of the law, as well as the common welfare, the public order or democracy

The form of the law is stripped of its content, the strength of the ~~law~~ is a fluctuating imperium that confers applicability to the law and other acts; the form of the law and its strength, together, mark the ground zero in respect to the law(AGAMBEN, 2011). A law in effect merely as a mold, just like in Kafka's legend, is insuperable and may be confused with life itself (AGAMBEN, 2010a). The gap opened by the mold of the law establishes itself through the elimination of anomie, as the space that allows for the existence of the law, because establishing so general principles fills up all the other spaces where law could not reach before. Law, this way, becomes the same as life; the introduction of anomie in the judicial order coincides with the invasion of life in the law.

The strength of ~~law~~ attempts to deactivate law, because it maintains its suspension as, against it, Walter Benjamin's nihilistic messianism intends to drive the ruling of the law into nothing with the goal of not making the absence of law (AGAMBEN, 2010a) be employed by its institutions.

Public law and current policies find themselves in the door of the law, the "whole text of tradition" while "in place without effect" is the diagnosis, but it is in regards to the meaning of this effect or the openness of the door that opinions split

> The risk for thinking is that it is condemned to eternal negotiation with the guardian or, worse, that he himself takes on the role of the guardian, who, not taking on its actual duties, guards the nothing upon which the doors open (AGAMBEN, 2010a, p. 59).

Here is where human rights expose their (non-)place, their effectiveness without meaning along with a strong of law that, under the argument of acting according to

"safety reasons" or to calm economic crisis, gives to the sovereign the possibility of ruling in a no man's land.

> It was not declared any formal state of emergency and, however, vague non-legal notions - securitarian reasons - are evoked to installing a constant scary and fictional state of emergency, in spite of identifying no threat. The concept of crisis is an example of these non-legal notions used as factors to instigate emergency (AGAMBEN, 2013, s/p).

Globalization has eroded concepts built upon national sovereignty[11] and profoundly impacted the judicial order because it came upon a classically liberal "rule of law" State (FARIA, 1999), incapable of dealing with the problems of conflicting societies, especially the ones found in peripheral capitalism (WOLKMER, 2001).

What is left of the law in this scenario? Being in place without effect. The mold of the law lives together with the "mystical foundation" of its authority, a strength of the law (DERRIDA, 2010) that hovers over the judicial order and is called upon to coat with authority not only the law, but other acts as well.

These phenomenons have the tendency to erode the separation of powers, with each branch performing specific tasks. It relates to a "one of the most important aspects of the state of exception – the abolishment of the separation of power between the Legislative, the Executive and the Judicial branches – making evident the tendency to become a ruling customary practice" (AGAMBEN, 2011, p. 19).

It is admissible to make sacrifices in name of Democracy. However, it is deep inside the tools employed to suspend democracy, in order to supposedly save it, where lays the possibility of its complete elimination. This risk grows because of the undetermined character of the rules.

[11] Concepts and categories such as "judicial monism, fundamental norms, original constitutive power, hierarchy of the laws, subjective rights and security of the law" (FARIA, 1999, p. 39, marked by the author) are just a few of the examples.

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Even though it is recognized some value to the idea "no sacrifice for our democracy is too big, not even the temporary sacrifice of democracy itself" (ROSSITER apud AGAMBEN, 2011, p. 22), the political content of terms such as "necessity", "urgency", "proportionality", "reasonability" or even the attribution of a fictional semantic reference, through which the decision of the authority remains hidden[12], allows for the "state of exception, in which the law is applied by not being applied" (AGAMBEN, 2010a, p. 57).

In this sense, the effectiveness of human rights and their spread to such an extent that their consensus, either practical, either ideological, as Boaventura de Sousa Santos says, is considered an assumption, makes possible to predict that if the recognition of human rights tends to a universalisation, their usage does not experience the same enlargement (SANTOS, 1989). The neoliberal logic, in the context of a trade prominence, in which State remains in the background, is able to make the already insufficient space for rights claim even more limited.

The neoliberal discourse is sustained in spite of the excess population that is found to be irrelevant to the workings of the system. To this respect, the description, by certain German journalists, of a meeting between by businessmen in enlightening:

> In this meeting, of market pragmatics, the future was summed in a couple of numbers: 20% of the population, in 21st century conditions, are enough to maintain world's economy pace. A fifth of the population would be enough to make all goods and provide all quality services the world population may need. The rest, about 80% of people, would be redundant to the economic efficiency goals (PHILIPPI, 2005, p. 48).

Imperialism was the maker of excessive capital and men, which have no room in the ordinary world. Concentration camps were the deposit of unwanted men. The lack of economic usefulness is what made possible the horrors of the camps, because these people were of no use to anyone (ARENDT, 1998), since they had no economic value – what other value mattered? They were "economically superfluous and socially expansive" (ARENDT, 1998, p. 498). Overabundance as a condition for totalitarian rule was forged in the camps. The current picture does not escape this mold. The production

[12] The subjectivist theories that intend to assign to the intention of the legislature (voluntas legislatori) to the meaning of laws, or the objectivist theories that attach to the law its own will (voluntas legis) as a source of their own interpretation as well as the idea of the will of the people, the State, such "as once was said of the will of God in the designs of divine providence, or the dictates of nature through reason" (Coelho, 1995), constitute fictitious semantic references through which the law operator is freed of the moral weight of his decision.

of humane surplus is, therefore, the result of the elevation of the camp to a biopolitical paradigm.

> Today, the misery that plagues populations in outer edges of the capitalist system, the precarious situation of immigrants, the agony of refugees, the barbarian invasions, and the unpunished consented extermination - a growing contingent of people gunned down, beheaded and burned in the filthy trenches of market democracies - expose its face (PHILIPPI, 2009, p. 15).

The biopolitcs of body control is fed by the dissemination of fear, making human bodies an object in public security calculations, since everyone is potentially offensive. The intent is massive control of the population through the imposition of the panoptic (FOUCAULT, 1987) as a model of social vigilance.

Final Considerations

Technological innovations, the flow of information insatiable market demands have made consumption the raison d'être of markets, of society, of the law and lead constant emergencies, capable of softening sovereignty and State autonomy. Furthermore, the security paradigm has caused, in western democracies, a tendency to make the declaration of the state of exception a customary tool of governing.

The anomy, instated by the market economy and the dissolution of regulatory references in the economy is especially worrisome for peripheral countries in the capitalist system, where self-regulating tendencies confer the market power over the government of interests, promoting: "Competitiveness, productivity and integration in the economy, and fragmentation, exclusion and marginalization, socially" (FARIA, 1999, p. 281, marked by the author).

It is here that Giorgio Agamben's thought gains importance, because, looking for a deeper analysis on structure and on the workings of public law through the study of the its origins, his proposal allows for a new way of thinking about western democracies

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through the conclusion that the state of exception has become the rule, both in law, and in politics.

The exception takes previously law-occupied spaces, mistaking itself with the law; the emptiness makes all situations possible and the decision is what determines who the ruler is. As a byproduct of the exception, naked life, that has not been banished by the law, but bailed (band) to a law that does not imposes anything other than its own mold and constitutes an "original core – veiled – by sovereign power" (AGAMBEN, 2010a, p. 14).

In the gap of the law and confronted by this being in place but without the effects of a law that does not imposes anything other than its own openness is that human and social rights have been attacked and violated. The first step in drawing alternative policies to minimize the tendencies highlighted in the present study is to become aware of the political reality, in which these new gaps must be filled, drawing their dimensions and limits.

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