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**The Avatars of Human Rights
in the State of Exception
ABSTRACT OF DOCTORAL THESIS**

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Thesis abstract

Contemporary society is a society of crises. They precipitate the course of history and enhance the emergence of the new; but they are also often the occasion for sudden stagnation and fierce axiological confrontation. Not infrequently, their legal and political fruit lies in an ad hoc construction, the solidity and legitimacy of which are intensely disputed and the time horizon of which is difficult to determine: the state of exception. Faced with the structural amphibole of the state of exception, human rights are going through difficult times, in which the dose and pace of their transformations must be linked to the specific conjunctural situation, whose evolution is difficult to predict.

The thesis that I argue below is that human rights and the state of exception are situated and intersect in a fluid dimension, in which a multitude of institutions compete, whose force shapes, like a torrent, the fundamental structure of society. What is at stake is human life. If the state of exception is indeed the governing paradigm of the contemporary world, then human rights must be fine-tuned, adaptively, in order to make them flexible and at the same time preserve their universal character. These modulations are inevitably ideologically imprinted, debated and critically welcomed. Their results are to be found in taxonomies enriched with new categories, from which emerges the desire to preserve human dignity through a deployment of forces appropriate to the magnitude of today's challenges.

Starting from Giorgio Agamben's observation that "declarations of human rights are the original figure of the inscription of natural life in the legal-political order of the nation-state"¹ and from the same author's observation regarding the deliberate and constant concern of contemporary states to establish the state of exception as a frequent political-legal practice, I have attempted to identify the specifics of these two phenomena, through a survey of their history first, followed by a theoretical analysis of their foundations, as identified and treated in the works of the philosophers Giorgio Agamben, Walter Benjamin, Carl Schmitt, on the one hand, Michel Foucault, Jacob Taubes, on the other, as theorists of biopolitics and political theology, concepts adhering to the polymorphous substratum of the state of exception.

The key concepts around which the theory of the state of exception revolves: legal order, anomie, violence and law, power, law, camp and biopolitics, control and surveillance, call for the clarifying intervention of fields such as theology, law, politics, philosophy and, more

¹ Giorgio Agamben, *Homo sacer*, trans. Alex Cistelecan, Idea Design&Print, Cluj, 2006, p. 104

recently, theories of communication and new technologies. This is why we felt that the purpose of presenting – albeit in summary form – the theoretical articulations of these concepts is to clarify the terms in question and to create a space for discussion in which the subject of human rights – an essential and, at the same time, sensitive subject, inasmuch as most political and social events are somehow connected to it, as if it were an original, fruitful and fortifying ground – can be dealt with organically.

The academic, philosophical and legal literature on human rights is overwhelming, both quantitatively and qualitatively. Far from being a strictly academic subject - although it has never been the subject of academic debate alone - the subject of human rights has invaded the public sphere in a salutary way, in all its segments. All the more so as current political practices tend to – stubbornly – recapitulate the errors of the past in terms of the violence they inflict on those who, in one way or another, demand their rights. Indeed, the history of the modern world can be seen, 'in the long shadow of the past', as a period in which the line separating those who belong to a 'tribe' from those excluded from it is fiercely contested. Inclusion and exclusion, inclusion that excludes and exclusion that includes, is the amorphous theme connecting the state of exception and human rights. Whether we are talking about the camp or biopolitics and heterotopia, about sovereignty or *homo sacer*, what is at stake is the positioning of naked life and human dignity in a particular conceptual and politically and legally conceptualised sphere², that of sovereignty.

Spatialization, as a hallmark of modernity, has enshrined the systematic rejection of decontextualization, leading to the assertion of markedly different "grammars" of human dignity. However, the affinity between the theory of the state of exception and the theory of human rights is, we believe, to be found in this element: human dignity, subjected, over time, to a painful but familiar process of segregation between "us" and "you", between "me" and "the other", interior and exterior. The point of convergence of the two themes is the often intentionally distorted understanding of dignity and how all the values to which society has attributed the status of "social cement" have contributed to the cultural earthquakes that have shaken – and continue to shake – the modern and contemporary world.

From a theoretical point of view, the subject of fundamental rights and freedoms is the subject of fruitful academic, legal and political debates and of nuanced distinctions on their

² The zone of anomie in which the debate on the state of exception is situated also concerns the law, since for the law, this legal vacuum is the constitutive dimension of the state of exception.

urgency, hierarchy or origin. But how much of a match is there between what human rights and citizens' rights represented when they were officially recognised historically and what they represent today, a state of exception that has become the rule?

So what are the vulnerabilities primed by the intervention of the state of exception and what – if anything – remains invulnerable to the potentially cataclysmic changes it brings to all horizons of life? What are the legal and political structures that survive this immersion in the 'indiscernible', that are radically transformed and succumb to the tumult of events? What legal protocol (what laws), what safeguarding techniques (what fundamental rights and freedoms) are urgently required to be applied/disapplied, who, how and when decides the algorithm of intervention and resuscitation? How do we diagnose sequelae and who chooses to manage them? What saving mechanisms can be proposed and fructified in a super-technologized world, in which man risks having to reconfigure his set of characteristics and the norms by which he conducts himself?

These are questions that attempt to mark out the winding path of understanding the conditions of possibility and existence of human rights in the contemporary world; they invite a transdisciplinary analysis for the benefit of a diachronic perspective on the specific legal-political phenomena of today's world.

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Both the state of exception and human rights are concepts that have their roots in antiquity, but which found their mature expression only in modernity, when the "invention of man"³ led to fundamental mutations in the understanding of the world and when political, legal, philosophical and institutional approaches were given the appropriate means to elaborate and fructify them in social and political life, with reference to the life of the individual. It is no coincidence that the "invention of human rights"⁴ occurred at the same time, as a natural complement to what was to become the new humanist paradigm.

Recent "exceptional" geopolitical events confirm, on the one hand, the topicality of the theory of the state of exception and, on the other, the need to identify and lucidly dismantle the

³ In his work *Words and Things*, Michel Foucault speaks of man as a "recent invention", in the sense that the preoccupation with man enters, in a scientifically articulated way, since modernity, into the "space of Western knowledge". Michel Foucault, *Words and Things*, trans. Bogdan Ghiu and Mircea Vasilescu, Bucharest, RAO International Publishing Company, 2008, p. 49.

⁴ The phrase belongs to Lynn Hunt, a renowned contemporary historian, who proposes a novel hypothesis for the emergence of the idea of human rights in the 17th century European world. His book, *Inventing the Human Rights: A History* (2007), is a fascinating attempt to trace the elements of the cultural conglomerate that made possible the emergence and evolution of the idea and practice of human rights.

subtle but perverse and debilitating mechanisms that trigger, maintain and disseminate the vulnerability of democracy, the individual and his or her rights.

In this paper, we have treated the relationship between the state of exception and human rights through an interdisciplinary and modular approach, juxtaposing philosophy and law, theology and new technologies, in an attempt to capture the metamorphoses that human prerogatives undergo when the norm is replaced by the exception, when crises bring to light the weaknesses and precariousness, both material and moral, of political institutions.

The first chapter, entitled *The State of Exception*, is devoted to the definition and conceptual clarification of the term "state of exception", given that some concrete aspects of it are the subject of controversy between legal theorists and philosophers; at the same time, it is interesting to identify, even if only at a speculative level, the conceptual roots of the state of exception.

At a general level, the term "state of emergency" means a set of legal and political mechanisms that are put in place to avoid and prevent a difficult and dangerous phenomenon with the potential to massively affect the lives and safety of people at community level.

From a legal perspective, a state of exception is understood as a period when the laws and rules in force are transgressed, suspended or removed as a result of an event requiring a rapid and coordinated response from the whole of society. In order to ensure a rescue response, all the powers of the state are ceded to the executive, which, for a given period, exercises them on the basis of the principle of obvious, immediate and universal necessity. The dispute at the beginning of the 20th century between the constitutionalists Carl Schmitt and Hans Kelsen over the 'guardian of the constitution', in which the two men's views on the concept of the constitution and its functioning are diametrically opposed, is precisely on this issue of sovereignty and decision-making in a state of exception. Carl Schmitt is known for his definition of the sovereign as the decision-maker in a state of exception and for his arguments in favour of establishing a legal order which also includes the state of exception. In a complex account of the theory of the state of exception, the philosopher Walter Benjamin, for his part, formulates the idea by which he highlights the marked tendency of political authority to transform the state of exception into the rule of government.

Based on these approaches, Giorgio Agamben argues that the state of exception has become the paradigm of governance in the contemporary world, defining it as "the immediate

response of state power to the most extreme internal conflicts"⁵ and describing it as a complex and debilitating mechanism that increases the confusion of roles between state powers and civic confusion, leading to the erosion of institutional contours and the dilution of responsibilities. Once installed, the state of exception evacuates the pre-existing legal-political order; by claiming to preserve the law, the sovereign suspends it, and through this suspensive action, the old Roman institution of *iustitium* is reborn and consolidates its reputation as an anomic state, a legal vacuum so uncomfortable for law.

Approached from the perspective of political theology, the state of exception reclaims its ingredients which, through the lens of Western eschatology, are provided to us by long-breathed concepts such as law, messianic and sovereignty.

In drawing the complex picture of the multiple coordinates on which we find the disparate fragments of this legal-political construction of the state of exception, psychoanalytic interpretation intervenes to highlight the articulations that transform it into a matrix of force, dynamic, in which bare life and politically qualified life – the key notions of the Agambenian theory of the state of exception, along with the concepts of sovereign and *homo sacer* – are used in an in-depth exploration of the mechanism of the state of exception. To these two coordinates – let us call them the "vertical" of theology and the "depth" of psychoanalytic research - we add the "horizontal", spatial coordinate, heterotopia – a term proposed by Michel Foucault - in fact an unassignable space, which coagulates incompatible elements, confusingly interferes with other spaces and produces the illusion of realities to which it has no access. Neither utopia nor dystopia, it is the binder in which alternative histories are written and rewritten, and the state of exception is its privileged hypostasis.

Dedicated to the subject of human rights as a history of the idea and practice of human rights, the second chapter of the work briefly presents the evolution of human rights theory and practice, from the first philosophical ideas in which they are more or less explicitly formulated to the laborious practice of their institutionalisation over the last two centuries. A complicated recent history, full of events that have tested the values of humanity and have contributed and continue to contribute to the human rights dynamic. In the biopolitical context, human rights are recalibrating themselves in accordance with the commands of biopower. Biopower is understood by Michel Foucault as a form of power in the modern world that aims to exert a positive influence on life by optimising and multiplying it, subjecting it to precise control and

⁵ Giorgio Agamben, *The state of exception, (Homo sacer II, 1)*, (trans. Alex Cistelecan), Ed. Idea Design&Print, Cluj, 2008, p. 8

comprehensive regulation. What the new technique of assurance and regulation aims at is a control of "de-individualized" bodies, "reintroduced into the overall biological processes"⁶. Discipline is, in this sense, understood as a radical construction of an idealized reality that works in parallel with everyday life. It is exercised above all on a population composed of individuals whose particular configurations are the multiplied expression of *homo sacer*, the term Giorgio Agamben uses to describe the human condition in the state of exception. Unspeakable but capable of being killed by anyone, *homo sacer* is the epitome of maximum vulnerability; it is, by this and at the same time, the embryonic stage of the human condition and the referent directly exposed to sovereign violence. Agamben's preferred place of production of the sacred man is the camp, a space where "everything is possible". The essence of the camp consists in the materialization of the state of exception in a space that evades the juridical-political order and that makes inclusive exclusion permanent.

The camp becomes the new planetary *nomos*, decipherable in almost all contexts in which we are confronted with the indiscernibility between norm and fact, with the situation in which the exception becomes the norm, and with the resurrection of the state of exception.

The third chapter, entitled The Mirage of the Interstice, discusses the phenomena recognised by their impact on the onset and perpetuation of the state of exception and, at the same time, their implications for human rights theory and practice.

Violence and power are interconnected; from an original symbiotic relationship, as historicism presents it and as world history illustrates it, this relationship is translated into a mutually supportive relationship between violence and law. For Agamben, politics is born out of a continuous violence, which is rewritten and reworked with each new eventual aggregation, and has as its crucial element the battle over the monopoly of the possession of violence and the decision about 'the life that is not worth living'. In this sense, breaking the link between violence and law is the destined task of a future authentic politics, in which the disabling and inoperability of law is the result of renouncing pure violence.

The contemporary challenges posed by war and pandemics, through the urgency and scale of these phenomena, bring back into question the issue of the state of emergency, with all the aspects that the theory of the state of exception has provided and which society recognises and tries to assess its effects and counteract the harmful ones.

The last chapter brings into question the current status of human rights and, at the same time, of human nature which is facing a concentrated pluriverse from which it is difficult to

⁶ Michel Foucault, *We Must Defend Society*, trans. Bogdan Ghiu, Idea Design&Print, Editură, Cluj, 2009, p.196

emerge. The world we live in is changing rapidly and dramatically under the onslaught of so many new inventions and relationships, and our rights cannot be left behind. If we are aware that the power of new media and new technologies risks succeeding in conquering the last bastion of our freedom, the human mind, then we must counter these dangers by reconceptualising and launching new categories of human rights adapted to these challenges.

The normative force and claim to universality of human rights makes attempting to deal with them on a sensitive subject and to contextualise them – so to speak – difficult and controversial. We have therefore briefly recorded, alongside the theoretical landmarks of the history of this idea, the opinions and arguments of critics and human rights protesters, not only because they are a constant – and certainly, within certain limits, welcome – presence in recent history, but also because, especially in exceptional times, which call for the declaration of a state of exception, their discourses - especially their debilitating fragments – tend to monopolise the agora. Appeals to values and traditions that promise a way out of the crisis, subterfuge delivered by conspiracy theories, encouragement of rule-breaking, erosion of trust in authority, pulverization of social solidarity and evacuation of past, present or future order – all, in varying doses, are present in the societal metabolism of the state of exception.

The establishment of the state of exception, at a seemingly ever-accelerating pace, is constantly changing the field of forces in which the struggle for human rights is being waged - in reality, a war of the human species with itself, with its violent tendencies and its moral harshness. Human rights seem to have definitively won the battle against sovereign inertia. And yet their hegemony may prove fragile if our expectations, imbued with a 'Western-centric' and, more recently, 'generation-centric' universality, do not open up to new cultures or, perhaps more accurately, to new areas of human rights, whose avatars welcome us, represent us and present themselves as personal layers of dignity, of identity, be it virtual or otherwise.

If the agora, the "space of everyone and no one"⁷ in which democracy was born, succeeds, not only in the world of blunt physical reality, but also in the new and fascinating - but no less ambivalent - virtual world that is emerging, in transforming itself into an optimised, second-rate agora, investing in this endeavour all the fundamental values that have built humanity, then human rights – and their avatars – will undoubtedly be found in every configuration of the future, as far as we are allowed to hope.

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⁷ See Virgil Ciomoş, The Deterritorialization of Human Rights, in *Journal for the Study of Religions and Ideologies*, 9, 25 (Spring 2010):17-27

As a research topic in the framework of the doctoral studies⁸, the theme of the *Avatars of Human Rights in the State of Exception* is not only an interesting and challenging topic, but also one with multiple theoretical and practical openings.

The future directions of this research could be linked to the way in which contemporary society exposes its vulnerabilities in the world of new technologies, an exposure that weakens human nature itself and contributes to the displacement of the conceptual core of human rights in favour of new concepts, more appropriate to a world that we can feel the unsettling breeze of, but still imagine as better.

⁸ Ironically, I have been given the task (daunting in its timeliness and scope) of dealing with such a vast and sensitive subject - that of human rights in a state of emergency - at a time marked by the pandemic situation that has led to the imposition of a state of emergency worldwide. The shift of a substantial part of human activity to the online environment has forced a reconsideration of priorities and a not infrequent, cumbersome adaptation to work (including intellectual work) guided by the mechanisms of new technologies, not always familiar, but which have proved salutary in keeping activities in various areas of life at a reasonable level and in preserving fundamental human rights, even in the form of simplified, often unfairly caricatured avatars.

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