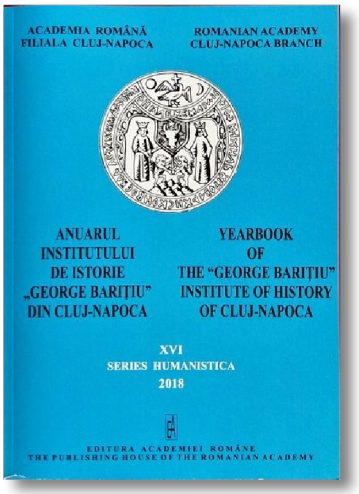

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THE REMNANTS OF THE LAW. UNDER THE SIGN OF URGENCY

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Abstract. *The insidious but tenacious instauration of the state of exception in contemporary states erodes not only the architecture of democracy, but the very foundation of human cohabitation – which is the law. Rigidly necessary – to ensure robustness , but flexible enough – in order to be able to claim adaptability to the contexts that demand it , the law is recommended to be the impartial mark of good coexistence. The declaration of "urgency" corresponds to the vehement eviction of the norm in the name of a pseudo-norm for imposing the paradoxical (non-) rule, in which the fact and the law overlap indiscriminately. Legal requirements become superfluous. Emptied of content, the law imposing the state of exception has only force, not significance; it re-unfolds itself in self-suspension. Institutionally dislocated, abruptly formulated and discretionally applied, the law emerging under urgency is a simulacrum, a vicious corpus of biopolitics. The study of its vestigial aspects makes sense in the prospect of salutary attempts to dismantle the resorts that allow the abuse and ultimately to relocate it to a space of "glass bead game", post-legal, but revealing its original meaning. W. Benjamin, quoted by G. Agamben, announced the liberating dissolution of the law and its replacement, in a timeless indefinite horizon, with a non-constraining meta-justice. Wandering in the exceptional state and ignoring its debilitating mechanisms postpones this messianic fulfilment of the law.*

Keywords: *law, state of exception, urgency, iustitium, messianic law, remnants, Agamben*

Dura lex, *sed lex* proclaims a well-known Latin adage, an adage that evokes compliance with the law and motivates the use of the coercion of the state for its fulfilment, if necessary. Through its normative, prescriptive, impersonal, general nature, the law prevents and sanctions deviant behaviours, thus guaranteeing the viability of the values of society. Invoking the law equates to the accrual of an objective, univocal and equidistant mark, according to which various behaviours are required, imposed, allowed and sanctioned. With a history that underlines the Greek-Roman and Judeo-Christian heritage of Western civilization, the concept of

law has provided philosophy with the opportunity to reflect upon the fundamentals, causes, and mechanisms of elaboration, application and defence of this norm in the judicial-political space. The birth and the recognition of the law meant the establishment of a pacific social order promising stability, relative safety and predictability. This social order, in turn, generated the legal order, on the one hand, and the political order, on the other hand, because at the very moment the normalization of the human relationships was born, politics – a *modus vivendi* of the human being – was born as well.

In the canonical interpretation of art of governance, law and politics interfere – sometimes scandalously – to indistinction. If for the ancient and medieval people the contents of the law shaped the patterns of politically qualified life (*bios* in the original Greek sense of the term, meaning "*the way of living for an individual or group*"), for modernity, as M. Foucault (1976) considers, the bare life (the zoe, which expresses the simple fact of living, common to all living beings) becomes the recurrent subject of a politics that draws in an improper dimension. The extraction of man's existential substrate and his placement as the core of politics represents, for M. Foucault and G. Agamben, the beginning of the biopolitical era and, nevertheless, of the juridical-institutional decadence.

The monopoly of the decision corresponds to the sovereign power, including the decision to be out of the law, but to create the right. The liminal position in which the sovereign is established records, it may be said, the privilege of establishing and breaking down, as the case may be, the norm of building and subsequently breaking the legal order, to set normative frameworks, rules and to confirm them through exceptions. By this, however, he becomes the non-plus vector of the paradox of sovereignty, a paradox that Giorgio Agamben (1998) delivers in alternative formulations: "the sovereign is at the same time outside and inside the juridical order (…) I, the sovereign, who am outside of the law, declare that there is nothing outside the law" (p. 15). The law is therefore in an indissoluble relationship except; the norm is constantly reporting to what is still non-normalized, but normally, in an avid attempt to include what, frustratingly, exceeds. The sovereign exception, as an area of indistinction between nature and law, excludes by inclusion and includes by exclusion and thereby germinates the exceptional state, a subtle and insidious political structure borne by the founding gestures of the law rebound. It tends to become the rule and, as Carl Schmitt (2005) announced, the governing paradigm of contemporary politics.

The stated imperative of establishing an exceptional state – under any other name we find it in the history and politics of the world: the state of siege, the state of emergency or martial law – is the urgency, the need to resolve, in a speedy and firm manner, a state of fact not drafted by law; an external situation and, presumably, provisional, of determined danger. An extrajudicial fact is required to be treated with *ad-hoc* legal instruments under the sign of stringency. Extending government powers, in the sense that the executive is given the power to issue decrees legally, is an unquestionable mark of exceptional status. "Full Powers",

claimed and acknowledged – in line with a noble tradition – "by the people in the name of the people and for the people", illustrate the abrupt collection of legislative, executive and judicial powers and creates the appearance of a *pleromatic* state of the right. Inflation of political power seems to be in line with the expansion of the law. In an exceptional state, the junction between state and law is affected by a fundamental vice of articulation, which G. Agamben (2005a), quoting C. Schmitt, points it out: "the state continues to exist, while the right disappears" (p. 31).

The insidious instauration of the state of exception draws not only the de-structuring / restructuring of the political architecture, but, worse, the dissolution of the law by suspending the law. Roughly demanding, to ensure robustness, but flexible enough, to be applicable to the contexts that advertise it, the law is recommended as the norm and normal impartial mark of good cohabitation. Announcing the state of emergency corresponds to the vehement eviction of the norm, in the name of a pseudo-norm, for the imposition of a non-paradoxical rule, in which fact and law overlap indiscriminately.

The law loses not only the scale but also the ontological status; it dissolves in fact because "it becomes impossible to distinguish the transgression of the law from execution of the law, such that what violates a rule and what conforms to it coincide without any remainder" (Agamben, 1998). Legal requirements become superfluous; emptied of content, the law that allows the installation of the state of exception has only form, not significance; it re-folds, self-sustaining. Institutionally dislocated, brutal and discretionary, the law emerging under emergency is a simulacrum, vicious corpus of biopolitics. It is the incapable and nonlocal product of the anomia resulting from the suspension of the law, which the Romans called *iustitium*.

Indetermination, indecisiveness, informulation – here are the features of the law in the exceptional state, in G. Agamben's analysis. Indetermination, as the interior and exterior are indistinguishable; the law achieves its maximum efficiency because, including the exception, it subverts reality itself. Indecision, to the extent that it is impossible to distinguish between law and transgression. Informulation, because the law does not have, or does not have any more the form of a concrete and clear statement or ban. Rather fictional (*fictio juris*) than legal reality, the law is, therefore, in an exceptional state, "an extreme and spectral figure of the law, in which law splits into a pure being-in-force without application (the form of law) and a pure application without being in force: the force-of-law." (Agamben, 2005a, p. 60) Debilitating disability or malformed / malforming mutation? Schizophrenia of the law in the exceptional state conceals, however, significant, disputable vestigial aspects, but with recuperating potential. Their study makes sense in the light of the salutary attempt to dismantle the resorts that allow abuse, and ultimately to relocate them to a space of post-legal "game of glass beads", but revealing its original significance sensitively.

G. Agamben (2005b) speaks, in *The Time that Remains*, of „a division of division", the logical correspondent of *the Apelles cut*, Pauline aphorism with

reference to the problem of the universal and the individual. To understand and surprise the universal does not mean, for St. Paul, „to formulate a transcendent principle from the perspective of looking at the differences, but an operation that divides the divisions and makes them inoperable without ever reaching a last ground" (Agamben, 2005b, p.52). This optics of the second game applies also in the legal-political sphere: the search for the law is similar to the identification of the successive divisions it carries, and especially – if we can say – in the end, of identifying a non-integrable remainder even to itself. "The remainder is (...) at the same time a surplus of the whole towards the part and the part towards the whole, which functions as a completely soteriological mechanism. As such, they only regard Messianic time and exist only through it." (Agamben, 2005b, p. 52). Messianic salvation has a remainder /a rest as a subject. In the exceptional state, the law that applies dislodges and is no longer situated, but is degraded; there is still a fragile yet plenary remainder, which makes it inoperative and leads to its messianic fulfilment: the law of faith, as a manifestation of a "lawless law". Paul's aporia, affirming that faith is simultaneous deactivation and preservation of the law, is the consistent expression of this paradox.

Wandering in the state of exception, this *kenomatic* state of law, is delaying the messianic fulfilment of the law. The messianic fulfilment of the law is not a new law, but it is "the point in which religious experience passes beyond itself and calls itself into question insofar as it is law" (Agamben, 1998, p. 56). "The remainder of the messianic totally exceeds the eschatological whole; it is the one that cannot be saved that makes salvation possible." (Agamben, 2005b, p. 57)

The remnants of the law in the exceptional state associate the seed and the fruit, the potency and the legal impotency, in a threshold that opens the non-open and in which the senses are divided indefinitely. What is left of the law in the exceptional state is the sublimated image of the faith. It could be said that the dissolution of law does not automatically lead to the disappearance of the law in a suspensive horizon, but rather its metamorphosis into a grade zero norm, which only a meticulous and passionate archaeology of the spirit can capture.

Confiscated and denied by the state of exception, the law records, in the shadow of urgency, the rest of the non-refundable. It can designate the beginning of justice, of non-constraining, fluid and playful justice, in which hope and faith are the preliminaries of a fulfilling law which St. Paul calls the law of love.

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