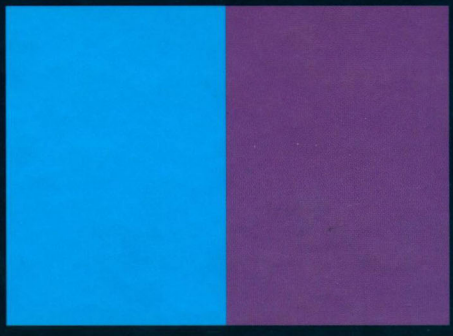
a GlassHouse book

GIORGIO AGAMBEN

POWER, LAW AND THE USES OF CRITICISM

THANOS ZARTALOUDIS

NOMIKOI
CRITICAL LEGAL THINKERS



ROUTLEDGE

Giorgio Agamben

Power, law and the uses of criticism

Thanos Zartaloudis

Routledge
Taylor & Francis Group
a GlassHouse book

First published 2010
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Avenue, New York, NY 10016

A Glasshouse book
Routledge is an imprint of the Taylor & Francis Group,
an informa business

Typeset in Times and Gill Sans by
RefineCatch Limited, Bungay, Suffolk
Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Zartaloudis, Thanos.
Giorgio Agamben : power, law and the uses of criticism /
Thanos Zartaloudis.
p. cm.
1. Agamben, Giorgio, 1942– 2. Law—Philosophy. 3. Criticism (Philosophy) 4. Justice (Philosophy) I. Title.
B3611.A44Z37 2010
195—dc 2009045005

ISBN10: 0–415–44022–X (hbk)
ISBN10: 0–203–85971–5 (ebk)

ISBN13: 978–0–415–44022–6 (hbk)
ISBN13: 978–0–203–85971–1 (ebk)

Giorgio Agamben

Power, law and the uses of criticism

Giorgio Agamben: Power, law and the uses of criticism is a thorough engagement with the thought of the influential Italian philosopher Giorgio Agamben. It explores Agamben's work on language, ontology, power, law and criticism from the 1970s to his most recent publications.

Introducing Agamben's work to a readership in legal theory and history, as well as in the humanities and social sciences more generally, Thanos Zartaloudis proposes that an adequate understanding of Agamben's *Homo Sacer* project requires an attention to his earlier philosophical writings on language, ontology, power and time. It is through this attentive and creative analysis of Agamben's work that Zartaloudis here presents a rethinking of the ideas of justice and criticism.

Thanos Zartaloudis researches and teaches at the School of Law, Birkbeck College of the University of London.

Nomikoi: Critical Legal Thinkers

Series editors:
Peter Goodrich
Cardozo School of Law, New York

David Seymour
School of Law, Lancaster University, UK

Nomikoi: Critical Legal Thinkers presents analyses of key critical theorists whose thinking on law has contributed significantly to the development of the new interdisciplinary legal studies. Addressing those who have most influenced legal thought and thought about law, the aim of the series is to bring legal scholarship, the social sciences and the humanities into closer dialogue.

Other titles in the series:
Judith Butler: Ethics, Law, Politics, Elena Loizidou
Evgeny Pashukanis: A Critical Appraisal, Michael Head
Niklas Luhmann, Andreas Philippopoulos-Mihalopoulos

Forthcoming titles in the series:
Carl Schmitt: Law as Politics, Ideology and Strategic Myth, Michael Salter
Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City, Chris Butler
Deleuze & Guattari: Emergent Law, Jamie Murray

Jurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia

[Jurisprudence is the knowledge of things divine and human, the knowledge of what is just and what is unjust]

Ulpian

φρόνησιν εἶναι ἐπιστήμην κακῶν καὶ ἀγαθῶν καὶ οὐδετέρων

[Phronesis is a knowledge of bad things and good things and (those which are) neither]

Diogenes Laertius

Precisely what is peculiar to language – that it concerns itself purely with itself alone – no one knows.

Novalis

Are we capable today of no longer being philosophers of the letter (Buchstabenphilosophen), without thereby becoming either philosophers of the voice or mere enthusiasts? Are we capable of reckoning with the poetic presentation of the vocation that, as a non-presupposed principle, emerges only where no voice calls us? Only then would tradition cease to be the remission and betrayal of an unsayable transmission, affirming itself truly as Über-lieferung, self-liberation and self-offering: hen diapheron heautōi, 'one transporting itself', without vocation and without destiny. Tradition would then have truly for-given what cannot, in any sense, be presupposed.

Agamben

Preface

Power, life and thought

The primary question in this work, apart from the obvious elaboration of the concepts of law, power and criticism or thought through the work of the Italian philosopher Giorgio Agamben, lies in the relationship between philosophy and law (and, to an extent, between religion and law). This question, however, is considered to be not just a theoretical investigation, but also a key element in the work of rethinking the concept and the practices of law-making and the understanding of human power in Western culture more generally. The work, thus, employs historical, philosophical and jurisprudential elements in studying the genealogy of these concepts, their formation and their limits. It also suggests that while philosophy and law can irritate each other, and have done so for centuries, they are not to be fused into one.

If there is indeed no meta-legal yardstick any longer that can rule over the internal rationality of law-making, there is also no need to enclose legal thinking within law. Legal closure is accepted in this work as a matter of fact, but legal thought's closure is simply not a good idea, historically and conceptually. It is also accepted that legal thought's realm is that of possibility, that is, the attempt to study the positing of laws, their success and failure, with regard to the possibilities of law. From a wider philosophical perspective, as is proposed here, genuine thought does not only confront the possibilities *of* law, but also all other possibilities. This work will, thus, disappoint those who require a work of criticism or theory to recommend a new world-view, to proclaim a revolution even, and so forth. Nothing to recommend; instead: study. As a consequence of this work's primary principle, then, another follows: the distinction between the *juridical realm* and the *non-juridical realm* are not to be fused. All that thought can do is show the exposure of both realms in terms of their claims and limits.

This is most fitting to Agamben's thought, since a key focus of it is the relation between law and life, and in particular, the problem of the institutional integration of life into law. Life does not of course entail any

normative essence. Law-makers, power mongers, policy-advisors and theorists in so-called modernity (and earlier) seek to conceal the merely positive nature of law-making and attempt to find their ultimate point of inauthentic support in the name of 'humanity', 'the economy' and the law itself. While the law can no longer pose any claim as to the truth of humanity, it maintains such a technique through claims as to the rights of humanity and other abstract fictions. It presupposes 'humanity' as its very own surplus value, which remains, for this work, a dangerous idea. It is also hypocritical since what is left behind, the living or dead waste of social and legal decision-making, is empirically observable and thus can render the claim of 'in the name of the law' or 'universality' empty of any meaning. For Agamben's empiricism, legal and political decision-making (and indeed philosophical decision-making) have primarily based their authority upon the manufacturing of certain lives as insignificant, as well as on certain concepts that have been seized to make sense. In this respect, Agamben is not concerned with some universal attributee of law, but rather with the life of legal remainders or legal waste. Today, *dehumanization* 'in the name of the law' is an *experience* of entire populations. Such dehumanization presupposes a particular apparatus, which Agamben calls *bare life*, that is 'mere humanity', and it is in its name that the managerial benefactors of humankind assume the role of deciding who counts and who does not count as human, as worthy of protection. In the name of 'bare humanity' the law attempts desperately to locate a meta-yardstick, that it itself produces.

The law has been thought historically through a pseudo-dialectics between a foundational power (i.e. a sovereign law) and a founded power (its immanent governance and execution); or, to use other terminology, a constituent and a constituted power. The key problem with such a way of thinking the law and the social plane is twofold: first, law and social *praxis* are conceived as separable, but their line of separation is drawn *by* the law. Second, the potentiality of law and of power are defined 'negatively' and are posed in relation to an alleged transcendental righteousness, which apparently forms the only available motor of reality production and by consequence the only determinant of what is possible and what is not.

The mythological presupposition of the existence of such a transcendental righteousness or power is grounded through the violence of the so-called foundations or sources of law or power, which rely, in turn, upon the presupposition of distinction between a pre-political, pre-legal or pre-historical human nature (bare life) and a legally qualified, social or political culture (citizenship), removing each time from the archival memory of institutions the fact of such transcendental foundations being 'a product of man', an *action*. For Agamben, this is akin to the manner of sacrifice, the oldest human institution. Within such a sacrificial initiation or transmission, Agamben notes, 'An action (a *sacrum facere*) is abandoned to itself and thus becomes the foundation for all legal behavior; the action is that which

remaining unspeakable (*arreton*) and untransmissible in every action and in all human language, destines man to community and to tradition.'[1] By concealing the historicity or experience of the production of such foundations a transcendental source of power and legitimacy is hypothesized to which only the messengers and functionaries of its mystery can make legitimate claims. Social life is in this sense grounded counter-factually in an allegedly simple transcendental origination that is to remain inaccessible, immemorial and unthinkable, turning life and thought into what can be called a tragic experience that remains imprisoned in agenealogical paradoxes.

Today, Agamben diagnoses the 'state in which we live' as characterized, legally and politically, by an extensive state of exception or emergency that threatens to cover the entirety of the globe. This is a dangerous state of affairs since despite the absence of any legitimate meta-yardsticks, governments around the world claim to possess an ultimate yardstick in the name of security, the law, human integrity and the liberal ideals of the free market. The history of this dangerous schema of understanding the law and its practice is a long one, enabling the commitment of atrocities that remain legally and ethically unaccountable and its genealogy is a key preoccupation of the analysis that ensues in this work. To the silence of law-makers, politicians, judges, theorists and policy-makers who attempt to bypass the fact of their making of laws, of their authorial saying, philosophical thinking offers at least some arguments that stand firmly opposed to such a logic. It could not be otherwise, since the condition of philosophy is that it must necessarily speak of something, and also of the *fact* that it does so (a quality or manner to which the law does not admit). The idea of justice that is considered in this work, philosophically, aims never to cease to remind us of this very fact.

Given that the book is published in a series on 'critical legal thinking', it seems necessary to state clearly the position of the author with regard to such a manner of thought. It is an assumption of this work that, as far as its legal readership is concerned, some of us, it is to hoped, are by now tired and unconvinced by both the narrow-mindedness and counter-factuality of certain conventional accounts of jurisprudence that close legal theory within law, as well as by the naïve hyperboles of certain unconventional, 'post modern', accounts, which effect the inverse. The first approach obsesses over the determinacy of the law and the other over the indeterminacy of the law. Both are myopic and inadequate; and without acknowledging it, both depend on each other. Crucially, both very rarely provide an account for the fact of their construction as theories, nor for their assumptions and their limitations. Furthermore, it needs to be said that as far as *homo academicus* is concerned, more generally, in the peculiar world of the academy, now that the myth of an academic community has collapsed for good, and now that it is more than obvious that theories are raised mostly for careers to be built without

1 1991: 105.

scholarly rigour and while ignoring the need for a careful study of legal knowledge-making, thought is experiencing a crisis of funding, as well as of genuine purpose.

With regard to law my theoretical engagement, here is an attempt to rethink the law as such (as well as to consider escape routes from it when necessary) given that what I call the four classic paradigms of legal theory have lost their meaning. The four paradigms in brief are: *the reference paradigm*, the resort to presupposing a meta-reference of law in the names of both external and internal sources, that is, natural law, divine law or a self-sufficient law. *The salvation paradigm*, the attempt to justify law and order to progress allegedly from the *factus brutus* of violence and disorder as well as the positing of an ideal of justice as the law's end – which includes the theoretical salvations that certain critics of the law promote. *The universality paradigm*, the still prevalent attempt to impose one legal culture and law upon all others globally. Finally, *the consensus paradigm*, the refusal to admit to a social consensus – a ritual that is now mediated, not by the state or the law, but by the mass media. As Anton Schütz has never ceased to remind me over the years, the obvious point as to law-making remains to be acknowledged in its profanity: the law is an apparatus, a mechanism for allowing certain arguments and decisions to be made. The law is a system wherein decisions are *made* and as such they can only be preceded and followed by other decisions. A modest legal theory, in this view, is to concentrate on the *making* of laws and further to examine their history and their possibilities.

In addition, this work advances the argument that beyond such legal theorizing, a necessary inquiry remains as to the relationship of law to philosophy (and by implication, historically speaking to religion). In this sense, over the last ten years my primary and most intimate interest in Agamben's thought, and philosophy more generally, has been twofold. First, my interest lies with Agamben's inquiry into what can be called the structure(s) of Western metaphysical thinking, which is an inquiry into the manner in which these transmissions or projections are thought: the architectonics *of* metaphysics. Second, my interest lies with Agamben's engagement with thought at the moment when thought tries to think itself; the point where it attempts to coincide with the generic potentiality of human being and social *praxis* itself.

Thus, the study contained in this book undertakes an analysis of Giorgio Agamben's writings from the early seventies onwards with particular emphasis on Agamben's understanding of power, life, law, language, ontology and thought, and with regard to the *trivium* (the intersection) at which these meet. Over the last ten years Agamben's work has become known to a wider audience, particularly due to the famous theses advanced in *Homo Sacer – Sovereign Power and Bare Life* (1998). Yet readers of his work, in particular within the fields of law, politics and philosophy, have persistently disregarded what is understood here to be both necessary and key: the investigation of the innovative, meticulous, systematic philosophical

archaeology of the polymorphous elements of Agamben's philosophical theses that are located in seemingly disparate areas of interest (such as literature, philosophy, anthropology, linguistics, theology, historiography, ethics, law, politics and epistemology).

It is also worth noting that what is at stake in *reading* Agamben's writings is an *experience* of reading and thinking as such, rather than the extraction of prescriptive arguments and conclusions. This is crucial since the heart of Agamben's philosophy is expression and the experience of language. Alice Lagaay and Juliane Schiffers have described this difficult experience with great clarity when they suggest that Agamben's thought and the concepts and phenomena that he investigates:

> [. . . show] the limitations of language – and not just of academic discourse! For a start, the discursive boundary between event and experience, between the particular or the individual and the general does not seem to hold with regard to such phenomena. Agamben's figures of thought are paradigms in the sense of concrete phenomena that can be transposed into other, different fields in order thereby not only to reveal what otherwise would remain concealed, but to bring into focus the very problem of categorial boundaries themselves. The question thus points to the event itself: to what happens when thought no longer preoccupies itself with weighing up the pros and cons of an argument but instead turns towards itself, that is, becomes self-referential and thus, to a certain extent, without distance to itself.[2]

For this reason some readers of Agamben see his work as irrelevant to rethinking the ideas, for instance, of law, power, politics and ethics. To state the obvious, relevance is a problematic operation since it presupposes the alleged relevance of something to something else on the basis of a presupposed yardstick that is taken for granted and which forms the so-called condition of possibility of relevance. Yet this is indeed the problem that is at stake in Agamben's thought, that is, the rethinking of such a presupposed condition of relevance or possibility and more generally the rethinking of the very *act* of transmission of traditions as a problem, as an embarrassment even, rather than as a presupposed and unthinkable dogma.

This is explored in various ways in this study as to the particular manner in which the obsessive search for the essence or origin of language, humanity, power, politics and law has been thought in the Western tradition (and especially so in philosophy, law and theology with emphasis at the points at which their traditional approaches intersect). Yet to the chimera of the obsessive search for origins in the Western tradition the only appropriate response

2 Alloa and Lagaay, 2008; Lagaay and Schiffers, 2009.

appears to be, for this book, the study of both legal and of social *praxis* itself, which cannot be pre-empted or pre-ordered by any alleged pre-existing principles of validity and authorization. If there is no metaphysical vantage point from which to observe the form and decision-making of the law and the life of social *praxis*, then, if one is not to be a mere believer or a mere enthusiast (in what allegedly appears radical and subversive in a campaign against a system or a tradition), a genuine realignment of thought and *praxis* is at stake – a realignment that does not succumb to the pseudo-dialectics between first principles and action, theory and *praxis*, truth and thought and which re-*cognizes* power (human action) in its intimate link with desire, potentiality and language.

Unless we accept counter-factually that the notions of 'secular humanity', the 'free market economy' and the 'free world' are today the transregional authorities whose factual, ethical and legal scrutiny is unnecessary, then the experience of the emptying-out of our everyday lives and our political or social *praxis* requires to be rethought more attentively. We are told daily that these newly founded principles of the 'new world order' in their rightful garments of sovereignty and ultimate human dignity, their renewed claim to a transcendental righteousness, are the only motors capable of giving meaning to reality. When one examines their mechanisms of administration and capture of reality, however, one can point to their counter-factual basis: according to these terms social *praxis* does not produce meaning. That is, a particular understanding of *praxis*, possibility and actuality is at stake.

This *difficult* freedom of human being is what is at stake if desires and aspirations are not to be reduced by the pre-emptive organization of potentiality through an alleged transcendental principle of power and its pseudo-dialectics. In this manner of thought and experience politics, law, human being and desire are not segregated from the complexity and tensions of their actual experience and are not reduced or exhausted in their so-called actuality. To put it simply, if we assume that we 'always-already' know what politics, law, human being and our imagination can do, then we might as well abandon all other aspirations. For Agamben, the key is to rethink life and thought in a way that shows the counter-factual presupposition of a transcendental righteousness or of an essential determination and to point instead to the *experience* of life and forms of thought at the *trivium* of their coincidence, wherein they cannot be anticipated or normatively determined by any alleged foundation or principial authority.

Agamben's theses in his various works offer an attempt to think 'the time in which we live' and many of them have proven prophetic such as, among others, the fact of the legal lawlessness of a state of exception that has become the rule and that threatens to encompass the globe in the name of the so-called war on terror; further, the exposition of the irresponsibility of economic government, the replacement of thought by marketing, policy, proceduralism and spectacularization, the origin of Western politics in

biopolitics (where the fiction of bare life as such is at stake) and the total demodalization of experience and life more generally. Agamben's studious insistence that a new experience of life, law, thought and language will only be made possible through a rethinking of the ontological categories of life, thought and time is an insistence to which this work is entirely sympathetic.

The task, if it is one, of *criticism* with regard to the traditions of law and power is to eliminate the fundamental partitioning that is each time presupposed between the potentiality of law or power (human action) *and* of their actuality by encountering the manner in which the limits of law and power have been founded and exposing them as mythologemes, as apparatuses of law and power that safeguard their self-sufficiency. In this sense criticism does not refer to a critique of law 'in general' or to a critique of a particular legal issue, but to the critique of the mythological-limit concept of legal foundations.

The study proceeds to examine in *Chapter One* the genealogy, historical and philosophical, of the so-called foundational assumptions of legal and political power from medieval scholasticism to modernity. In doing so it suggests that a key technique of defining power that remains influential today is located in the early scholastic distinction devised by theologians as much as by canonists, between absolute divine power and ordinary divine power.

Chapter Two engages in detail with Agamben's book titled *Il Regno e la Gloria: Per una genealogia teologica dell'economia e del governo* (*The Kingdom and the Glory: A Theological Genealogy of Economy and Government*), which was published in 2007. It forms a key work for this study as a whole. Given the current and continuous proliferation of discussions on the relationship between secularisation and religion, law and politics, law and religion and the economy and politics, the unique archaeology of government undertaken in Agamben's recent book deconstructs what seem as common assumptions and delimitations between, for instance, law and religion or law and government in such discourses. Agamben's analysis shows that power, from the start, has been conceived along the lines of a distinction of powers, between an absolute power (or reign) and an administrative, vicarious, power of government. The target of proper critique has to be, then, directed, in this sense, not any longer at the mythological foundations and discourses of sovereign law and power, but, after their exposition, towards the messengers or functionaries who economically (functionally) administer, execute and police the laws and policies authorized by what they presuppose (but conceal) as an empty throne of sovereign or transcendental power and law. The structure of the schema 'in the name of the law or sovereign power' is located, for Agamben, in the apparatus of what he calls *oikonomia*.

Chapter Three examines the so-called discourse of political theology and its implications for the understanding of law and power in light of Agamben's critique of political theology as an apparatus of sovereign power in itself.

Chapter Four examines the production of a particular type of subjectivity under the 'reign' of so-called sovereign power, which takes its name from a

historically specific legal ritual in Roman law with regard to the dogma of the 'sacred man' (*homo sacer*). The chapter situates this particular mode of production of humanity, in the name of a so-called bare life or mere life, within the contour of current biopolitical government.

Chapter Five begins to resituate Agamben's analyses within their larger philosophical significance and it looks in particular at the specific understanding of the experience of language that Agamben rethinks.

Chapter Six furthers this resituating by examining Agamben's philosophical understanding of the notions of power (potentiality), contingency and time.

Chapter Seven engages with the messianic trope of Agamben's analysis of the notion of time in order to suggest a particular manner of rethinking the notions of law and justice through my own philosophical inquiry into the ideas of law and justice.

It needs to be stated, finally, that this work is not a mere introduction to the work of Giorgio Agamben, though its readers may find that it offers such an introduction in its own way. It is, instead, a particular engagement *with* Agamben's thought, that is sympathetic to its rigour and arguments, but that also advances the author's own arguments and analysis.

This study was assisted by a sabbatical leave from the University of London, Birkbeck College, School of Law, in 2007. In the course of researching for this study a number of libraries and their staff offered me considerable assistance, two of which I would like to thank in particular: the Warburg Institute Library in London and the Bodleian library at the University of Oxford. A number of colleagues, students, relatives and friends have assisted my study by offering comments, criticisms, editorial suggestions and support; to them I express sincere thanks. Valerie Kelley read large parts of the manuscript and suggested editorial changes that were of great assistance. Costas Douzinas pointed my attention to Agamben's work in the first place. The two friendly and imaginative editors of this series, Peter Goodrich and David Seymour, offered genuine encouragement and criticism. Peter Goodrich and Amanda Emerson provided numerous editorial suggestions for which I am indebted. Alex Murray, Elena Loizidou, Jose Bellido, Piyel Haldar, Nathan Moore and Raphaëlle Burns read parts of this book and provided support and insights.

Kostas Axelos, Giorgio Agamben and Anton Schütz have offered me pathways to thinking and its limit, and this study forms a modest expression of gratitude to them in particular.

Contents

Chapter 1

Sacred foundations: mythologemes of law and power

Introductory note

Over the last ten years one of my main preoccupations in legal theory has been the peculiar character of the *structure* implied in asking and answering the problematic question 'what is law?' I did not find satisfactory answers to this question in either conventional jurisprudence, in the gigantomachy between positivists and natural law theorists, which in late modern and so-called postmodern theories of law, pose a radical transcendent politics or ethics in the place of the foundation or origin of law, offer little other than the repetition of the same pseudo-referential form. I call it pseudo-referential as I perceive the answer to the question 'what is law?' – 'The law is grounded in a transcendent Law of law' – as an attempt to evade the question of the dogmatic foundations of law and of legal theory.

The obsessive attempts to find an answer through stipulating an 'essence' of law or an 'originary or foundational' meaning to and of 'the law question' did not appear adequate for reasons that I cannot analyse in detail in this work. Acknowledging what has been termed the '*nomophilia*' of legal theory (and I would suggest of social and political theory in general), the use of a supposedly legal structuring in/of theorizing, the problem at hand appeared as a dogmatic problematization with regard to both the normative reality of law and the normative reality of the theories of law. What I perceive as a dogmatic problem, using the word dogma in a general sense, is the theoretical structure imposed in thinking law and politics (as well as ethics and society) through the form of a 'Law of law'. That is to say: in answering the question of the origin of law through the presupposition of a hyper-normative, a supposedly transcendent, structure of law itself, the law manages to silence the fact that it attempts to juridify theorizing and life more generally.

Whereas one could see in this *nomophiliac* approach to law a merely, positive, acknowledgement of law's self-referential system of truth and judgment, I further see a dogmatic juridification of truth, a legal self-referential monotony that aims to silence its paradox of formation, rather than expose it as a problem or indeed as an embarrassment. Neither law, nor