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Guilt as Threshold of the Law: a Philosophical and Biopolitical Enquiry

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Introduction

In the midst of the present enquiry focused on the category of guilt in its philosophical and biopolitical meaning, lies an almost naïve quotidian question, even if we examine it as a religious, juridical or existential matter – Why are newcomers almost always perceived as dangerous or even criminal or such as to disturb or endanger our societal setup in juridically unbearable way? Facing this question during one major event that marked my engagement as a civil rights activist, the undertakings around the Balkan Route in 2015-2017, when a gross migratory flux took place on the borders of Balkan countries, was somehow decisive in thinking the figure of the migrant (or each coming-foreigner for that matter) in a multilayered manner trough focusing on two generating veins. The first one deals with the law described either as order (*nomos*) or norm (*Gesetz*), signifying at the same time a space of inclusion and exclusion, and representing a dispositif i.e. collection of practices, institutions, mechanisms, truth, discourse that organizes life itself and produces its subjects, namely, the subjects of the law. The second one, opposed to the disciplinary steadiness of the law, deals with the capacity for action attributed to the subjectivity of the self that is not completely determined by one authoritative force, being aligned with the possibility of the political and of investing the singular being in a community. As I intend to explore in the following pages, in between of these two veins, as threshold stands the category of guilt. Guilt is not employed as strictly legal category that associates with penal sanctioning, and applies its effects on misconduct. The principle of legality sustained by *nulla poena sine crimen* or *sine colpa* describes guilt as condition that inhabits the subject, only if the law establishes what is punishable or for that matter which being is to be inhabited by guilt. A problem emerges though if this principle is reversed, questioning the effects guilt produces before punishment transpires, before the sphere of law occurs, showing us that guilt is not a technical attachment to the norm, but its position is in the same time within the legal dispositif and outside of it, preceding it. By being understood as contingent, guilt not only designates the law's domain and the space of its applicability but releases in it what is outside, what is not yet calculated in the legal formula of the order. This feature of guilt makes this category also existential, moreover it extends its

effects on the existence of a being not only in juridical terms but also in religious, since it concludes the ontology of sin in itself. Once established as part of the legal order or more precisely the penal code, guilt does not reduce its effects only to legal ones, but still keeps touch with what is existential in the wrongdoing and the wrongdoer. Not only brings these into the domain of law, but pierces one's inner life and there cultivates self-negation or bad conscience. Therefore, guilt cannot be proscribed or precisely measured, but can be described as an effect that the law needs to discipline the existence of a body, to confront a force that is not its own and most importantly to encapsulate the capacity for action. For guilt to transcend into punishment or not, depends on the capacity to act and the act itself. If the presupposition for this capacity to act sustained in a human life, from law's point of view, is always already under the sign of sinful ontology or guilt or transgression overall, then either within the order or under the effect of the norm, action is to be aligned with threat. Action being proof for the force of human life, on the other hand, is the main source of defining one's existence. At this conflictual point, once the law allocates the capacity for action as threatening it is able to fabricate some existences as dangerous.

Considering the recent illiberal turn in many Western societies, a great venture is not needed to detect how officialdom of modern nation-states and their operative guardians of dominating discourse (ex. the police, media, mobs) has rearranged the political arena into space of antagonism where certain individuals or groups threaten the organic cohesion of the sovereign units. A question as naïve as it seems, it might tackle the core of political challenges for our contemporary times given the conditions in which many governing elites are using the instrument of penal populism or illegality (abnormality), to overall establish their firm positions on the worth of lives, juridically translated into either subjectivized lives of individuals or illegal capture of unworthy lives. Many reasons are at stake with this continuous separation of worthiness of the living and undoubtedly, some of which brings us back at the ever restless roots of colonialism. It is important, though, to emphasize that officialdom of contemporary politics is reduced to pressing crisis whose effect is best visible in this separation, echoing the colonial difference remained active even after historical colonialism. The question of borders, here from, emerges again as the questions that preoccupy the governmental structures the most, revolving around the unity of the sovereign nation-state and the necessity of closing down or walling up a territory that is strictly defined as homeland for some but not for others. Moreover, crisis mobilizes contemporary politics towards enmity, declaring some individuals or groups as symbolic remnants of the mission to accomplish the glorious consolidation of purified nations and subjected multitudes. Approaching crisis as *arte di governo* (Dario Gentili 2018)

means allocating the widespread economic and political premises of the order of (bio)power, whose main scope is to maintain its content by intervening in lives of singular human beings and equally of entire populations, adjusting the living potential to the sovereign relation or the *double bind of representation* (Boyan Manchev 2012), that includes or abandons. The last formulation rather recalls the mythological origin of the law that is permeating the material reality of subjectivized individuals, underlining one particular recourse, that is the mere actuality of how the juridical-political order unfolds for an established system of governmentality. It is almost unavoidable to exercise its powers without discriminating certain individuals or groups or assigning the political burden of enmity to some of them or simply abandoning the less worthy, whose existence is politically useless unless seen as a point of negation. Given this discernment for modern politics, we might get back to crisis the immediate resolving of which requires sacrifices or 'scapegoats' that would bear the burden of modern societies' flaws. Scapegoating as political resolution has become the unifying nucleus for today's societies. It becomes almost impossible to oppose violent sights of juridical-political undertakings by defending the society or by giving agency to community and acting within space of the common. This scrimmage that confuses politics with violence, justice with decisions, and community with sovereign unity. Additionally, the living beings bringing nothing more than life itself at the shores of roughly policed lands are being confound to agents of criminal, illegals that are not distinguishable from solemn bearers of guilt. The figure of the migrant, the coming-foreigner is a target for the established juridical-political order of our times, either penalized or reduced to life not worth living. A new approach is needed to tackle the figure of the migrant so that it can be viewed in its potential as a figure of transformation, a force that reshapes the understanding of the self and the capacity for human action in search of forms of life. Which can mean to share one's own fate with unknown persons that are not to be associated with blood or soil, but as fellows being-there-with. The figure of the migrant in the following pages is taken as vector for critical thinking and reevaluating the philosophical canon, giving a material context to otherwise superfluous content and approaching the law from angle different to that of legal positivism. Moreover, a vector of such political pervasiveness that would, from the visceral depths of the wretched of today draw a force both singular and common, that is yet to be materialized in more just and equal societies, where care has primacy over fear in the community.

I've divided my thesis in three chapters entitled I. *Law as Order*, II. *Guilt as threshold of the law*, and III. *Community as law*. In the first chapter, the firm orientation during this endeavor of reconstructing the law was guided by the need to examine the relation between

law, the force of authority and sovereign power. My first focus is the origin of law where violence and the constitution of order are not clearly distinguished and where the gesture of establishing order at the same time is also an origin of law, since the order is the location of law's enforcement. The perspective on the origin is important because going down to first signifying points reveals the ruling principle that establishes and maintains it, but also enables stability against intrusion of other forces. Law's enforceability directs us to its unavoidable relation with violence and to the unpredictably variety of forms it takes depending on the particular historicity of relations among peoples. What truly remains unchanged, though, is the fact that it was always up to marking or emanating significance to a certain space, where the effects of appropriation are brought about. This is the space that is later divided and distributed as a manner of ruling altogether with the subjects that inhabit it and whose status is determined by subjugation and exposure to inclusion and exclusion. A pastured space, in biopolitical terms, where administration of life of individuals and the population is employed. Going through the meanings of the word *nomos* in antiquity, those of appropriation, distribution and pasturage almost completely describe why and how the order or space of the law are dependent on these terms, since they became main principles of order. Law analyzed as order, beside unfolding of the inscribed violence effectuated in its signifying system also provides a perspective that avoids the concept of law as a neutral space of normativized living proposed by legal positivism. An overview of the most important philosophical legal texts that attempt to elaborate the origin of the law shows that legal positivism cannot successfully hide or reconcile with the need for mythic establishing of the law and the relations that define it. Legal positivism seems to be enabled only by mythologemes of pre-legal and legal worlds. Transition from the pre-legal to legal puts forward the subjection of subjects and the contracting demand for them to participate in the sovereign transfer of power, from the multitude to a cephalic center, thus allocating the weaker and those who menace the order closer to the natural state and including them by exclusion. Examining law as order further on directs us to its indispensable fusion with power, since the intervention in the domain of life that causes effects on singular and commonly living would be impossible to imagine without the force of authority, as the sum of juridical and power effects. The interest for the domain of life emerges from law's tendency to continuously extend and situate all living forces, grounding them on an appropriated soil that becomes law's order. In this context, the living is exposed to law's intervention and the singular being of life becomes completely subordinated to law's power to subject. It is not by chance that the chapter is enclosing with the famous parabola *Vor dem Gesetz* (1914), not only because it is one of the most exploited bibliographical units for critical legal studies, but also because of the historical context in which Franz Kafka writes the first version, when a police decree

prohibited the entrance in the city of Prague for refugees fleeing or that have been evacuated from the front areas in Galicia and in Bukowina, amongst which were the defamed Jews from Eastern Europe, *Ostjuden*. Contemporary migration or humanitarian crisis echo Kafka's parabola, with interpellation of law becoming a point of measuring the worth of life, which is being lived under law's mark of guilt and transgression. Simply, law marks with guilt, coining terms such as illegal persons whose lives afterwards continue to be lived under that mark of transgression, keeping active this dispositif of separation that separates life into threatening bodies and legal subjects. Enhanced by the legal and discursive stream of personalism, law materializes the soil and the fortress that delimit the one common world we all share and live in, contrary to the universalistic premise of legal positivism that extrudes fate with norm, effectuating thus much misfortune.

In the second chapter *Guilt as threshold of the law*, I attempt to overview of the category of guilt in philosophical and biopolitical terms. My approach, instead of undertaking an all-encompassing task to examine guilt in a religious, juridical, existential, and psychological framework will be to emphasize the contingent feature of guilt, that makes this category a piercing one. Guilt at the same time precedes the law, but also pulsates in its sanctioning heart, securing religious legacy of sin and capturing human's existence in a totalizing way, only because it is entrenched with human's capacity for action. Avoiding scholarly allegiance to the philosophical canon, also avoiding a chronological order of ideas, I start the chapter with Michel Foucault's genealogical insights that better than his previous archeological phase underline the power-knowledge nexus. Foucault actualizes law as norm, not by focusing on its exclusionary principle and inscribed violence, but by opening the possibility for a productive approach to law as something that does not negate or is associated with negative features. Law has a productive imperative, produces and subjectivizes individuals whose lives are exposed to the disciplinary mechanisms and are set up within a framework of the dispositif and the discourse. What Foucault calls *infra-law*, explains the expansion of effects of the normativizing apparatus. Discipline and power are not some counterpoints to it, they do not excavate law's force only to establish distinctive even opponent technologies. At stake here is a complex structure of a diagram of power with a twofold result: it juridically justifies the existence of subjects of law and opposite to them, the existence of the abnormal or dangerous ones whose existence or acting is not necessarily harmful, but their imperilment is established as such by the law as so to affirm its need to discipline, by maintaining the contrast or the negativity in its sphere, and also for surveil and uphold the capacity for action under the sign of punishment. A straightforward reaction to the previous, under the negative assumption that built the modern

political philosophy from Thomas Hobbes onwards (when everyone is at war with everyone else in the absence of authority), is that the diagram of power is a much needed basis for our communal living, exactly because of the lurking danger that can inhabit different individuals and groups, namely that penal law is the uncompromised advantage of our living together. A problem appears when the capacity for action or a solemn act is not the object of significance, but rather the existence of specific individuals or groups that is juridicaly allocated as source of this danger or criminality to be immunized from. So, mere existence, and not transgression or the deed, becomes important for the penal machine. I tried to align some practices of punishment and the corpuses of peoples that Foucault elaborates in his conclusions to the Italian cluster of critical criminology. The most famous representatives, Massimo Pavarini and Dario Melossi, especially Melossi's diligent engagement with criminality and migration, focuses on the fact that from point of view of migration, in various periods and historical contexts, penal law has not been executed in a neutral and positivist fashion. On the contrary, law is guided by its end to dispose life of newcomers in the two main disciplinary institutions in modern society – the factory and the prison. The contemporary recourses on migration confirm the standpoint that through punishing, law allocates dangerous individuals and its intention is to impose its sanctioning force. Those which in political sense are marked as enemies, in juridical terms are illegals, *sans papiers*, *clandestini*. The sanctioning force is not contained only within the frontiers of the order or the sovereign unit just to maintain their security, but penetrates the skin of those marked as enemies or outlaws, whose lives remain nothing more than that and just a marked bearer of guilt. The sphere of legal obligations suddenly becomes a sphere where the self is indebted, since alleged guilt associated with its singular being preserves a relation between the possibility for life and for life to be situated in law and societal living.

This means that guilt precedes both law and punishment. Sometimes guilt itself punishes, independently of conducting a deed, since it enables or brings judgment for entrance in the system of law, designates the law's threshold. A form of life that appears on the shores and before entering the city is nothing more than human, from the point of view of law. It is perceived as a threat because law sees in it another force that should be confronted, not yet subjected and not already used as an investment in the established order, since whenever a subject is born or produced as subject the order rises anew. Through the immunitarian paradigm, the law secures for itself the arbitrariness among other systems of signifying. From the point of view of the singular human being, it is crucial to be positioned at the entrance of law, namely when its belonging to an arranged context of a national officialdom is associated

with being a danger and an outlaw, coming from the exterior outside. This is the point when guilt develops an inner life, becomes inner-subjective, it inhabits the depth of the being, acts as self-negating, and there circulates as a process; the heart becomes a courtroom. What is here described as a source for bad conscience or negative self-understanding for those individuals or groups whose existence is point of criminality or enmity, means only misfortune. Though a misfortune that does not contain itself only in a being's soul, but is a misfortune for the society where harm, discrimination and injustice become sites of political interventions that jeopardize the communal living. Through readings of Friedrich Nietzsche, Walter Benjamn, and Giorgio Agamben, I thoroughly examined some of the aforementioned aspects of guilt. But I find some insights from the doctoral thesis titled *Über Schuld und Schuldarten* of the controversial German layer Carl Schmitt written in 1910, of particular importance. He elaborates the meaning of guilt by emphasizing this inner-subjective feature of guilt and its capacity to develop an inner life in the soul's depths, determining the life of a human being almost completely. Some ten years after his doctoral thesis, Schmitt publishes *Politische Theologie* (1922) and almost never returns to elaboration of guilt in his other writings, aligning with many other legal thinkers that have obscured legal scholarship by not dedicated enough attention to this category either as a strict legal one or as such that precedes the legal sphere.

In the third chapter *Community as Law*, I bring the previous content under the immunitarian paradigm in an attempt to distinguish the passive modality of subjection or being subjected *to* from the active modality of subjectivity. The orientation point for the active modality of subjectivity is community, which differs from the sovereign unit and historically diverts from the totalitarian turn in conceptualizing and materializing the community in the 19th century. The mode that makes possible to think the community is transforming the forces I dealt with in the previous two chapters – guilt and debt and their interconnection, especially notable in the German *Schuld* which can stand for both. Guilt is only another name for the capacity for action, and from the established negative anthropology after The Fall up until the modern political societies, is the mark that bears life itself. The technology of penal law makes reference of guilt for human action, but does not succeed in total determining of the self and the relations with others. Especially because transgression does not always coincide with breaking the law, given that justice sometimes doesn't overlap with law's referential space which is apart or outside the law, as Paul from Tarsus suggest in his *Letters*. Localizing justice, however, is not a risk immediately declared from point of view of negativist comprehension of the juridical-political order. Since the capacity for action viewed outside the law and nearer to justice is not equated with unruly offenders, but it is a proof for a self-able investment in the

common-being with others. When this self-investment also means transgression, as with Sophocles' tragic character Antigone, the singular human being endeavors for the other without whom the community is impossible, although this endeavor is not for legal acknowledgment and is against the norm that excludes. This transgressive endeavor brings the other's radical particularity at stake, and even if the nomination of this act unfolds guilt it is still reshaped in care. Even if transgression is implied, an employed care in the community is its basis, the solemn possibility and the source for the community. Some contemporary translations of Antigone's claim or Pauls' localization of justice apart from the law are to be recognized in extraordinary biographies that witness how transgressive care has become basis of community. Even when the law has not yet discerned this transformation of guilt into care, anchoring guilt further on as the nucleus of punishment and punishment only. Such is the biography for instance of Domenico Lucano, the ex-mayor of the small town Riace in Calabria, Italy, who managed to inaugurate one of the most remarkable models of politics of hospitality, although in a series of events afterwards he was found guilty by the Tribunal in Locri and has been sentenced to incarceration for a period of 13 years and 2 months. If we are up to draw a line from antiquity to contemporary political gestures, from the burial of Polynices to reinventing Calabrian local politics into politics of hospitality, what is to be noted is the other scene of individual existence as existence-power, apart from the technologies of production of subjects. The social being of individual existence is not to be individualized under the pressure of the rising legal ideology only. But rather in a transindividual manner, individual existence is to be thought of relationally, as bodies to be affected by one another, translating the contemporary living in democratic collectives as rejection of essence as ruling principle, leaving the space of power empty, the foundations shaken, and the *democratic method deideologized* (Ljubomir Frckoski 1992).

I. Law as Order

1. In the beginning there was the soil: appropriation, distribution, pasturage

Legal positivism appears to be insufficient for exploring law as a dispositif or a collection of practices, knowledge, formulated truths, ordering rules and institutions; it also seem unable to explore it as an entity comprised of local rules whose obeying generates the notion of whether a multitude of persons, mutually not connected, are co-citizens or nation fellows, belonging to a formal political unit such as the nation-state might be, where the juridical language that enables them to connect and in the same time to differ from other units is precisely the law. The confusion that legal positivism makes and leaves a confusion with regards to how and why a particular piece of soil could be a space of a particular system of rules that intervene in the domain of life itself; how the common good is distributed without being lost in the vastness of space; what is at stake, what is meant to be produced by submitting the members of a multitude to a situated system of rules with a defined scope of authority, space of enactment and enforcement.

In the beginning there was the soil. The effort to measure the area of the law, and by doing this to address complex solutions to some of the questions posed in the opening paragraph, confronts us with an interrelated scheme of terms and phenomena characteristic for modern law. The law cannot be thought of without in-depth examination of its fundamental conceptions of order, power, and sovereignty. Therefore, my necessary starting point is exactly the examination of several notions of order (*nomos*) and its establishing as the key predisposition of law, moreover of its accompanying syntagma that relates to its effect: namely, *force of law* or entering in force. Order is necessarily connected with the so-called foundational process of appropriation of space or the initial gesture of soil appropriation. The first line that is drawn, represents at the same time the (order's) border and the horizon. Some thinkers (like Slavoj Žižek) suggest that the first gesture cannot be properly called otherwise than 'foundational crime'. In the search for a radical title, it is important to emphasize that order does not entrench ones' entirety upon which the force of the law would later applied. On the contrary, the first movement should be towards clearly entrenching the distinctive act in which the soil enters into relation with the foundational process and by which something as sovereign territory can be declared. Following this direction, the German lawyer Carl Schmitt, whose work is permeated with what Roberto Esposito explains as *politica e negazione,* with a clear whoop to restore the energy and majesty of *nomos,* unavoidably goes back to the classical meaning of the term *nomos*, asserting that exactly this term is the first measure of all subsequent measures, "the first land-appropriation understood as the first partition and classification of space, for the primeval division and distribution", respectively "[a]ll human *nomoi* are

nourished by a single divine *nomos*" (Schmitt 2006: 67, 70-71). Therefore, we could understand Schmitt to claim that all human *nomoi* are incorporated in the order, and that it is actually the first conjunction of soil with law. The axiological link between soil and law is not possible - as I will attempt to demonstrate – without the fundamental political operation, that is appropriation. Appropriation or *ius proprium* denotes the major political assign of modern, western-centric political thought, and this will be shown later when the argument focuses on the subject of law from the perspective of propriety and ownership. Schmitt insists on the classical meaning of *nomos*, or to be more precise, he insists on not replacing order with the regulative function of law encompassed in norm (*Gesetz*). Throughout his work, with more or less consistency, he postulates the relation between *ortung* and *ordung,* so what the Greek meaning of nomos coming from *to divide* and *to pasture* suggests is "immediate form in which the political and social order of a people becomes spatially visible - the initial measure and division of pastureland, i.e., the land-appropriation as well as the concrete order contained in it and following from it" (Schmitt 2006: 70).

Schmitt strengthens his argument with verses of Pindar, the whom he called a prophet and who transformed nomos "from a spatially concrete, constitutive act of order and orientation - from an *ordo ordinans* [order of ordering] into the mere enactment of acts in line with the ought and, consistent with the manner of thinking of the positivistic legal system, translated with the word law" (Schmitt 2006: 78). Bearing in mind Immanuel Kant's *Science of Right*, and following the direction of establishing order as a territorial entirety that determines the collective orientation of the people, and of course in accordance with Schmitt, it could be said that soil appropriation is of categorical character. Through Kant (even to remind that in his *Science of Right* there is a section entitled *How to acquire something external*), yet again we arrive at the crucial point of appropriation as a juridical-political category. The concept of *right to* is posited in a requisite dependence of *having* "which abstraction is made from all spatial and temporal conditions and the object is thought of only as under my control *(in potestate mea positum esse)*" (Kant 2013: 252). The right of ownership or *holding* (detention), having or more precisely having in control (*in potestate mea positum esse*) becomes the general condition for establishing law, and in the same time for organizing a set of rules that will guide the communal life, clustering its numerous capacities in public and private law. Having control over the soil does not automatically overlap with some system's validity or in our case, with law's validity. To that, having control over the soil has to make difference, more rightly vertical difference in the relations of the community, enabling the possibility for declaring something – this external object, that is not me and is allocated outside me – as mine. Mine or yours or the right of

ownership in this sense is the sum of all laws, in addition, it keeps track with the foundational postulate that the *nomos* bears as the source of all human *nomoi*. This is clearly implied by Kant when he writes about the acts of appropriation that employ the law so that law later guarantees them: "these acts have to do with a right and so proceed from practical reason, so the question of what is laid down as right abstraction can be made from the empirical conditions of possession" (Kant 2013: 259).

If we concord *nomos* with *Gesetz*, with the previous notion of the sacredness of the act of appropriation of soil that consists within the relation between power and naming ("A land-appropriation is constituted only if the appropriator is able to give the land a name" (Schmitt 2006: 348), it is important to once again underline how the word nomos in its classical meaning is partitioned in three meanings, as Schmitt explains in his famous book *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), wrapping up the complex wholeness of the order that further on instructs the meanings of sovereignty and sovereign power, as well of law and its enforceability. Namely, Schmitt indicates that the noun *nomos* comes from the Greek verb *nemein* that has three major meanings which he elaborates as follows. First meaning of the verb *nemein* is the action or the process of taking or appropriating something. He continues by making an analogy between *nomos* and *logos*: "If the noun *nomos* is a *nomen actionis* of *nemein*, then the first meaning of *nomos* indicates a *nehmen*, just as logos [speech, word, or reason] is the *nomen actionis* of *legein* [to gather or to speak]" (Schmitt 2006: 326). As the second meaning of *nemein* as *teilen* (to divide or distribute) seems to have attracted major attention of the philosophers of law, we will first proceed with the third meaning – *weiden* (pasturage) and come back more thoroughly to the second afterwards. When it is through the meaning of *weiden* that we attempt to explain order, what we have in mind are the activities that emerge from production, that is – to pasture, to run a household, to use, to produce. Soil appropriation is necessarily connected to ownership, and immediately after that with production so, the assumption of the initial division that somehow defines the taking of control or the right of ownership, suggests "the third meaning of *nomos* derives from the type and means of production and manufacture of goods" (Schmitt 2006: 327). The rounding up of these three processes: appropriation, production and the one with which we will continue shortly, distribution, introduce each and every political and juridical order, wherefrom the three main questions of the sciences about life emerge: "Where and how was it appropriated? Where and how was it divided? Where and how was it produced?" (Schmitt 2006: 328).

Going back to the second meaning of *nemein* as *telein* (to divide or distribute), it is

notable that appropriation is not enough for mythic initiation of each legal order or at least it is not immediately incarnating a legal fact the demonstrates the presence of a legal order. Instead what makes appropriation decisive is the effect of division, of making a sovereign difference in the space that has changed, that has been reshaped, divided and ruled. Guided by the significance of *division primaeva*, Schmitt adds this note to his shorter text before publishing the longer version of the book: "In every extensive plan there is dividing and distributing, and what is divided and distributed first has been appropriated, be it land and property, the means of production, (…) the social product" ("Postscript" to his article, op. cit. pp. 502f., 1973). This meaning of nomos as distribution/division is dominant in modern political philosophy and philosophy of law, particularly since *teilen* amongst the most influential attempts to propose establishing an order or the commonwealth as presented in Thomas Hobbes' *Leviathan* (1651). The order of the commonwealth does not hide the element of coercive power of its establishing, but displays the direct link between foundational power and order as such using propriety: "where there is no coercive power erected, that is, where there is no commonwealth, there is no propriety" (Hobbes 1998: 96). Hobbes goes even further in his thinking of the modern political order, guided by the effect of propriety. Firstly, he equals order with law and a system of rules that can bring security and happiness in the commonwealth, and the action that ends the state in which all men have right to all things and there is no possession, therefore no propriety and no justice, that is, only appropriation, since only propriety could appoint justice. Although he theoretically and practically distinguishes law from justice, Hobbes builds his argument by disregarding this difference. He ties law to justice so that order or the commonwealth remains the ultimate source of their unique value. And by simple overturning of the logic that if there is no commonwealth, then nothing is unjust, it becomes clear that commonwealth is a prerequisite for appointing justice the, and that it stands as law and system of rules in the same time, being platform that enables the secure and happy life of multitude of persons. This secure and happy life means conjoining order, law, and justice: "the validity of covenants begins not but with the constitution of a civil power, sufficient to compel men to keep them[,] and then it is also that propriety begins" (Hobbes 1998: 96). The law of the commonwealth sustains the relation between the rules of communal life and propriety, or in other words, it makes the effect of these rules statutory and dependent on propriety by the way of distribution: "rules of propriety (or *meum* and *tuum)* and of *good, evil, lawful,* and *unlawful* in the actions of subjects (...) that is to say, the laws of each commonwealth" (Hobbes 1998: 119). What is important to underline is the point of eclipse where Schmitt meets Hobbes, that order and in the same time law are always incarnated in a unique sovereign figure: "Seeing therefore the introduction of *propriety* is an effect of commonwealth; which can do nothing but

by the person that represents it, it is the act only of the sovereign; and consistent in the laws, which none can make that have not the sovereign power. And this they well knew of old, who called that νόμος (that is to say, *distribution)* which we call law; and defined justice, by *distributing* to every man *his own.* In this distribution, the first law, is for division of the land itself" (Hobbes 1998: 164).

2. Law as *nomos basileus*

It can be said that in modern political philosophy and philosophy of law, *nomos* is almost invariably conceptualized as *nomos basileus*, and this approach has recently acquired canonical value with the famous book published in the 90ties as the first of series of nine books – *Homo Sacer,* by the Italian philosopher Giorgio Agamben. Influenced by Hobbes' Leviathan and Schmitt's decisionism, while explaining the order via the bearing cephalic figure of the sovereign, to which the political capacity of the multitude is transferred, Agamben suggests that what the poet Pindar implies by using violence is the founding sovereign gesture that later becomes self-referential and witnesses the presence of a founded sovereign order, all of this by establishing point of indistinction. Or as Agamben puts it "*the sovereign nomos is the principle that, joining law and violence, threatens them with indistinction*" (Agamben 1998: 31). This principle is always in search of soil, but more importantly it searches for a meaningful figure that interfered by power and actually asks for absolute power to incarnate itself. In Pindar's verses it is about the figure of Heracles, whose violent hand is not violent per se, but only as assumption of order since order that incites Heracles to act even with violence, to be unjust if this is justified for sustaining and keeping order constituted: the order must be defended. This does not always mean that violence is justified, but that what is justified is the use of violence in the name of sustaining order through sovereign will, where justice has been identified with the order, and its sustainability with the use of violence. "Heracles' injustice is not justified, but shown to be the means that a sovereign, amoral power uses to bring about the implementation of its will" (Zartaloudis 2019: 236). Violence that cannot be avoided means that it is present in all the affairs, of the mortal and immortal ones: "[t]he only certain thing about *νόμος* is what Pindar himself says about it, namely that it is an all-pervasive power governing with extreme violence the affairs of both gods and men" (Zartaloudis 2019: 223). Additionally, the force of the divine order is evoked, since before settling in one head the abstraction of absolute power remains as present, the two worlds collide and the traces remain visible in the so called succession myth: "*Nomos* is an abstract idea personified, or rather

deified, on the model of an epic formula for Zeus' while '[t]he title *βασιλεύς* is usually given to the god in power in the so-called succession myth" (Zartaloudis 2019: 222). The sublimation of power is thoroughly explained in a very important study about the various meanings of *nomos* by Thanos Zartaloudis, that are still relevant for critical legal studies today, minding that elaborating power and sovereignty remains crucial for elaborating law. To give an incentive, the phrase to enforce the law, law to enter in force of enforceability of law not only assumes the element of force inscribed in the juridical language and action, but explicitly appoints force as a condition for the use of law. The linguistic order of this literal allusion does not establish some chronology of force preceding law, on the contrary, law implies force within a priori considering that what is meant to be an authorized force is "a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable" (Derrida 1992: 5). Obeying diverse rules and legal norms is not compelled through imaginary overlapping of law with the value of rightfulness, but it is excavated from the implicated force within the dispositif of the law. Enforceability of law assumes that what links the set of norms and rules in a system of predictable positions, as in reliable behaviors of the subordinated subjects is not due to some communal use of a contractual and repetitive scheme, but due to the already consistent force within the law that makes it applicable and it applies it to the already established relations. To sum, "there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth" (Derrida 1992: 6). Therefore, what seems as unnoticeable and spontaneous exhibition of the law even in pronunciation of this trivial phrase 'to enforce the law', actually refers to an exposed and in the same time historical and mythic element of the authorized force, contained in sovereignty, power, and law or assembled in the order. This is clearly presented in the work of a famous renaissance author Michel de Montaigne who by defining law necessarily underlines the difference between law and authority, the meaning of which seems tautological if we are not to be reminded of the existing force that circulates within the law and that it what actually makes the law. Montaigne suggest that laws keep up their good standing "not because they are just, but because they are laws: that is the mystical foundation of their authority. . . Anyone who obeys them because they are just is not obeying them the way he ought to" (quoted by Derrida 1992: 12).

It comes as evident how the monolith center of power from the divine order in antiquity has been translated in what later is defined as the principle of the unique One, who has the

sovereign right to rule in the echo of political theology. Within the sacred or bare sovereignty, the theological elements are inscribed and the absent god that still is in force is extended towards the unitary principle of governing, whose voice has become *ius dicere* and as a juridical language of the community determines who is member of the order, by speaking it, understanding the call and answering to duties, unifying the multitude in a particular sovereign unity that inhabits the sovereign order, where security and happiness are delivered. This sublimation goes on and tackles also the modern translation of the overtaking power that circulates in the established order, and from position of the sovereign arranges the rule over all things, that up to this moment do not have title or meaning and by that are not acknowledged. Exactly this is understood in the first opening sentence from the last chapter of Michel Foucault's first volume of *Histoire de la Sexualité* – "For a long time, one of the characteristic privileges of sovereign power was the right to decide life and death" (Foucault 1978: 135). *Ius dicere* or the authorized force that overtakes life and death is a singular voice, as one of the initiators of critical legal studies, Costas Douzinas states. "The singular speaking voice, dressed in the colorful garments of value as absent justice and its substitutes, projects on community the figure of One, of a *pater communitatis*, of *communitas in imago dei*, in unity and homogeneity, as nationalism, populism, tribalism, fundamentalism. The unity of community mirrors the sovereign singularity and joins bare and theological into the modern figure of political sovereignty. Together bare and theological sovereignty, law and (absent) justice, open the space of modern [as] belonging and exclusion" (Douzinas 2006: 51-52).

The overview of the spatial application of the supreme power, the source of the law or the initial beginning of order, the first day of enforceability of the law, going back to divine sovereign right to establish the law of the order, the disposition of power and government is still not helping to better and in a more accepted way to understand why law should be obeyed in terms that life itself is at stake by being normativized and juridically enabled in the sphere of communal living. The problem of obeying the law though does not bear primacy before some other issues such as who is called by the law and whose juridical-political position has been recalled in the transfer of ruling and applied force i.e. the issues of the subject of law. Kant poses something that can be misunderstood as a dilemma, notwithstanding in work is put the obligatory mystic or mythic positioning of the unique place of the source or the initial beginning, when it is not that important whether the power came first and the law only appeared after it, but what seems to be happening is spraining the interest for the law from the area of legal positivism (the factual vs. the normative) towards something that can be called mystical foundation of authority or simply mythical law, law as myth. This doesn't mean that law is

sustained in a bird's whispering or 'in some secret discourse with a divinity'. But, "[t]he origin of supreme power, for all practical purposes, is *not discoverable* by the people who are subject to it. In other words, the subject *ought* not to indulge in *speculations* about its origin with a view go acting upon them, as if its right to be obeyed were open to doubt (*ius controversum*)" (Kant 1970: 143). In the discussion about the origin of law that threats it as mythic law is important not to lose or misunderstood the notion about law that is ever opperatively attached to an existent situation, and that the midpoint of this emergent and effective relation of law with pieces of reality that are codified, prescribed and determined is actually the legal decision. "It is in the legal decision – the decision of the subject, the judge, the legislator – that law becomes operative [and] legal decision could not be reduced in terms of an empirical truth, [so] law can always be other than what it is" (Fitzpatrick 2001: 105). The first decision that in itself has the voice of authority and bespeaks the juridical language, that from law makes textual strata has actually been the decision for drawing a line on the soil, the line as we have already mentioned represents both border and a horizon. Going back again to how Schmitt explains nomos, we once again confront the spatial situating of law and order, since what has before been said is impossible or not valid without materialization of soil, whose settlement witnesses that law is in force. "The primordial scene of *nomos* opens with a drawing of a line in the soil. This very act initiates a specific concept of law, which derives order from the notion of space. The plough draws lines – furrows in the field – to mark the space of one's own. As such, as ownership, the demarcating plough touches the juridical sphere. The primordial act as described here brings together land and law, cultivation and order, space and *nomos*" (Vismann 1997: 46-47).

3. Law as myth or mythic law

Up until now, several important elements are distinguished in the discussion about the source of law and its force to extort respect and subjugation: spatial reference or the soil on which a line is drown or *prima material;* the first indistinction of violence from law in the hand of the most violent that bears the supreme power and initiates sovereign rule, that enables the first intervention in space, demarcating it as the space of the new order, being the first founding crime or *actus novus*; and, finally, the narrowness of legal positivism does not enhance this discussion but law being examined as myth gives the more insightful answers about it very beginnings, about the force a priori inscribed in it that in continuity makes possible its use, from the mythic initial beginning up to modern conditions. Nonetheless, law as myth does not

risk the seriousness of philosophy of law and the canonic determination of legal validity, on the contrary, even legal positivism cannot answer to its immanent task without considering the assumption about the mythic positioning of law and order. In the words of one of the most important representatives of critical legal studies, Peter Fitzpatrick, myth is "the mute ground which enables 'us' to have a unified 'law' and which brings together law's contradictory existence into a patterned coherence" (Fitzpatrick 1992: 2). What Fitzpatrick poses as his main theses addresses the myth of the patricide and the social contract among the sons, that establishes order exactly with the murdering of the father and by annihilating the totem, leaving an ever-present mark of its presence, presence of the absence, of what has been annihilated that becomes a point of reference referring to violence used for establishing the order. In this case, it is evident that the father is an almighty figure, an absolute master that knows no boundaries or in short – a god and a beast. But this is not overshadowed by the violence of the murder, so that the foundational violence does not overshadow bestiality, but secures the memory of it. This condition of bestiality is attractive to the sons and in the same time it must be transformed so, the social contract among them assumes search for space that will be marked with the memory for beast like-acting, but in the same time will be a triumph of a departed world, a world of civilized and arranged life. It is how morality and law are initiated and interdependent, especially bandaged in the duty of murdering and to affirm the terms of the settlement or the changing conditions of communal life, the result being the order is settled only with transforming the duty to kill into – *thou shalt do no murder*. Now, what has been outside is inside and it is revealed as a totem of the brotherly relations and the newly began society reflects the manifestation of law since it relies on attachment and communality. It is shown how law occupies the site of the origin and there finds its allegory "combining the 'original' elements of a persistent determining force" (Fitzpatrick 2001: 34). Although the psychoanalytical ultimate relief in tautology or its hermetic, auto-referential narrative made a breakthrough in the anti-humanist critique of modern juridical and political dynamics, being relevant for critical legal studies also, it still seems an excessive excursus of the effort to explain something as concise and desiccated as law is. However, the myth of the patricide is positioned in a very useful way despite the contractual idea of founding the order, as presented in the work of Hobbes, John Locke, and Jean-Jacques Rousseau. Legal positivism goes on further in completely legitimizing the origin of the sovereign and juridical order, but thoughtful missing out of sight the bestial potential as a negative imprint of this need to positively arrange relations, makes things complicated and never complete. In continuation things will become more clear, following the direction of Fitzpatrick that might be negation of the mythic foundation that is at the same time negation of that which gives law coherent existence. The following extensive

quotation from his notable book *Modernism and the Grounds of Law* (2001) will introduce to us the challenge for legal positivism and his attempt to allocate the origin of law by mindfully avoiding the element of violence or by implying that law emerges from its absence, ex *nihilo*. "What comes before an origin has to be different to what comes after, and a pliant savagery does indeed prove to be chasmically different from the civilized existence. [L]aw is precisely as a societal container of savage violence that comes to be set against [and] identified with civilization. [L]aw takes on the savage violence of precreation as its ultima ratio… Savagery may lend its violent force to law, but it is law which constitutes and contains that force within itself. And whilst savagery may provoke a civilizing law into being, it is law which delineates that savagery by separating civilization from it. Yet, it goes on, for law to be in its response to savagery, that savagery must remain more than extensive with it" (Fitzpatrick 2001: 36)

The standard position in jurisprudence in the western-centric world is represented in Herbert Lionel Adolphus Hart's book *The Concept of Law* (1961). Among many influential theses about what would be the heart of the legal system i.e. its center or essence, with a non-mistakable jus-positivist approach, Hart poses the important question – *What is law*? The answer to this question led by the main juridical assumption about a set of rules that make up law or rules that always anew secure law despite the social changes that happen, will focus now on what Hart names as the 'fabulous primal scene', as important for legal thinking as it crystalizes two realities: the one of the pre-legal and the other of the legal world, as well as the threshold between them. Without a doubt, in Hart's *Concept* the discussion about the origin of law emerges in the overall thinking and conceptualizing law, the origin being also the essence of law or an orientation point for the civilizing outgrowth of the primal scene and of the pre-legal world ample with defects to be adjudicated. This is how Hart write about it: "[t]he remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law [and] convert the regime of primary rules into what is indisputably a legal system…If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist" (Hart 1961: 91-95). The area in which law is established by also establishing the order from simple, tribal becomes one in which the inhabitants are obliged on things notwithstanding if they like it or not, are allowed or forbidden. The same narrative elements recall of how Locke assumes the making up of law and it is rightfully noted that here the violence of *homo homini lupus* is exempted but still the mere

existence of rules that call for subjugation by the inhabitants of the primal scene shows of a certain arrangement of force that is not equalized. Non equally arranged force in the germ of society is not a problem that cannot be solved but the traces of this non-equality leads very often to violence that on the other hand cannot be solved also, and it is already inscribed in law and the violent hand that distributes. Also in Hart's work the fresh start for the law overlapped with the birth of the new society is closely related to the sovereign figure of the Rex who gives voice to those who previously were inglorious inhabitants of the primal scene, deprived of voice, by making a decision for use of law that commits the community to rights and duties. The realm of the official or officialdom makes unbinding the sovereign relation independently of the political regime at stake, so that this relation does not only mediates the use of law but necessarily breaks the society so that each subject obeys for its part only, emphasizing an intimate fate of acceptant subjectivity, whose knowledge of who rules is never transparent and connectable. It is officialdom that emerges in Hart's quest for the essence or the origin of law, since the ever-effective formula is that on the opposed side of the broken society only "the official can properly recognize law and we relate to law definitively through the official" (Fitzpatrick 1992: 206).

Before Hart's *Concept*, another juridical achievement has been affirmed as the main point of reference for legal positivism in the Anglophone world, that is *The Province of Jurisprudence Determined* (1832) by John Austin. If Hart manages to settle down the aspects of bestiality in the pre-legal world, reshaping law in acceptable terms of its consistency, Austin is not very successful in it and as theoretical heiress of Hobbes cannot withdraw from modern western cosmology. Hereford, it is actually clear that neither Hart nor Austin can be declared authors that write about universal history of law and this is the introductory point for Austin's argumentative strategy for defining the origin of the law, emerging once again from the negative assumption of living together and the unavoidable clash among those who dominate and those who are dominated. Before continuing with Austin's quest for the origin of law, I'd like to shortly bring attention to the relation between negation and politics. It appears as more than relevant this argument of Roberto Esposito that negation is 'il cuore segreto' of politics, as such questioned in the discussion about the origin of the law shows itself rather appealing and even a solution to enigmas of modern politics and modern political philosophy concerning power, sovereignty and the law, overall the order. In the following pages we will be confronted several times with the fact that law in the real ongoing material life would remain almost unnoticed if breaking of the norms does not take place and order almost does not have any use of law up until this breaking happens and a sanction follows ("Just as punishment is what

guarantees order, a law becomes noticeable only if, and when, it is negated" (Esposito 2019: 18)). Order and law are imbricated in their nugatory potential that is the potential of *non/not*, simply put law is not law if it does not admit forces that negate and that have to be punished, and order is not order if it is not guaranteed by sanctioning a threating appearance and for that matter of anything that can draw it in chaos. The juridical logic of order emerges from a negative register, and nothing can be established if an opposite subject is not juxtaposed. Opposition, adversary, and enmity are terms that reveal this register as decisive for the political and sovereign power. According to Esposito, it is much easier to understand the law as order in the following way: the order cannot be perceived independently of the means that establish it but the one thing that defines the order is the opposition to disorder. "It is no positive model of society, but what remains after everything that threatens stability has been prohibited. It is the outcome of an exercise aimed not at producing results but at repressing actions that are considered deviant" (Esposito 2019: 87). Underling this defining method, we are not talking about a positive model of society and the forces that can break the law or draw order into chaos are necessarily in advance inscribed in the mere juridical-political proposition for relationality and society. The society is only an excuse for the negative register and the linguistic terms alike as the political relations are defined through a figure that opposes, confronts and acts with enmity. The order is not an order as the law is not a law if on their opposite site does not allocate a deviant enemy. Hobbes as the father of modern political though actually gives a distinguished space to the negative reservoir in his writings, putting sovereign power under the sign of negativity and by this determining much of the rest of modern politics up until now. Beside the effect that negation had on the law and the norms that were to be obeyed within the ruling order, it remains relevant that sovereignty coincides with the non-relation or shattering the relations in the society. What makes the legal world legal is its capacity to negate a non-legal world, and this legal world actually comes into being by negating the pre-legal world, or of negating the natural society. This is made possible only contrasting the capacities in politics, moreover with shuttering ties. The non-relation is "not only that of the sovereign vis-à-vis subjects, but also among subjects themselves. It is symptomatic that politics is viewed by the first great modern political thinker [Hobbes] only from the negative side of the depoliticization of society" (Esposito 2019: 93).

The quest for the origin of law in Austin's work is completely overlapped with sovereign political power and law is actually a 'law existing by position', which position is overlapped with that of the 'political superior'. To Austin, establishing or enforcing law is as important as securing the space for sovereign power, that should remain stable so that the rules

remain applicable, since what is shaped as rules is not because of law extending itself but because of sovereign power having area of effective usage. The aforementioned failure for the sovereign power to have positive placement, brings Austin to allocate the origin of law in the originating scene with an assumption of negation. Namely, for a political society to be established as a referential space for sovereign power and as a context of legal relations, another contrasted society that is savage or natural should be negated and declared as inferior. It is notable that the sovereign relation here it is accomplished only after law is applied as command that subjugates the political inferiors to one political superior. The negative contrast helps imposing this approach towards establishing the juridical-political order, without every now and then questioning the sovereign relation and the negative premises of domination exactly in the originating scene. In this spatial and timely sequence, it is necessary to recognize the initial community that for Austin is "savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland" или those which "range in the forests or plains of the North American continent" (Austin 1995: 173, 184). The quest for savage societies that can be outgrown with civilized societies of political superiority does not only recalls ignorant, imperial understanding of juridical and political origins, but shows subjectivization as obliging political operation in the established society and even more shoes how individuals are meant to be subjugated into subjects of law. As Austin poorly explains: "all of the persons who compose it live in the negative state", so, not in "the positive state which is styled a state of subjection" (Austin 1861: 176).

Examining law as myth or the mythological discern of the origin of law brings us to a very important thread to be followed in understanding how law functions and how its spatial and timely consistence is possible. In this part of the argumentation, the interest for the beginnings of the newly established *nomos* and before law being examined as well as *Gesetz*, it is important to indicate that law is considered also as *Macht* since it bears within the principle of mythical positioning (*aller mythischen Rechtsetzung*). In a very abundant text from 1921 that has significantly plunged into understanding the connection between violence-law-justice, *Zur Kritik der Gewalt*, Walter Benjamin among many things analyses law as mythic violence and indicates two very important aspects on the wholeness of legal usage that has not been changed from the very beginnings up until the modern civilized condition: we are talking about fate as uncontested mythic category and secondly, about the clear distinction of means from ends in founding law. Dependent on the question if means and ends are acknowledged as justifying or harmful for the order, Benjamin states that for legal positivism violence is a product of history and is blinded before the absolutism of the end, the end being "rule of law

over the living or mere life" or "[m]ythic violence is bloody power over mere life for its own sake" (Benjamin 1996: 250). So, if law as mythic violence is applied over the domain of life as such, it is almost impossible to hide the violent vitalism of law: "For in the exercise of violence over life and death, more than in any other legal act, the law reaffirms itself" (Benjamin 1996: 242). Violence is sign that something 'rotten' in law is revealed, so continues Benjamin about positive law: "if conscious of its roots, [positive law] will certainly claim to acknowledge and promote the interest of mankind in the person of each individual, this interest i[s] the representation and preservation of an order imposed by fate" (Benjamin 1996: 241). The assess to the legality of violence cannot hold back only to the end of establishing and sustaining law. On the contrary, to keep alive the interest in violent lawmaking or fate-imposed violence coincides with the critique of violence. Namely, it is precisely the critique of violence not only as emphasizing of its negative potential and its denouncement, but as an evaluation and examination that provides itself with the means to appraise violence that Benjamin's text is important for, so not only as revealing analysis of law as mythic violence, but also as enthralling critical and resisting reality (the one of divine law, the elaboration of which at this point would destruct us from the argument). The following aspects of mythic violence as lawmaking – that it sets boundaries, that brings at once guilt and retribution, that it threatens, and is bloody, are proposed by Benjamin with the myth of Niobe. With clear insight about myth and mythic violence as archetypal forms, Benjamin underlines that these forms do not contain the means of the gods, but that it is the mythic violence that affirms their existence and manifestation. In the myth of Niobe, firstly by her ridiculing what is challenged is the fate of conflict and the possibility of law to be remerging so, the conducts of Apollo and Artemis does not only punish Niobe but also reestablish their rule. "Mythic violence in its archetypal form is a mere manifestation of the gods. Not a means to their ends, scarcely a manifestation of their will, but primarily a manifestation of their existence. For the function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, what is to be established as law, but at the moment of instatement does not dismiss violence; rather, this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence but one necessarily and intimately bound to it, under the title of power. Lawmaking is powermaking, assumption of power, and to that extent an immediate manifestation of violence … Power [is] the principle of all mythic lawmaking" (Benjamin 1996: 248).

4. Before the law

With confidence, Benjamin identifies the decisive elements of the origin of the law and the area of its reference, enclosing violence, power and their mythic reckoning and finally, fate and its central protagonist – life itself (*das bloße Leben*). Up until now, the main effort was to allocate some of the elements of the law that in one or another way are hidden or adjusted by legal positivism, which could be clearly noted with the overview of how the origin of law is positioned and why its force keeps the form of subjugation in a spatial and timely continuity. Approaching law as *nomos* not only nourishes the interest about its origin and the primal scenes of establishment and enforceability, but also brings attention to a very important, defining characteristic – the soil or the area of application and the crystal-clear insight into the fact that order assumes a delimited space that is bordered, that has its exteriority and interiority, that includes and excludes and has thresholds that dictate the fate of the individuals either before them being subjected into subjects of law or already as such. The delimiting effect of the order is not only spatial, other aspects also tackle the juridical language that calls upon its subjects and their ability to understand this call that is always selective, always determining of who belongs and who by being admitted has laid its life in the fresh rules of living under the law ie. in the birth of law and society, and whose existence has been at stake in the transfer of the political capacity to act. The transfer of the capacity for political action of the individual subjects is important because it points to an inscribed paradox: at the same time they represent one part of the sovereign relation, they enable it and also they are erased from the possibility of conducting power, while the other part is positioned in power itself as exercise of law or force of law, as a position of authority that if left without material grounding, cannot but be explained in tautological terms, or be explained only as inequality, domination and exclusion. So, for the individual subject who, dependent on the needs of law can be included by laying its fate in the birth of the order, there is not much left. Although it is a parabola and gets away from the seriousness of legal positivism, one of the most descriptive references for this constellation is *Vor dem Gesetz* (1914) by Franz Kafka. It is known that this parabola tells a story of a countryman or a man close to nature, natural man that comes at law's gate and asks to be admitted into the law, but there he meets a doorkeeper that neither lets him in nor expels him out, only announces the dreadful interiority that begins from the threshold on. After many months and years, this doorkeeper pronounces the enigma of the law at the exact moment when it cannot be solved and not because the efforts of countryman ceased but because his strength and life is coming to an end: *No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it*. Nonetheless years and years have passed by, the countryman remains astonished by an imperative that each living being has and strives to reach the law so, with his stoic attempt to be admitted confusingly asks – *Does it happen that for all*

these many years no one else but myself has ever begged for admittance? Between this countryman's question and the answer that will follow from the doorkeeper stands subjectivization. The threshold of the law is also the threshold of the realm of the official, officialdom or space of figures of law, the vast shaping of law into concrete positions and authoritative personages, from the first to the third doorkeeper that is so awfully terrible that cannot be watched to the incarnated Rex. Coming from this parabola, the bright notice that law is completely dependent "only on who is before it-and so prior to it, on who produces it, founds it, authorizes it in an absolute performative" (Derrida 1992: 36), discovers firstly the threshold as an important space of law that determines its interiority and exteriority and secondly, that the possibility to be admitted is always divided. On the one hand, each authoritative figure upright before the law makes of it inaccessible transcendent space whose interiority is equally reserved both for being in power and being terrible (as each doorkeeper after another is described). The threshold that determines the two realities of law affirms that notwithstanding if this leads only to the law or to the space where law is sheltered, we always talk about an appointed space, something that we have already confronted as one of the key preconditions. Moreover, given that the threshold is ascertained by the position of the doorkeeper, whose activity is to keep a lookout, it becomes even clearer that law depends upon who stands before it, "therefore mounts guard *before* by turning his back to it, without facing it, without being "*in front*" *of it,* the sentinel who keeps a lookout over the entrances [and] imposes respect on the visitors" (Derrida 2018: 47). On the other hand, considering the opposed position of the countryman before the law, fixed by the words of the doorkeeper that the admittance to law is possible but not yet or not at this moment, elucidates two things: the life of the countryman is prior to the law, it precedes it, but nonetheless it is not yet admitted in, therefore, life precedes law and the moment after which the countryman starts to waits doesn't concern the continuity of the singular life, but subjectivization, the subjected and subjugated life that reemerges by being let in the interiority of the law, by passing the threshold of the gate, by being included. The countryman that represents singular life is neither under the law nor in the law, but law is interested about is only as a life of the subject of law. By becoming a subject of law, the living one enters in contradiction. "This contradictory auto-interdiction allows the man to act 'freely' with self-determination, although this freedom cancels itself out as a self-imposed interdiction to enter into the law. Before the law, appearing before the law, the man is subject to the law" (Derrida 2018: 52). If appearing before the law as in being admitted is examined the other way around, so appearing as a result of exile, and the threshold of the gate being not an entrance but an exit, even more a failed exit, something else emerges respective to the subject of law. The subject of law is not defined with exit or refuge but with entrance and belonging, meaning that

countless states of suffering and exposure to violence outside the order are not appraised as important or even decisive for law's treatment of subjects that nonetheless being subjugated are in the same refer by theirs mere being to law's force, are abandoned by it. However, not only the entrance or going over the threshold is to be admitted as human capacity, especially when this move could be deadly. Subjectivization by being so close to death means that sometimes life could be destined to death if it is not subjected to this force that signifies its being, names and includes it This means that the act of free choice or free will, that brings life from being nothing more than life to this state of subjectivized life is not free at all, it is rather contradictory if freedom does not span also towards freedom of successful exit from conditions of violence. Franz Kafka's parabola is a plural text, since it has been written in four different versions and published three times during the author's life, meaning that different circumstance and historical events affected the author's experience of rewriting it. As a canalizing notion of the text plurality is the one that explains it as a text about the law as "a story told to make sense of the accident of being the wrong person at the wrong place at the wrong time" (Caygill 2011: 56). The appealing background related to seemingly separate and even general circumstances of writing these four different versions, publishing the parabola either as a short text or as part of the novel *Der Process* (1925) makes the philosophical insights even stronger. For the first time the parabola is published in an independent weekly Jewish Journal *Self-Defence* (*Unabhӛngige judische Wochenschrift Selbstwehr*), where a significant attention is dedicated to unifying the Jewish world, and to other issues important for the Jewish national identity. Apart of the possible individuations of Zionism, it is more interesting to bring attention to the fact that the first writing of the parabola in 1914 coincides with the Decree of the Ministry of the Interior that closed Prague to refugees. So, parting from the assumption that *Vor dem Gesetz* is a 'fable of a failed exit' even exit from the bare, biological even natural condition in which the life of refugees is forsaken, actually the text actualizes to be free to request entering in the legal world coming from a pre-legal one, entering the city from the vastness of the valleys that surround the city's fortress. Howard Caygill in a extraordinary way evokes the autumn in Prague in 1914 when Jewish and other refugees "from the Galician front placed increasing pressure on the resources of the Jewish community to support them", that resulted with a decree closing "the gates of Prague to the men and women from the country" (Caygill 2011: 56). These conditions in which Kafka writes the first version of the parabola clearly recall the material reality in which violence, power and the law are entrenched and their forces are indistinct within the space of the sovereign order and soil being its most crucial proof. It is about the materiality of this vertex that the forbidden territory is always in advance the forbidden law. In 1919, the parabola appears in the collection *Ein Landarzt*, that has been changed many times.

So this interesting parabola we are dealing with now, by the way being declared as the parabola of the 20th century was put right to *Ein altes Blatt* or a story about closing of the palace doors against the nomads. Never minding the different historical occasions in which the text was written four times, what could be firmly noted is that two gross topics characterize it – refuge or exile and non-recognition. The previous makes free choice or free will, altogether with subjecting to the law paradoxical. Law is universal, and the entrance into it or the obstacle to being admitted or included are singular. This contradiction refers to the ongoing contemporary state in which countless singular exists from violence are not being recognized. The lives of those in exile are unworthy if they remain associated only with exiting violence. If a life is not lived as continuation of the birth of the nation, and is not admitted to the officialdom of the law than not only Kafka's parabola it might be declared also as such of the 21st century but it once again witnesses that legal positivism is not neutral, it contradicts its principles and is not interested in affirming the living, even less in guarantying free choice. Under these circumstances, the juridical kernel of the order means that law is in function of either establishing or maintaining order, but not also designating the possibility for free choice and free will that enables singular life to be invested in communal living.

II. Guilt as threshold of the law

1. Michel Foucault's *infra-law*

To use Michel Foucault's admirable studies from the late 60's and 70's when his focus turned to power for a critical analysis of law, and to concentrate on the moment of the turn that takes place after *L'archéologie du savoir* (1969) and *Les mots et les choses* (1966), which records his intention to now focus his research on 'chance, the discontinuous, and materiality', provoke doubt about the enterprise right from the beginning. There is, in fact, a theoretical attempt within sociology of law that objects to using Foucault's genealogical research as a critical perspective on law; what is more, Foucault is mustered as an author who expels law from the analysis of formal and non-formal systems, from corpuses of rules and behaviors, relationships, institutions, concepts, from the life of the subject within a community in general and the subject and the community as such. In the following pages, by using of extensive quotations from Foucault's *oeuvre* on power, I will try to justify the choice of his genealogical enquiries as a background of critical questioning of law and the subject of law. By deliberately provoking a tension, this procedure will closely follow the criticism leveled at Foucault, with regards to his treatment of law and the theoretical status of his claims. Let us begin with the latter and emphasize that Foucault indeed does not claim theoretical status of his engagement with the geological practices, lectures, and activism, so, Foucault does not claim theoretical

status for his writings (*I don't have a theory of power*). It is exactly the methodological rejection of fixed meanings or positing a theory of something, the search for a source and essence, that enables different treatment or different thinking of the law. And it is Foucault's *oeuvre* from the 60's and 70's that enhances the contemporary anti-humanist critique of law and how individuals and relations within its sphere are produced. He will write about that in an essay that undoubtedly marks a line he crosses, leaving behind topics from *L'archéologie* and *Les mots,* and completely dedicates himself to the study of power – namely, his essay *Nietzsche, Genealogy, History* (that first appeared in *Hommage a Jean Hyppolite*, 1971). The reason why Foucault's genealogical enquiries are of use for legal scholarship is his firm refusal to search and discover source (*Ursprung*) and essence, a search that in his words implies that 'essence was fabricated in a piecemeal fashion from alien forms'. In an exemplary book of criticism about the treatment of law in Foucault's writings, we can read the sentence – "Foucault does not have a theory of law. He does not have one because law is never one of his major objects of inquiry" (Hunt et al. 1994: viii). It is correct that Foucault does not have a theory of law, because having a 'theory of something' is not compatible with his genealogical method, furthermore, the way Foucault thinks about law does not ignore its transgressive, restless, changeable and adaptive potentials, and hence, not enclosing the law in a theory of law is not only a methodological decision but a deeper commitment to thinking differently (*penser autrement)* about law and power. Moreover, in this same *Foucault and Law: Towards a Sociology of Law as Governance* (1994), in which Alan Hunt and Gary Wickham assume that law is displaced or acquires an ambiguous role at the expense of Foucault's interest in power (sovereign, disciplinary, governmentality), they're also developing the so-called thesis about the expulsion of law: "it is apparent that the most distinctive features of Foucault's account of the historical emergence of modernity led him to present a view which can be aptly summarized as the expulsion of law from modernity" (Hunt et al. 1994: 56). In any case, the insistence on attaching to law an increasingly subordinate or supporting role within contemporary disciplinary society, cannot define the treatment of law in Foucault's writings – a topic, which will be argued in detail in the following pages. A more close reading of his genealogical enquiries from the 70's makes clear that he is not subordinating the role of law to the political-individualizing power (so, a disciplinary social form of the diagram of power), but quite the contrary: the treatment of law in these genealogical enquiries finally acquires – otherwise ignored by legal scholarship – capacities for transgression, transformation, responsiveness and force which, in fact, is at the same time the only permanent determinant of modern politics, whose continuity has a strong connection with domination in all its forms, including juridical. "This relationship of domination is [f]ixed throughout its history, in rituals, in meticulous

procedures that impose rights and obligations. It establishes marks of its power and engraves memories on things and even within bodies. It makes itself accountable for debts and gives rise to the universe of rules, which is by no means designed to temper violence, but rather to satisfy it" (377). Foucault proceeds with a very clear discursive framework, where law has a place and is precisely set as his continuous interest. An important point before we develop the argument further on is that of violence as a critical platform for the encounter of domination and law. "The law is the calculated pleasure of relentlessness. It is the promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated scenes of violence. Tacit acceptance of the law, far from representing a major moral conversion or a utilitarian calculation that gave rise to the law, are but its result and, in point of fact, its perversion: 'guilt, conscience, and duty had their threshold of emergence in the right to secure obligations; and their inception, like that of any major event on earth, was saturated in blood'" (377).

The only stable moment in Foucault's writing is the vigorous questioning, which often notes the impermanence and personalizing it as a style. By the time he finishes a book, he is invariably asking questions different from those he began with. Such is his turn from the archaeological to the genealogical method, namely from the interests covered in *Archeology* and the *Order* to the study of power (sovereign, disciplinary, governmental) and subjectivization. Perhaps *The Order of Discourse* (*L'Ordre du Discours*, 1970) enables a closer look to a better programmatic statement in the change of Foucault's theoretical apparatus, where archeology is evidently replaced by genealogy, and the conditions of possible knowledge (*savoir*) no longer include only the archeology of knowledge but also the genealogy of power-knowledge nexus. Eric Paras (2006) rightly notes that in this passage Foucault's interest in exclusion as a concept that is congruent with the objects of his analyzes is undoubtedly lost. So, which are then the new subjects of research? As Foucault's explanation itself reveals, they were *societies*: societies imagined as machines, performing 'functions,' carrying out particular 'processes' and 'operations,' generating 'mechanisms of exclusion.' Again, circularly coming back to Foucault's critique of treatment of law, at the same time as a starting point for his different kind of thinking, in the following pages law will not be considered as an exclusion but as a productive force, which moves disciplinary mechanisms and activates the diagram of power, which can transgress and acquire new forms, that either confirm or challenge dominance. This means that in the following pages, law will not be considered as an order (as was the case in the first chapter) but as a norm (*Gesetz*). And instead of its exclusionary potential, we will now examine the productive one. The previous direction for considering law

as a norm is, in fact, explicitly analyzed in various texts from Foucault's *oeuvre*, which are not primarily of interest to legal scholarship. For example, in the first volume of *Histoire de la Sexualité* we can read that: "the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory", as well as "[p]ower acts by laying down the rule: power's hold on sex is maintained through language, or rather through the act of discourse that creates, from the very fact that it is articulated, a rule of law. It speaks, and that is the rule" (Foucault 1978: 83). The thesis around which both Ben Golder and Peter Fitzpatrick (2009) engage in their polemic against the thesis of expulsion of law from Foucault's genealogical research, is scrutinized in a way that is not true that he attaches qualitatively less importance to law in his studies of power and its forms, and consequently the forms of power that mark modernity (disciplinary, biopolitical, governmental) do not usurp the place of law or, more precisely, do not subordinate it to their institutions. Foucault actually describes how law and discipline are interrelated and are deployed jointly in modernity. What can be asserted with certainty is that there exists 'co-existence, hybridization and mutual inter-dependence' of law and norm in Foucault's *oeuvre*, especially in his detailed critical attempt to 'separate, without collapsing techniques of juridical rule' from 'techniques of the norm' as a way of analyzing the role of law in modern societies. Refusing the expulsion of law-thesis seems to connect the dots across Foucault's different periods and texts in a fresh way, and that connection, even if it sounds challenging, yields what might be called a 'radical theory of law'. Golder and Fitzpatrick argue Foucault's radical theory of law in a scrupulous way, distinguishing two main, uneasily but integrally related dimensions in his treatment of law. "The first dimension is the one more persistently remarked upon in his work – a determinate law which expresses a definite content. This is, if you will, law 'on the side of' the norm – a law to be resisted and transgressed" (Golder et al. 2009: 71). The other dimension is the responsive one, which exposes law as a 'law of mutability', which "forms itself through an encounter with its outside, with what lies beyond itself" (Golder et al. 2009: 71). Transgressiveness of law and its capacity to adapt to resistance, on the one hand implies that it can spread unstoppably and cover all domains of life, and, on the other hand, the attempt to respond to what exists outside the boundaries of law, in any case confirms the existence of an externality or an outside towards which law extends. Again, if we return to the controversy surrounding the thesis of the expulsion of law from Foucault's genealogical research, as a deliberate narrative strategy which can help us enter into a brief elaboration of the following key terms: law, power (sovereign, disciplinary, governmental) and subjectivization, we necessarily collide with *Surveiller et punir* (1975), advanced as one of the ur-texts of the

expulsion of law in Foucault's writings, the textual center of power-knowledge, i.e., knowledge formation and its nexus to institutional practices. Golder and Fitzpatrick claim again – with a lot of sense – that not only is it not a question of expelling law, but is rather that law is constitutively attached to a whole range of different entities, bodies of knowledge, or modalities of power. "For example, the assertion of guilt in the 'legal machinery' is made pursuant to a whole 'scientifico-juridical complex'" (Foucault 1995: 296). The statement is also explicitly affirmed by Foucault, when he describes the law as "genealogy of the present scientifico-legal complex from which the power to punish derives its bases, justifications and rules" (Foucault 1995: 23).

Foucault's view is not reduced to treatment of law as a prohibition (*Thou shall not*), nor according to him or for that matter also as described in this text, law is always criminal. Nevertheless, he works on a set of problems that seem to fall under the rule of *nomos*: the consequence of not knowing the law, of not respecting the order of things or not distributing truth that coincides with this rule. The reign of *nomos* or officialdom for Foucault has an exclusionary effect, or more precisely, effect of inclusionary exclusion, given that it is the subjects of law who can acquire the status of *anomos* and vice versa. It is interesting to note that Foucault uses adjectives that have nothing to do with the juridical apparatus when referring to *anomos*, like purity and blindness. "Under the reign of *nomos*, the offence consists in ignoring a law that is there, visible to, and known by everyone, made public in the city and decipherable in the order of nature. The impure is someone who has had his eyes closed to the *nomos*. He is impure because he is *anomos*" (Foucault 2013: 188). This statement in *Will to know*, along with the legal neutrality he introduces through blindness and impurity to replace the fate of the subjects with that of *anomos*, moves him away from criminal law to a less specific point: that there should be truth in the city, because a city without truth is a city under threat, and the truth necessarily creates separations, it uses the principle of separation. The impure from the pure, the blind from those who can perceive the order of things and its truth, are most effectively distinguished precisely in the field of law and the criminalization of subjects, of those who are abandoned by the law, and thus also from the social space of truth, i.e., in the framework of law appearing as unfulfilled exclusions. Wherever *nomos* reigns, that is to say, throughout the space that constitutes the city, 'the criminal is dangerous'. His pollution 'compromises' the order of things and of men.

Here crime is not meant as in the codified sense of the word, but crime as the vicious side of truth or as chaos that threatens the order in the city, stands not only as a legal category,

but also as a subjectivizing one. Law needs purity as much as impurity, because the changing and inconstant status of the subjects of law, the fate of the impure and the pure in the city – all this marks the threshold or access to the legal belonging or perceiving the truth. "[P]urity is the condition for access to the law: for seeing the order of things and for being able to utter the *nomos*. Purity is the condition required to tell of and see the *nomos* as manifestation of order" (Foucault 2013: 88). Since the principle of separation keeps the city safe from threat, of the truth about the order of things or the reign of *nomos*, what maintains the law is the need to distinguish pure from impure. Legal blindness produces externality or exclusion in order to keep the space of law or *nomos* – established and stable. That leads us to the assumption that what is impure is set up as such for the immunizing needs of the law, for a front against the threats that jeopardizes the order. Subjects who are excluded are still absorbed by the law but through the imperative of law to exclude, and to distinguish between the space of order and that of an outside, between those who are pure and those who are criminalized or who become *anomos*. The eclipse of law, or the blinding criminality, does not necessarily coincide with the deontological intention of everyone being included and everyone being pure. The law produces both pure and impure figures, and it justifies impure figures in its domain by criminalizing them (making them illegal), and then this circulation of signifiers maintains protection against threats legitimate: "impurity produces its effects in the space of the *nomos*; impurity must be excluded from the *nomos* and according to the *nomos* itself. It is the law that says it is necessary to exclude; but impurity occurred only because one was already excluded from the nomos due to ignorance or blindness. And if one is blind to the *nomos*, it is because one is impure. [T]o be able to state the law; one must not be impure. But to be pure one must know the law" (Foucault 2013: 88). On closer examination, the purity-innocence and impurity-crime connections are not so legally neutral, bearing in mind that they have their reference in the rituals and legal-religious system of the ancient Greeks. Incorporated into the legal system as a residue is the following premise: the impure cannot be tolerated because it endangers the city and threatens to destabilize it. The impure sinner or criminal is forced into a reality where the places of rituals are not available to him, nor the public space as a place of deliberation: in fact, the entire space of the city becomes inaccessible to him. Central here are those 'out of' and 'excluded from', as they do not refer explicitly to criminal law or to specific violations of the law, but rather to what arises as an effect when a subject due to his impurity or because of that impurity is excluded, abandoned, made *anomos*. What the law uses as a contrast to what could be pure is a signal for a deeper political consequence: that the criminalized subject is not perceived as one that only violates the law, but is marked as one who breaks the social contract as well. "Actually, in the new theory of criminal law I have been talking about, the criminal is someone

who breaks the pact to which he has subscribed and prefers his own interest to the laws governing the society to which he belongs" (Foucault 2003: 92). Then, elsewhere, Foucault complicates the situation furthermore, not giving up the genealogical aspect of criminalization, which through law intervenes in the city, dividing it, so that some groups or some individuals necessarily drop out; because otherwise, the auto-immunizing logic of law and the political viability of the city would remain unsupported. "[If] it is true that it is not the illegalism directly affected by the laws that is most perilous, but immorality, which concerns the body, need, desire, habit, and will, then a whole system of moral conditioning needs to be incorporated into penality" (Foucault 2015: 176). In *Abnormal*, Foucault talks about the so-called dangerous individual, (until then he was systematically researching the fates of social outcasts), and introduces perversion (as an advanced form of impurity) as a connecting point for a number of legal concepts that will more easily detect the 'dangerous', i.e., that can attach 'dangerous' to subjectiveness – reaching the dangerous individual (which will make possible the justification and theoretical foundation of an uninterrupted chain of medico-judicial institutions). With the introduction of the dangerous individual, an irreversible change takes place within the field that regulates law, or better: the field of effects produced by legal regulation. Namely, the crime acquires a nature, the human being who commits a crime is completely defined by the act that the law declares as a crime. "The question now concerns the mechanism and play of interests that could have made the person accused of a crime into a criminal. Therefore, it does not concern the circumstances of the crime or even the subject's intention but the immanent rationality of criminal conduct, its natural intelligibility" (Foucault 2003: 89-90).

Not only does the law exerts its force through criminalization, dispersing its effect in the city, collecting and generating knowledge about the nature of crime and criminals, but its punitive power divides the legal reality of the subject of the law: the dangerous individual is abandoned by the law, remains outside its field, while producing a warning influence back into that field; the subject of the law, whose purity supports the stability of the city maintains its stable position only until the moment when the legal transgression is either neutral or does not reach to still undetermined phenomena. "At the level of the rules governing natural species and distinctions between natural species, the monstrous individual was always associated, if not systematically at least virtually, with a possible criminality" (Foucault 2003: 81). Then he continues, "[t]he aberration of nature was inscribed in the transgression of law, but not the reverse. That is to say, the extremity of crime was not likened to the aberration of nature. Punishment of an involuntary monstrosity was admitted, but not the spontaneous mechanism of a confused, disturbed, and contradictory nature behind crime" (Foucault 2003: 82).

The transgression of the law does not only possess the unconquered territories or phenomena before it spreads itself, and is also not only about an elastic formal framework that contains the old and new institutions of normativization and normalization. Quite to the contrary, it is about a deeper and more internal action, always having life of subjects as its end, even their inner life or self-understanding. In relation to the latter, the effect of the law sounds like this: *causam meam dico*. The form that determines the inner life of the subject of law resembles a judicial process, because one pleads one's own case, one investigates itself. Investigation is necessarily linked to one category that is part of law but also exists outside its field: guilt, which is closely related to the exercise of *potestas* over oneself. "The text says that one exercises a potestas over oneself, that is to say an institutional power. Second, this potestas takes on the appearance of what? Well, of the functions of censor, of the investigating judge: I plead my own cause (…) I make investigations, search through my day, I take the measure again (that is to say I weigh up whether they are good or bad). A sort of judicial splitting: is not conscience becoming a sort of tribunal in which the subject has to become both accused and judge?" (Foucault 2014: 242). In a sense, Foucault declares this judicial overlapping of the inner life of the subject to be inconvenient (especially due to the Roman-formalist logic of the existence of not only a judge and a prosecutor, but also of an accused), and admits that in addition to the functional judicial metaphor a better representation is obtained when this procedure is reviewed as if it was administrative. The inspection and confirmation of the self as one thing or something else, a pure or impure, criminalized or legally justified, takes place on an administrative and almost mandatory level, at which the need for judgment becomes redundant, but at the same time, the ongoing process of self-questioning which seems to conform to time and constantly flows, confronts the subject with: "errores, mistakes of management, of administration. It is less a matter of a judge condemning infractions than of an administrator who has to supervise the faults of management, the mistakes of management, and who, as a result, has to rectify them" (Foucault 2014: 243). As a consequence of this intervention, the procedure through which the inner life of the subject acquires an administrative basis, namely the constant examination and search for mistakes, the maintenance of guilt as a threshold of entry into and exit from the system of law, of the internalization of the legal flow – all of this, together with the punishment, acquires a specific status. It is a matter of rivalry, the inner life of the subject that is now reduced to the excess of the crime is predicated by the excess of the punishment. "The problem of the relationship between crime and punishment was not posed in terms of measure, of a measurable equality or inequality…There had to be a kind of surplus on the side of punishment. This surplus was

terror; the terrorizing character of the punishment. [T]he terror inherent in the punishment had to take up the crime again; the crime had to be somehow presented, represented, actualized, or reactualized in the punishment itself" (Foucault 2003: 83).

The impression one gets is that the law is actually an 'infra-law'. The epistemic-juridical process that repeatedly takes place in the single substrate of law, unique but heterogeneous, refers to a widespread penal mechanism (discovered in the common matrix of the history of penal law). In the systems that regulate human life, in their heart pulsates the legal privilege of the courtroom, which has different forms and scopes, taking into account that it is the courtroom that gives a formal shape to the disciplinary technology of power. If the disciplinary systems in a society are connected to each other in what Foucault calls infra-law, then it can be said that we live in the society of the 'teacher-judge, the doctor-judge, the educator-judge, the social worker-judge'. Why is it important to talk about law as infra-law, especially in terms of the relationship between law and power? First, because the lawfunctions and justifies itself only by this 'perpetual reference to something other than itself', and this is clearly visible from the Middle Ages until now, given that the exercise of power has always been formulated in terms of law. Then, Foucault makes this connection even clearer, despite the fact that it includes three forms of power: sovereign, disciplinary and governmental or the famous triad: "sovereignty as pre-modern form of negative, repressive power [was] progressively overtaken by a new mode of operation, or technology, of power, namely disciplinary power" (Golder et al. 2009: 13); 'anatamo-politics of the human body' (disciplinary power) becomes linked to a 'bio-politics of the population' (bio-power) and their combined aim is to endow and utilize life". The phrase 'law cannot help but be armed' does not refer to the written violence in the text of the law but to the widespread points of imputation, of authority, from the sword to becoming the master of its own truth, the law guarantees its existence by opening towards the invasion of legal norms, changing their nature, from norms to procedures and tactics that relate to the individual and to the population. In that way, "the techniques of discipline and discourses born of discipline are invading right, and [n]ormalizing procedures are increasingly colonizing the procedures of the law" (Golder et al. 2009: 192). Then, "it is not a matter of imposing a law on men, but of the disposition of things, that is to say, of employing tactics rather than laws, or, of as far as possible employing laws as tactics" (quoted in Golder et al. 2009: 34) So, if the state of the Middle Ages is seen as a state of legal justice, and the state of the 15th and 16th centuries as an administrative state, it is necessary to formulate power in different ways, but that does not mean that it should be done in an abrupt termination or replacement of the various forms of power. For example, the governmental state

still functions, using the mechanisms of discipline. As it is emphasized by Golder and Fitzpatrick: "In fact we have a triangle: sovereignty, discipline, and governmental management, which has [life] as its main target and apparatuses of security as its essential mechanism" (quoted in Golder et al. 2009: 33).

Law as infra-law is perhaps best considered through the disciplinary form of power. Foucault to some extent tries to tame the sovereign power which is contained in a 'visible and named individual', turned towards many, nameless individuals – 'effects' or 'targets' of power. He begins to speak of power in its immediate connection, a synaptic connection with bodies, because before subjects become subjects they are bodies. When power changes its trajectory and is not only vertical, from the head of the sovereign to the individual fates of the subjects, when it becomes capillary, it is actually "a particular modality by which political power, power in general, finally reaches the level of bodies and gets a hold on them, taking actions, behavior, habits, and words into account; the way in which power converges below to affect individual bodies themselves, to work on, modify, and direct [the] soft fibers of the brain" (Foucault 2006: 40). Unlike sovereign vertical relationship, disciplinary power does not presuppose dualism or asymmetry, its action coincides with the action, or rather – overtakes the action of the body in real time, "at the point when the virtual is becoming real; disciplinary power always tends to intervene beforehand, before the act itself if possible, and by means of an infra judicial interplay of supervision, rewards, punishments, and pressure" (Foucault 2006: 51). Furthermore, one can detect another difference arising from these two forms of power, which do not die out because a third has arisen, but strengthen and simultaneously spread the knots of imputation and authority, seeing the extreme actualization of those forms of power and the connections which they establish. In the case of the sovereign relationship the most extreme actualization is the war, while in the case of the disciplinary relationship it is punishment, both miniscule and continuous punitive pressure. Regardless of whether the imposed sentence or the continuous punitive pressure – which should be understood more broadly than the formal-legal framework of criminal law – have a formal status of judgment or not, they in any case cast the eternal light on the individual who is both the effect and target of disciplinary power. Light (in the panoptic architecture of power) betrays the individual, makes him accessible, constantly visible, and easy to monitor: visibility is a trap. "The panoptic principle—seeing everything, everyone, all the time—organizes a genetic polarity of time; it proceeds towards a centralized individualization the support and instrument of which is writing; and finally, it involves a punitive and continuous action on potential behavior that, behind the body itself, projects something like a psyche" (Foucault 2006: 52). Writing is not only a record, but also refers to

the text of the law, which in a constant, uninterrupted pangraphic dynamic achieves a relationship with itself through large piles of documents with legal content, records, reports, lawsuits, judgments, complaints etc. The relationship between law and power is much deeper than what claim the advocates of the so-called thesis about the expulsion of law or those who reduce Foucault to an author who can only be interesting for a critical analysis of criminal law. The fact that in the above quote law is defined as the continuous action on potential behavior, reveals the platform on which the forces of law and power come together in their main operation of production, the production of their own subjects. It is about the possibility of supervising each action, which will then be deeply organized, named and transferred as a political or legal capacity (for action). At the threshold of law, on one side is anomie, the external, the excluded, and on the other side is order, the internal and the included, this being perfectly demonstrated by disciplinary power. What happens is what Foucault calls: "reorganization in depth of the relations between somatic singularity, the subject, and the individual… Disciplinary power has this double property of being 'anomizing,' that is to say, always discarding certain individuals, bringing anomie, the irreducible, to light, and always being normalizing, that is to say, inventing ever new recovery systems, always reestablishing the rule" (Foucault 2006: 54). The law with its text cannot successfully carry out this in-depth (re)organization without aligning it with disciplinary power, given that the subject-function is fitted exactly on somatic singularity. "The subject function of disciplinary power is applied and brought to bear on the body, on its actions, place, movements, strength, the moments of its life, and its discourses, on all of this. Disciplinary power is individualizing because it fastens the subject-function to the somatic singularity by means of a system of supervision-writing, or by a system of pangraphic panopticism, which behind the somatic singularity projects, as its extension or as its beginning, a core of virtualities, a psyche, and which further establishes the norm as the principle of division and normalization, as the universal prescription for all individuals constituted in this way" (Foucault 2006: 55). The deep (re)organization that results from the cooperation or secret solidarity between law and (disciplinary) power has the political individual or the political subject and the juridical individual or the subject of law. In relation to the subject of law or the legal individual, from the inclusive side of the threshold of law or the side of order, it is important to note that there is a tendency to empty it of the force that life brings, being vainly defined by individual rights that cannot be limited with power, power is always resisted and its form seem finite, neutral. Thus, if we return to interpretation of law as infra-law, the subject of law cannot reconcile its own abstractness, surrendering life of the body in exchange for abstract individual rights. "[B]eneath this, alongside it, there was the development of a whole disciplinary technology that produced the individual as a historical

reality, as an element of the productive forces, and as an element also of political forces. This individual is a subjected body held in a system of supervision and subjected to procedures of normalization" (Foucault 2006: 57). It is erroneous to assume something which, again, Foucault himself has denied on various occasions – that his study of power and genealogical research are aimed at deriving a theory of power. As it is undoubtedly wrong to accuse Foucault of trying to banish law, at the moment his interest focuses on the power-knowledge nexus. What firmly remains from the abundance of his contribution to the critical examination of legal and social subjectivization, of the functioning of law and the effects it has on the social body, is in any case power – to think power and law differently. The composition of this simple phrase, containes what without which in our current present, it would not be possible to critically observe on the one hand the social disconnection and the open vulnerability of countless vulnerable individuals and groups, and on the other hand, the use and abuse of disciplinary mechanisms (in which power coincides with law). Possibly, any note that attempts to summarize Foucault's contribution, on which this text heavily relies, carries the two terms – power and subjectivization – in bold print. What is sure to be seen on an accelerated historical tape is how the economy of disciplinary mechanisms first show power as ritualistic, occasional and applicable on occasion, and then as productive apparatus of discursive practice. So, permanent application of surveillance and control over bodies (physical power), whose repetition and unavoidability name it as a principle of juridical-political organization of society. "[I]ncreasing the effects of power means making them inevitable in principle, that is to say, detaching them from the arbitrariness of the sovereign and his good will so as to turn them into a sort of absolutely fatal and necessary law, weighing in principle on everyone in the same way" (Foucault 2003: 87). This fatal and necessary law still remains abstract if it is experienced through certain institutional regularities, i.e., without practical or more precisely physical dispositions of power that shape realities and give concrete form to individual and communal life. In that way, if we take into account that power is 'procedure of individualization' and that the individual is only its 'effect', the institutions become comprehensible only when we need to deal with relations of force. Finally, according to Foucault, the human being the law's point of interest is an illusion or a twisted image which is obtained when the body oscillates between the juridical individual and the disciplinary individual. This "juridical individual—ideological instrument of the demand for power—and the disciplinary individual—real instrument of the physical exercise of power—from this oscillation between the power claimed and the power exercised, were born the illusion and the reality of what we call Man" (Foucault 2006: 58).

2. Friedrich Nietzsche's *bad conscience*

Friedrich Nietzsche is important for this project for two reasons: first, he was the first to treat the body in opposition to the philosophical canon and second, the thoroughly discusses guilt as part of a moral conceptual world, as an instrument of that psychical reaction called 'bad conscience', connecting it with a proverb he uses in *Zur Genealogie der Moral* (1887) - *Injury makes one prudent*, namely, as an injury to the human life. It is important to establish at the beginning the circular effectiveness of the relationship between guilt and punishment. As Nietzsche himself emphasizes, the ancient Greeks failed to see the importance of this relationship of misfortune and that is the reason this space was filled by Christianity and law. If we follow the work of Nietzsche, it is difficult to locate the primary source of guilt, that is, where its force makes its first appearance, and at the same time how and when its form is transferred and applied in different historical and merit nomenclatures. Does it all start from the ancient tragedy or from Christianity or from the legal order? The primacy of the source, the *causa prima*, is in fact less important than the effect that guilt has (in relation to punishment) when juxtaposed with taming of life forces in both ancient tragedy and Christianity and the legal order, down to our modern communal living. The effect of the relationship between guilt and punishment is to tame peoples, tame life and to tame the capacity for action. Taming does not refer to a good selection of human qualities that make possible the good life in a community, but rather it makes the human a calculable, regular, necessary individual who, before realizing his function in communal living as a tamed, internalizes this image in himself, and encodes his vital force and potential for action in a regulated and calculated appearance. It would be erroneous to claim with certainty that Nietzsche locates the blame first in the legal order, although in his essay *Guilt, Bad Conscience, and Related Matters* he writes: "It was in *this* sphere then, the sphere of legal obligations, that the moral conceptual world of 'guilt'[had] its origin: its beginnings were, like the beginnings of everything great on earth, soaked in blood thoroughly and for a long time" (Nietzsche 1967: 65). The sphere of legal obligations or the sphere of law is initially not interested in whether its subjects can or cannot commit themselves to the rules of communal living. That sphere activates its space at the same moment which coincides with the moment of taming or the transformation of the subject of law, who is previously an animal that needs to be raised in such a way as to be able to commit, promise and cede its untamed force to the only system which contains the good actions, individually translated into *I will not*. The animal that needs to be trained to promise should ensure its communal future and be one of the parties of the contract, that is, embody its life force in memory and reason. The law in this procedure does not provide comfort or help, but provides

sympathia malvolens, given that precisely in the "rudimentary form of personal legal rights [the] budding sense of exchange, contract, guilt, right, obligation, settlement, first transferred itself to the coarsest and most elementary social complexes[,] together with the custom of comparing, measuring, and calculating power against power" (Nietzsche 1967: 70). So, what the animal trained to promise has to remember, what kind of reason it has to develop? Before answering this question, it is important to emphasize the form of guilt, according to Nietzsche, because as he himself says – it is symptomatic that a moral phenomenon such as guilt (*Schuld*) is first associated with a distinctly material phenomenon, such as debt (*Schulden*). Or, the feeling of guilt, which is used as an instrument to develop a bad conscience within the framework of legal obligations, and does not remain only as a feeling, but becomes a state – a state in which the legal subject finds himself as soon as the force of law coincides with the taming of man. A state such as *in culpa esse* is the most reliable option for fulfilling all those 'I will not's' in regard to which one had given one's promise so as to participate in the advantages of society. As real as the situation between debtor and creditor, given that it is a progressive, self-depleting thought when the debt grows larger, since these forebears never cease, as Nietzsche writes, in their continued existence as powerful spirits. Despite the paradoxical connection of two opposing phenomena, one moralistic and the other materialistic or, the connection between guilt and debt, they were perfectly identical in one point: bad conscience. "The 'bad consciousness,' this most uncanny and most interesting plant of all our earthly vegetation, did *not* grow on this soil; indeed, during the greater part of the past the judges and punishers themselves were *not at all* conscious of dealing with a 'guilty person.' But with an instigator of harm, with an irresponsible piece of fate. And the person upon whom punishment subsequently descended, again like a piece of fate, suffered no inward pain other than that induced by the sudden appearance of something unforeseen, a dreadful natural event, a plunging, crushing rock that one risks" (Nietzsche 1967: 82). Does the animal that can promise develop a bad conscience when it starts to remember? What it needs to promise to secure its future in communal living? How does he start to remember? It seems that bad consciousness immediately takes possession of the memory and the reason of the tamed man. Guilt as a state or bad conscience possessed by the tamed man, the one that is capable of being legally bound or to be the subject of the law, does not necessarily arise from the mistakes and from breaking the rules – they are more widespread than the proportional respect for the rules and legality, which ensure the communal future. It is not even as much the case about the transfer that takes place between the vital force of man and the force of law, in that continuous disproportion in the collision of force with force. Here we are talking about the misfortune that contains or effects of this relationship between guilt and punishment. The inner life of the

subject of law does not take place around *I ought not to have done that*, but around the inward pain about which Nietzsche talks a lot more, bearing misfortune by punishment, from a punishment witnessed when an enemy is defeated. If punishment is only a legal, morally neutral procedure, then the misfortune that accompanies it will not be defined in such profound, fateful terms, far from the mere regulations of the penal code. Punishment, in the sphere of law, is not necessarily related to the consequence of transgression, it is also intended to mark the enemies, because what exceeds the legal sphere in the case of punishment no longer refers to the legal order. Furthermore, considering that punishment never uniforms neither the crimes nor those who commit the crimes, i.e., how accidental the meaning of punishment is and how one and same procedure can be employed, interpreted, adapted to ends that differ fundamentally – it is very easy to see that the effect of punishment does not contain only the valence of disobeying the law, but also of marking those who do not answer to the reason, the memory of the tamed subject of the law, those who fall away from the established legal obligations, and those who are a threat for the juridical future. The linguistic signification of the animal that weren't trained to promise makes things a lot clearer. "The lawbreaker is above all a 'breaker', a breaker of his contract and his word *with the whole* in respect to all the benefits and comforts of communal life of which he has hitherto had a share" (Nietzsche 1967: 71). Nietzsche continues – "[t]he wrath of the disappointed creditor, the community, throws him back again into the savage and outlaw state against which he has hitherto been protected…Punishment at this level of civilization is simply a copy, a *mimus,* of the normal attitude toward a hated, disarmed, prostrated enemy, who has lost not only every right and protection, but all hope of quarter as men" (Nietzsche 1967: 71). Any entity that can be part of the contract can also break the contract, but the entity that will break the contract is an enemy or already being an enemy breaks the contract, when it enters the transfer of the law, in the sphere of comparison, calculation and measure of power against power. Law needs a type of punishment that is neither morally neutral nor merely legal, but one that spreads into the inner life of those who are punished, those whose bodies are not equipped with the memory and reason of a tamed human; and those who are already tamed, once who witness, and who, through the misfortune of punishment, manage to maintain the status of the promise, in a state *of culpa esse* and with a bad conscience.

Nietzsche is right when he writes that in every great punishment there is so much that is festive. The law celebrates its supposed completeness through every punishment that locates the offender of the law (of the contract), it celebrates the strength of its interiority and the

obligations it produces to immunize itself from the space of its exteriority. Both punishment and the punished, among other things, serve the right to successfully delimit the space of its power in that constant clash of force against force. Both the punishment and the punished also serve law, they manage to distinguishing the tamed from the untamed, the animals that have the right to promise from the animals that lack memory and reason, the subjects of law from enemies. “Punishment as the making of a memory, whether for him who suffers the punishment-so-called improvement-or for those who witness its execution” (Nietzsche 1967: 81). Returning to the initial dilemma about the source of guilt, it is perhaps important to note that no other system has succeeded in reconciling misfortune or suffering with punishment, something that continues to prevail in the political theology of modern life precisely than the system of law. Guilty before God, guilty before the law. The Christian proportion in relation to misfortune, suffering and punishment (the greater the misfortune, the greater the guilt; misfortune ensuing from an instance of guilt is great, the greatness of the guilt itself), even when we do not see them, points us to precisely what follows. “Only with Christianity did everything become punishment, well-deserved punishment; it makes the sufferer's imagination also suffer so that with every malady he also feels morally reprehensible and depraved” (Nietzsche 2011: 59). The judgmental tone of the previous statement and the placement of guilt within the framework of Christianity, which then transcends to the sphere of legal obligations and law itself, however, narrows the field of influence and does not reveal all the aspects of how religious connection between myth and law works. Namely, it is not only about punishment as a reference point. In fact, in the *Old Testament*, when we talk about guilt or sin as its ontology, we mostly talk about the reward for the offered flesh in which sin is embedded and which can become the home of the presence of God only through the reward, that is, the merit. *The Proverbs* clearly advocate happiness and obedience in a proportional line, which in turn cannot be drawn in the absence of God who has laid Law in its place, which guarantees his presence even when God is absent. The obedient person is happy and has found life, so he has obtained ‘the favor of God’. Between sin and reward, the value of peoples is established, and the problem of such a matching of religion with morality does not explain only their internal meaning systems, but extends to life, and whether he will be rewarded with worth, and whether he will deserve to be worthy one to be lived or not. Returning again to *The Proverbs*, it becomes clear how the sphere of law and religion are in fact the only possibility of recapturing or restoring lost value, where sin has occurred and reduced the value of life itself: *For he who finds me finds life; he will obtain the favor of Yahweh*. (8:35). If the inmost existence of the human being is taken as a pledge, not only as one who can be distinguished as a human who does what is good or does what is bad, i.e., who satisfies or does not satisfy the

favor of God, the question is not only about overlapping of life with the already pre-overlapped systems of morality and religion, but about the status of a person and the feature of merit. We will see further in the text that merit, related to the status of a person, is an extremely dangerous formula for counting the subjects of the law. "Merit is the imprint of the just act; it is, we might say, a modification of the good will; it is an increase in the worth of a man, issuing from the worth of his acts. A second idea is added, in the notion of merit, to the idea of an increase in personal worth, namely, its connection to the idea of 'reward'" (Ricoeur 1969: 129).

The law in the place of God, as the reservoir of worth and merit of human life, does not therefore exist in a neutral dimension, open to all who respect it; rather, the law is a blessing that is demanded by those who obey, even as an opportunity for obedience (*mitzvoth*) and the possibility for acquiring merit (*zachuth*). The happiness of the submissive and the obedient that results from the favor of God, in any case and again as an echo of the taming that Nietzsche talks about, has not so much to do with good will but with servile will. And it is not only about respecting the law or the faith in God, that is, about moving life into the moral-religious framework of happiness, but about a clear assumption of what should be done, and be good, in order to respond to the subjectivizing call of God and the law, to give up the flesh to the commandment perfection, simply, as if man could be justified by the juridical-theological canon? The word of Paul of Tarsus solves this enigma, speaking in his Letters about what Paul Ricoeur will call the 'infernal machine'. For example, in the Letter to the Galatians he says: *As many as are the works of the law are under a curse. For it is written: Cursed is everyone that continueth not in all things which are written in the book of the law to do them*. (Gal. 3:10), then in the Letter to the Romans*: It was sin which, in order, that it might appear sin, made use of a good thing to procure death for me, in order that sin might exert all its sinful power through the commandment* (7:13), also in: *But I am a being of flesh, sold into the power of sin* (7:14). In Paul's Letters, it is important to trace first the logic of the powerlessness of life as such, human life before God and the law, secondly a division which, in advocating, the canon necessarily implies not only a division, but that which remains excluded, external, impure, unreasonable, and unholy is necessarily equated with guilt. As for example in this exemplary address, again, to the Romans: *It is then, I myself who by reason serve a law of God, and by the flesh a law of sin* (7:25). The perfection of the commandment and the theological-juridical canon reduces the life of human, even before it embodies it as a field of intervention, precisely because the set of perfect commandments already implies in advance the human's inability to satisfy them in their entirety. The arrangement of the forces between human and the canon is such that submitting to the law is nothing if it is not whole and complete, and the perfection of

the commandments is always limitless; the arrangement is such for its elusiveness to maintain the balance of forces and the necessary opposition of worthy versus unworthy life forms. The powerlessness of human against the perfection of the commandment would not exist without the circular movement which, in fact, makes sin the source of law. As Paul reveals in his address to the Galatians: [it] *was added because of transgresion ... far from giving life ... give*[s] *knowledge of sin*. Ricoeur even thinks that Paul – long before Nietzsche – discloses this infernal machine that overlaps law and sin in their deadly circularity, having precisely the law as a threshold in this vicious circle, already described in a letter to the Romans: *The law entered in, that sin might abound…* (5:20). Right on the threshold of law, we also encounter the hell of sin, given that not only does the process that brings justice seem endless, but law itself does not move away from the place of finally revived justice or a life that is fully justified by law. In this sense, what Ricoeur calls curse of the law can easily explain the setting in which the set of perfect commandments does not exist in the name of justice, and a life justified entirely by law; rather, it is about the loyal cogs in the infernal machine, whose lives are meritorious or not, rewarded to respond to the blessing of law or not, bearers of a servile will or not, depending entirely on the sign of sin and the inner guilt as its ontology. "Guilt, we have said, is the completed internalization of sin. With guilt, 'conscience' is born; a responsible agent appears, to face the prophetic call and its demand for holiness. But with the factor of 'conscience' man the measure likewise comes into being; the realism of sin, measured by the eye of God, is absorbed into the phenomenalism of the guilty conscience, which is the measure of itself. If this analysis is brought to the light of the Pauline experience of justification by the works of law, it appears that the promotion of guilt – with its acute sense of individual responsibility, its taste for degrees and nuances in imputation, its moral tact – is at the same time the advent of self-righteousness and the curse attached thereto. Simultaneously, the experience of scrupulousness itself undergoes a radical re-interpretation: that in it which had not been felt as fault, becomes fault; the attempt to reduce sin by observance of sin. That is the real meaning of the curse of law" (Ricoeur 1969: 143).

The effect of law and Christianity alike, from aspect of the ethical-legal and ethical-religious corpus, which later acquires penal rationality within the framework of modern law, can be perceived more clearly with the transformation of the personal pronoun *I* into *Thou*. Undoubtedly, the transition takes place by means of guilt as the interiority of sin or transgression. Obedience and respect for the commandment and striving to match the way of individual life with its perfection, i.e., with the expediency of the laws, in one part produces consciousness or a conscious subject whose orientation point is guilt, and it is no accident that

there is a correspondence between moral awareness and self-perception in psychological and reflective sense. Respect for the canon, in that sense, necessarily makes of consciousness a measure of the evil that an individual can cause from a vulnerable position in life. But the fact that the religious text in some places suggests that the law will dwell in the depths of their beings, or that it will be inscribed in their hearts, that is, the internalization of the canon and its transgression towards life, where it is lived, in the flesh, and consciousness does not stop only with production of servile consciousness. But, from the individual who follows the speech of the commandment and laws under the pressure of punishment, he forms the author of acts. The capacity for action is at stake, because the individual cannot produce any actions, i.e., the actions that will confirm the individual's capacity for action should satisfy the canon, i.e. *I* should be transformed into *Thou*. And only thus is confirmed the involvement of the individual in the community, and his life as worthy of the intervention of the word of the commandment and the laws. So, his moral existence as a place of coincidence with the existence of the order itself. The moral, tamed and conscious individual coincides with the "subjective pole of responsibility that can no longer be only one who answers the sanction, one who is responsible in an elementary sense of a subject of punishment, but a center of decision, an author of acts" (Ricoeur 1969: 103).

The ethical-legal or rather moral-legal experience of the individual transformed into a subject of law, through the transformation of the *I* into *Thou*, is not based on itself, and cannot guarantee its duration if an important basis of law is not ensured, which simultaneously springs from both the individual and the order. It is about the internal dialectic of guilt, as the center of the legal subject, but also as the center of the legal order. Namely, it is precisely through guilt that the law maintains the sovereign relationship with the individual, which is not explicitly or strictly punished, but is an imprint of what was explained above as a double plateau: the capacity for action is completely consumed by the effort to reach the perfection of the commandment as opposed to the mere slipping away of material experience before the infallible way of life, contained in the commandment. The capacity for action is determined not only by the desire to follow the letter of the commandment or the legality of the norm but from the position of disciplined action, an action that should always ensure the birth of order and the validity of the rules that will maintain it. That's mostly visible, according to Ricoeur, in the metaphor of the courtroom, because "it invades all registers of the consciousness of guilt; but before being a metaphor of the moral consciousness, the tribunal is a real institution of the city, and this institution was the channel by which the religious consciousness of sin was reformed" (Ricoeur 1969: 108). Furthermore, the internal dialectic of guilt does not have two

points that linearly and serenely join in the effect of law, that is, the point of the singular *I* in the sovereign moral-legal *Thou*. The law, within the framework of that dialectic, should organize and hermetically close the rules of life in something that can be called a complete juridization of the law itself. The concepts that should be completely identified with the effects of law such as judgment, court, sanction – if we want to highlight those that are both the most terrifying and the least ambiguous in relation to the individual life that stands upright against the order, are signs of the complete juridization of law, which now becomes a legal text with a certain sanctioning grammar. The sin is in past tense, but guilt remains as the threshold of the experience of being before the law, while law acquires another defining function, that of supreme pedagogy. It is not by accident, as Ricoeur ingeniously observes, that the notions that testify to the full juridization of law itself (those that were already set aside as judgment, court, sanction) "embrace both the public domain of penal justice and the privative domain of moral consciousness" (Ricoeur 1969: 144).

3. Walter Benjamin's *fate*

Nietzsche does not place guilt within a single system of meanings, neither solely within the framework of Christianity, nor solely within the framework of law. Both, law and Christianity, put life at the center of their systems, that is, life is not only considered a vital function but it presumably has a higher expediency – for law and Christianity, life is sacred. Life's sanctity does not emanate its inviolability, especially when it comes to the technological principles of the legal order. What materializes legal text is precisely the opposite of life and its vulnerability, it's the evident experience of suffering. Therefore, life's sanctity does not refer to what is experienced, but to the field in which the intervention takes place. It corresponds to the guaranteed space in which all dynamics should refer back to the inviolability of the order, and its maintenance. Law cannot achieve this effect without mediation. The purpose of the established law is to maintain itself, and this can only be achieved through mediation, that is, a sacred life where a transfer of the effects of power takes place in the everyday lives and fates of the subjects of the law. In a similar line of thought as Nietzsche, matching his views on the misfortune that can takeover the fate of those who break the contract or any legal obligations, and even supporting the mythological ground of law, Walter Benjamin exposes the scheme behind the sanctity of life and why life itself is not sacred, its sacredness is rather derived from it being the 'marked bearer of guilt'. Despite the mystical tone of this statement, and the association of violence with law, and law with life, the total effect on the fate of the subject of

law in the case of an error that cannot be administered in any way except as a juridical violation of the social contract or the established, mythical law, sets the framework in which guilt not only carries the sign of life (and vice versa), but it is also diffused as a guardian of the order. If we twist this logic, towards guilt being a part of life itself that anticipates life to be a field of intervention, then law not only needs life, but it also calls for it to be sacrificed, become sacred and testify to the inviolability of an order that is being maintained. The mythical ground of this order that needs maintenance is 'bloody power over mere life for its own sake'. The unknowing nature of the threat that can destabilize the maintenance of law calls forth a different sphere from the legal one, that is, the sphere of fate, and this can be observed through the effect of punishment, whose procedural dimension does not include its full effect; rather, the effect of punishment can be best seen through the fateful changes in the subject's life.

As in the previous pages, it is important not to lose sight of guilt not being treated as a raw element of criminal law, that is, in a procedural sense, nor law only as a system of clear rules and sanctions. The ontology of law does not fall apart when good rules get a positivist translation, it extends and carries within itself the primary violence that establishes the order, the same violence that later, so as to maintain the order, changes its shape and punishes. As an answer to this process, guilt offers precisely life as a field where the effect of the punishment will be able to shape the course of life and the tragic fate of the subjects of the law, while at the same time maintaining the order. What Nietzsche sensed earlier, and where Benjamin boldly established a necessary link with the law actually emphasizes the theological possibility of an order, religious and juridical. With turning our attention to fate, a phenomenon that is not named as such in the text of the law, helps in this direction, because of the inextricable connection between guilt and error in terms of fateful consequences is *sine qua non* or "guilt and atonement does not measure justly in the balance, but mixes indiscriminately" (Benjamin 1996: 203). This existential spread of the effect of guilt, which eludes nomotechnics (the prescription of legal regulations), except as a witty strategy in Benjamin's critique of violence contained in the legal order, is important, not only in terms of it then being reduced to criminal law and a procedural nature of error, but also because it helps understand 1) the very positioning of the guilt (which precedes or is contained within the law), as well as 2) the subject of law's capacity for action. If the assumption of a link between action and guilt, 'conjoined' in the subject of law's unique destiny, is placed in Heidegger's key: the authentic ability-to-be-yourself (*Selbstseinkönnen*), which involves the ability-to-be-wholly (*Ganzseinkönnen*), and the ability-to-be-guiltily (*Schuldigseinkönnen*), life cannot be sacred (it is only guilt that remains sacred in it), but rather condemned. What does law have to do with this? "Law

condemns not to punishment but to guilt. Fate is the guilt context of the living. . . It is not therefore really man who has a fate; rather, the subject of fate is indeterminable. The judge can perceive fate wherever he pleases; with every judgment he must blindly dictate fate. It is never man but only the life in him that it strikes-the part involved in natural guilt and misfortune by virtue of semblance" (Benjamin 1996: 204). In this framework, the great achievement of law that ensures its inviolability and maintenance, far more consistently than any other rival system, is that law succeeds in putting in text the existential guilt that precedes the order and also insert it in the regulations that normalize and standardize life, that tame man and his capacity for action, and as an effect the law produces the subject of law as long as the subject's life is considered necessarily sacred or it has already been successfully sacrificed. Law as a text that constantly rewrites itself, in an echo of what Foucault previously called 'infra-law' or even more ingeniously 'pangraphic panopticism', not only successfully places guilt as pre-legalistic or existential, but it constantly monitors it and tends to fix it. In this way, law succeeds in binding its subjects to an active and unwavering submission, monitoring everything under the sign of a possible error-punishment-guilt-misfortune, centralizing the potential life forms into one unique shape of an individual, a subject of law, allowing the disciplinary power to fasten the subject-function to the somatic singularity by means of a system of supervision-writing, or, a text that is always rewritten. "Which behind the somatic singularity projects, as its extension or as its beginning, a core of virtualities, a psyche, and which further establishes the norm as the principle of division and normalizationn, as the universal prescription for all individuals constituted in this way" (Foucault 2006: 55). Benjamin too, clearly adheres to the assumption that a binding force of this type is a force that maintains the order of law, whose sole intrinsic concepts are misfortune and guilt, and within which there is no conceivable path of liberation (for insofar as something is fate, it is misfortune and guilt), that is, this order cannot be religious. "Another sphere must therefore be sought in which misfortune and guilt alone carry weight, a balance on which bliss and innocence are found too light and float upward. This balance is the scale of law. The laws of fate-misfortune and guilt-are elevated by law to measures of the person it would be false to assume that only guilt is present in a legal context; it is demonstrable that all legal guilt is nothing other than misfortune" (Benjamin 1996: 203). What Benjamin brings upfront is the effect on human life that guilt has, something of which is not interested when utilizing guilt to design seemingly technical but really essential bond with punishment. It is not in laws' order of things to be concerned with something so spontaneous as fate is perceived to be, nonetheless penal guilt that enslaves the already existing guilt bared as a mark of life itself enables the law to condemn not by punishment but by guilt. As Benjamin puts it – fate is the 'guilt context of the living'.

4. Carl Schmitt's intriguing doctoral thesis: on guilt being *inner-subjective*

As a sign of bad conscience or a groove in the infernal machine, in modern life, the category of guilt resonates mostly with the legal system, given that the main orientation is always aimed at guiding human behavior and at the constant emphasis on the close connection between law and human life. This does not make guilt a legal category, that is, in addition to being moral, religious, legal, guilt cannot be exclusively categorized; and from law's point of view, guilt cannot be a legal category, because in that way we imply its insertion within the framework of the law and its prescribed functionality in the system of law. There are more reasons why guilt cannot be exclusively considered a single category, i.e., a legal one among others. Thus, in the following pages, we should not expect to successfully position guilt, on the contrary, having done a genealogical and philosophical research, it is important to observe how the various systems seeking to guide human behavior harness the effect of guilt, with a single goal – control over the human capacity for action. The main question that arises and which should lead to other questions could be – How does the burden of guilt take the most radical experience of a man with the law bringing it and pushing it towards visibility and intelligibility? The famous Danish jurist Alf Ross proposes a simple but comprehensive understanding of the burden of guilt: "[t]he burden of guilt is simply fear of the punitive vengeance of the authority's power" (Ross 1975: 9). With this brief definition of the burden of guilt, Ross undoubtedly links guilt with transgression in human behavior, as well as the internal connection of guilt with punishment, in addition, this oppressing burden goes beyond the rules that lay down what is ought to be done rightfully or wrong, so it makes guilt less or not at all tangible. In respect to the law's precise proscribing system, guilt is not something tangible as punishment might be. If we consider the claim that guilt is not a legal category but, at the same time, it absorbs within itself the most radical experience of a man with the law, it is necessary to observe two important things: what remains of the unbearable burden of guilt, when we withdraw law from the experience of carrying such burden, and whether it is even possible for law to intervene in the domain of life at all without causing that deep anguish that is the result of the legal formula that arithmetically contains both guilt and punishment. According to Ross, to bear the burden and to feel the guilt means to be exposed not only to the fear of punishment, but also to the 'torment of conscience', and at this point the weight loses sight of the point of orientation of law's authority and power, but "[it] consists of the soul's anguish at feeling itself separated

from God and in conflict with itself and its fellows" (Ross 1975:10). The final cited togetherness, the community that the feeling of guilt can separate you from, is clearly reflected in the echo of the social contract that we have has been mentioned numerous times so far. The effect of that separation or the breach of the social contract that overlaps with the transgression (the violation of the law) is once again a reminder that the law uses guilt to mark the harmful elements in society, those that can break the contract and those that the rest should be immunized from. The real problem, however, is not linear, as the law anticipates guilt and aligns it with human life even before a potential breach of contract can take place. In the modern conditions of communal living, all lives do not have the same value, and the unrecognized value of the lives of many individuals and groups becomes a stronghold of danger and threat to the contract. In one way or another, this observation of the difference in value of people's lives invokes the logic of the sacrificial crisis. Namely, the sacrifice of life in the name of order and its maintenance has some ritual overtones but can be easily found in both religious texts and in the political reading of the law regarding the different strategies of dealing with political enemies and antagonized individuals and groups. One relevant author and an inevitable reference in the discussions on the presence of violence in the order, is René Girard and his mimetic theory of the sacrificial crisis. Here, his work is important because he correctly perceives sovereign juridical power as a "modern substitute for sacrifice as it has the monopoly of violence, which retains its transcendent character" (Stimilli 2019: 83). But Girard does not see guilt as part of the law, he does not place it inside its system (as a modern substitute for ritual sacrifice) and does not add the legal adjective to the categorization of guilt. Rather, he considers guilt 'coessential' to legal power. For example, this is how Girard summarizes the dangers to the community, and their solution within the framework of the sacrificial crisis: "[a]ll the dangers, real and imaginary, that threaten the community are sub-sumed in the most terrible danger that can confront a society: the sacrificial crisis. The rite is therefore a repetition of the original, spontaneous 'lynching' that restored order in the community by reestablishing, around the figure of the surrogate victim, that sentiment of social accord that had been destroyed in the onslaught of reciprocal violence" (Girard 1979: 94-95). This is where the evident admixture that brings ritual and law closer together stems from. It refers to the sacrifice of life or, in a less dramatic and more formalistic way, to the fate of the victim and to the way it can be tragically changed with the introduction of guilt into a person's life and self-understanding. At this point, the actual situation and the possible transgression of the laws are irrelevant, because the victim is not necessarily a sinner or a criminal. "In the judicial system, the culprit can take the place of the innocent victim of the sacrifice precisely because those who have the power to inflict punishment—the judge, the court, and ultimately the state— are

in an asymmetric position over those who are punished" (Girard 1979: 82).

The conflict with God, or the singular divine voice translated into the sole juridical language of the authority of *ius dicere*, evokes the main politico-theological determinant of the western world: the commandment. The power of the commandment which is then translated into the power of the law is, namely, a power that not only imposes rules to respect and to submit the subject's life to, but also rules that can be broken and transgressed. It is this binding power that Paul addresses in his Letters. He translates the resistance to it into the time of justice or in the case when justice is already there, before punishment takes its place. The commandment, or the order of the rules, in a double manner clamps down on the opposing force, that is, the life of man as a force, in such a way that not only does it recognize in that force a capacity for action, but it also immediately attaches to that capacity the ever-present possibility of punishment and rebuke. Law is not about merely following the rules, but it pertains more to the state of exposure to punishment, and justice does not coincide with the fear of punishment. According to Paul, justice is located outside the law, and outside the future time of the pending punishment, and a step away from the broken law, thus, the transgression itself is an opportunity for justice, justice for the law and a compensation of the capacity for action by maintaining the order. The very order of laws, therefore, necessarily revives the transgression. It inspires the material experience of life in the abstract perfection of the rules, in their violation and immediately after, in the punishment - all at once. From the standpoint of the laws, justice works with the grammar of the future tense. Even Judgment Day is a day to come and is set in a time that is not yet present. In contrast, Paul suggests that justice must be nearby, in the time of the 'now' (*ho nyn kairos*), operative at the current moment. The impression one gets is that man becomes a 'slave to sin' or to the broken law, so the inheritance of Adam who is only a man and his specificity is that he has the nature of a man, is summed up in the following way: "the only reason Adam the man can disobey is that since his creation he is ruled by a commandment", and according to the Bible "there is only disobedience where there is a commandment" (Stimilli 2017: 56). The takeaway point from this biblical story is that man is not oriented towards the abundance of action, and that the freedom that gives name to action is not freedom but a limitation, because disobedience and transgression of the order's rules, or what the order sets as a potential danger to its sustainability, are the space where human nature is primarily focused. Therefore, under the anthropological sign of Adam, to the order of God and law, man "appears to be naturally inclined to transgress the law, [to be] in conflict with it, and thus fundamentally dangerous, wicked, and sinful..." (Stimilli 2017: 56).

"In Western history, thanks to this biblical tale, human nature became marked, irretrievably, by its relation to an original commandment. Adam's disobedience shows that a changed relation to the law can bear consequences that touch upon the being of man. Adam's transgression of divine command gives rise to a substantial transformation of not only the status, condition, and being in the world of the transgressor, but also of his nature" (Stimilli 2017: 56).

Regarding guilt, it can be said that human life is introduced into the order of law by marking its fate as the very fact of living, and labeling the capacity for action as the *causa* of human life. This means that life is *in causa*, or in other words, it can be called into question in the order of law, given that the action is consistent with the potential transgression, and the translation of sin as 'missing the mark' or 'making a false step', turns life into a bearer of guilt, making it culpable and thus open to juridization of the state that expands the meaning of culpable to sanctioned by punishment. In the eyes of the law, the action that human life is capable of, is an action as long as it can be sanctioned. In his book *Karman* (2017), the famous Italian philosopher Giorgio Agamben devotes scholarly attention to the concept of guilt. Referring to the action whose capacity the law uses to call into question human life or challenge fate, he uses the term *Crimen*, "that is to say, the form that human action assumes when it is imputed and called into question [in causa] in the order of responsibility and law" (Agamben 2018: 25). Starting from what the law formalizes within the framework of criminal law, which boils down to an interest in the capacity for action, i.e., to the fact that the sanction determines the crime as the center of legal positivism, Agamben points out that "no fact exists that is illicit or criminal in itself, which is to say, independently of the sanction that foresees it and punishes it", citing the pure theory of law developed by Hans Kelsen: "There is no *evil in itself*, but only *prohibited evil*. This is only the consequence of the principle, generally recognized in criminal law: *nullum crimen sine lege, nulla poena sine lege*" (Agamben 2018: 21). In this sense, the center of law cannot remain unnoticed, considering that any fact testifying to some action is not juridically foreseen or calculated, and is not even named or determined as good or bad, without the sanction distributing the entire web of meaning between action, guilt and punishment. This means that the sanction or the punishment that sanctions, is not interested in the subject of the law in the sense of affirmatively confirming his capacity for action, but the law immunizes itself from that capacity, seeks to subjugate it and put it in a system of rules that have no other reference point except for the consequences following the subjective responsibility. Legal positivism encapsulates this logic, justifying it through negation and

anthropological pessimism, but the stakes are higher. Law is in an extensive search for the acts that emit different forms of life. It wants to include or exclude them, regulate or abandon them, so it requires that the two important and above all non-legal categories such as *causa* and *culpa* coexist with the central legal nucleus or the penalty that sanctions. Recalling the valuable research of Yan Thomas, Agamben emphasizes that the term *causa* indicates a certain situation, "an affair [*cosa*]—in itself non-juridical—at the moment in which it is included in the sphere of the law" (Agamben 2018: 5), moreover the situation that witnesses of one who acted.

We are more interested in guilt, and what it can contribute or attribute to the legal sphere, where it introduces the subject of law by way of consequence. In the legal vocabulary, despite the fact that positive law does not hold this view as simple: guilt does not signify responsibility, but its 'limitation'. What Ross only offers a glimpse of above, regarding the relevant position of guilt in relation to law, is crucial at this point: guilt is not (only) a legal category, it does not spring from the center of law, it can even be said that law craves its effect and tries to align its central nucleus with it. Despite becoming part of the legal vocabulary with the criminal law, and despite the religious heritage establishing its meaning within the legal system, that is, the sin gives way to the offense, guilt remains close to, inside and outside the law, at the same time. However, the best explanation for guilt's position from which it spreads its effect is that guilt is the threshold of the law. Certain subjective behaviors, pushed over this threshold, establish the subject as culpable or "*in culpa esse*; *obnoxius*, culpable, does not designate the one who has caused the crime but, according to the originally locative meaning of the preposition *ob*, the one who stands in *culpa*. We are dealing with a fatal threshold, because it leads into a region where our actions and our gestures lose all innocence and are subjected to an alien power: punishment or pain [*pena*], which means both the price to be paid and a suffering for which we cannot give ourselves a reason. How this could happen, how a human mind could have conceived the idea that its actions could render it culpable—this self-accusation, which seems so commonplace and taken for granted, is the enigma with which humanity must still come to terms" (Agamben 2018: 6). Agamben maintains a coherent line of argument around the position of guilt in relation to law, and how law uses its effect, while at the same time keeping in mind what he calls the hidden solidarity between two concepts or between two phenomena. Such an archaeological approach helps him cite from the relevant legal sources that clarify the Roman legal system, to establish a clear connection between guilt and punishment. In fact, from law's standpoint, guilt cannot exist in any different way unless it is related to punishment in an unwavering continuity. This colonizing logic of law or in general of juridical-political theology, in relation to guilt, is more than evident in the well-

known legal maxim *nulla poena sine iudicio* or no punishment without judgment. The first impression is that this is a technical principle of the judicial effectuation of law, but we have to highlight that the punishment here has high valence. Namely, the punishment contains within itself – the guilt or the verdict of guilt, thus, the technical contact between the law and the simple friction from the court benches immediately covers the burden of guilt or as Benjamin simply puts it: "law condemns not to punishment but to guilt" and "misfortune and guilt are elevated by law to measures of the person" where from guilt becomes a context of the living (Benjamin 1996: 204, 203). One of the leading authorities in the field of Roman law, Yan Thomas, whose explanations can be found in Agamben's work, shows that the sanction is not only a consequence of irresponsible behaviour, i.e., the law cannot be established as a valid system of rules unless the sanction is an integral part of the norm. They are positioned in a certain conditional proposition, so that the enabling of the transgression is not as dependent on the subject, his capacity for action or responsibility, and the laws of force are not abstractly binding, they are not drawn from the reservoir of relationships, interdependence and the common, but they are dependent on the possibility of crime. As Thomas points out, this possibility of crime is in some way inevitably integrated into the law, in a tacit agreement surrounding the terms of it. In fact, things become more exciting if we switch up this legal maxim so it reads as no judgment without punishment, when the absence of legal expediency actually implies the absence of punishment, and even the absence of fault. Agamben calls attention to the fact that in the formulation of the relevant ancient laws, fault is not only unregulated, but the law is limited to the sanction, which not unburdened by the juridical logic of the order, but it contains the basic operation of the law, and that is to create a connection between the action and the legal consequence, and for that, the penalty is more important than the crime, contrarily to articulating the subject's freedom. "In reality, we are dealing with a strengthening of the bond that ties agents to their action[.] The connection between action and agent, which was originally defined in an exclusively factual way, is now founded in a principle inherent in the subject, which constitutes the subject as culpable. That means that fault has been displaced from the action to the subject" (Agamben 2018: 9-10).

Toward the end of these philosophical meditations on guilt and its position in relation to law, we will once again use an admixture of Ross' concept – soul's anguish. The law does not have access to the internal life of the subject, i.e., the external circumstances which are the only material environment where the offense or crime and what is subsequently sanctioned take place, and in general the space of punishment is within the domain of the law, but despite all that, the law is interested in the internal circumstances in which the penalty is carried out. It

seems that for the punishing state (*Schuldzurechnung*) it is exactly within the internal circumstances where an actual punishing thing can be found. The law does not see what remains hidden in the soul. This is precisely what Carl Schmitt, one of the most controversial and simultaneously very influential jurists, takes as a starting point in his theory. His doctoral thesis titled *Über Schuld und Schuldarten* defended at the University of Strasbourg precisely dealt with the meta-legal (*meta gesetzlich*) nature of the guilt. In 1910, Schmitt published his dissertation, but during his working life, he rarely returned to the otherwise extremely relevant dilemmas about the effect of guilt on the internal process of the subject. In his dissertation, in a clear manner Schmitt writes about the essential operation of the law: "[t]he law sees the essential in the crime, that for which it makes its accusation, in a certain kind of process in the soul" (Schmitt 1910: 29). The repeated mention of the soul here, to quote the interesting young doctoral student, aims at highlighting guilt as *inner-subjective* or as an inner spiritual movement, an internal process for the subject (*innersubjektives*). According to Schmitt, for the law to be effectuated, the subject who shoulders the burden of guilt should be able to materialize his experience in the external circumstances "stepping out into the external world is an essential precondition of punishment" (Schmitt 1910: 31) and more importantly, this does not refer to a fixed form of being that is prescribed by law and prepared for the soul, but to the *operari* or for the operability of the law that continuously brings closer the external world of phenomena that can be sanctioned to the internal processes of the subject. "What appears externally, we do not judge according to its appearance, but according to the inner spiritual movement from which it sprouted" (Schmitt 1910: 30). If the norm alike the punishment, since the punishment remains the orienting centre of the law, are established in the world of the order, outside, in the space of exposure and connections, then, that space for the law is not enough. The effect caused by its apparatus has to break through the limitation of the skin and access the inner processes and the self-experience. For this to be achieved guilt needs to be a gravitational point that pulls the subjects into the domain of law, lowering and grounding firmly onto the order – life itself.

5. Critical Criminology

In 1997, in his lecture in Toronto, Michel Foucault talks about the so-called dangerous individual. Using the central turning point of modern criminology, Foucault now highlights the criminal, in addition to the elements of criminal law such as punishment and punishable act or

committed crime, as addresses law's intention through criminology to single out the so-called dangerous elements in the social body as a juridico-political metaphor. Focusing on 'medico-legal criminality' and the 'juridico-moral' principle, Foucault explains how the modern system of sanctions abandons or rather expands its interest, which now exceeds the crime or the committed act, and is based on what one *is*, taking shape as such in the social body. Law's interest in the law-breaker and the bearer of guilt, the individual that affirms the tautological need of the law to immunize itself from the space of relations and to intervene in organizing individual and collective life, could not be established within the social body unless it determines a so-called anthropology of the criminal human. Human existence reduced to a subject of law cannot be a sufficient transformation (like the transformation of the life forces into forces of the order), from point of self-sustainability and self-referentiality of the law and the part of the sanctions (penal practice) that opt for more rationality. In order to get closer to the social reality, and for it to acquire the shape of rules and sanctions, the law necessarily singles out dangerous elements within the social body. It allocates them in such a way that the formalistic framework of 'the penal machine' is no longer working only in name of the normative life and the responsible parties, but it requires a supplementary material, that is, a confession and an intimate internalization of the crime which coincides with the answer to the question – Who am I? As Foucault explains, modern criminology (from the 19th century onwards) by using the most obvious situation of legal interpellation as it happens in a courtroom, the interest in the criminal human does not stop at establishing facts and circumstances of violating the law and committing the crime, nor the imposing of the sanction is determined in the courtroom. Instead, the interest of the law is directed towards a perpetrator, as the one who has the key to his action, the key that is contained in the confession, memory and inner self-negation for which the law now calls. The formal framework of punishment and sanction – the force of law and subject's rationalized responsibility – is not completely intrinsic to social reality. In order for the logic of the sanction to sufficiently sink in, we need a dangerous element: "today, the crime tends to be no more than the event which signals the existence of a dangerous element" (Foucault 1978: 2). The effect of the dangerous element has two directions. The first direction works from the inside of law towards the outside, that is, from the machine of normatization and sanction towards social reality, thus repeating the points of reference in life and in the community while at the same time it immunizes itself from forces that circulate in social reality. It takes one's existences and ways of life to create danger, a danger that must be legally named and placed within the framework of criminal law and which should be extended into social reality through identities of certain individuals and groups. As for the second direction, the dangerous element that matches the crime, i.e. the law violation,

with the identity marker of the individual or the group has the effect of punishment internalization, which in a legal sense is a sanction, and in the social sense - exclusion. That means that the bearer of the danger is simultaneously the bearer of guilt, a guilt that even before becoming criminal is already identifiable, existential and within the intimate self-knowledge. The discourse of memory, confession and speech of lived experience inhabits the negative hail of law. Since, for law to be self-maintaining, there must be danger, embodied in the intimate existence of subjects whose lives are emptied of value and they fill the anthropology of the criminal human. The problem arises when the danger starts to be identified with individuals and groups, with their way of life, and when a different identity lends itself to the formation of the the danger's identity. The committed crime or the act of violating the law as one of the two important elements of the criminal law, together with the sanction as a legal consequence, in this scheme of juridical-political allocation of danger, may lose its determination capacity. Simply put, the crime and the punishment are no longer important to danger. For danger, it is only the perpetrator whose existence is already dangerous that is still important. Hence, the act or the commission of a crime may even be absent, it may not even happen, and it may not materialize penal presumption. For this presumption to remain valid, even in absence of a crime, allocating and treating danger is still necessary. In this scheme, the singular existence of some individuals and groups, juridically-politically marked as dangerous, is under attack, and the order in which relationships take place and which contains the social reality is not a place of belonging. "Well, just as one can determine civil liability without establishing fault, but solely by estimating the risk created and against which it is necessary to build up a defense (although it can never be eliminated), in the same way, one can render an individual responsible under law without having to determine whether he was acting freely and therefore whether there was fault, but rather by linking the act committed to the risk of criminality which his very personality constitutes. He is responsible since by his very existence he is a creator of risk, even if he is not at fault, since he has not of his own free will chosen evil rather than good. The purpose of the sanction will therefore not be to punish a legal subject who has voluntarily broken the law; its role will be to reduce as much as possible – either by elimination, or by exclusion or by various restrictions, or by therapeutic measures – the risk of criminality represented by the individual in question" (Foucault 1978: 16).

The shift of the interest from the act of violating the law, the commission of a crime or the danger in general, towards a subject who is capable of action, and at the same time also determined as the bearer of danger by the juridical-political machine is an expression of modern criminology, as we have already pointed it out. However, earlier, during the Enlightenment

period, this interest was already considered crucial by some of the most influential thinkers. For example, Cesare Beccaria introduced a major change by criticizing the arbitrariness of the criminal law, its practices of torture and the death penalty, that is, he advocated for a positivist legality and for the prohibition of retroactivity (as founding benefits, then, for modern criminology), as well as separation of law from theology and morality. However, the author of *Dei delitti e delle pene* (1774), continues to see criminal law as a platform for the sustainability of the social contract, in which individuals can respond to this task only through organization and discipline, located in separate institutions that would function as a benchmark for the individual will. However, the contracting party of the social contract consisted of a human being who is endowed with free will, able to make the 'wrong' choices, sanctioned as such by criminal law is under the constant pressure to exchange and support what the other contracting party, the sovereign entity, needs. The negative assumption about this first contracting party or the individual who needs to be regenerated through criminal law, thus becomes fixated as the subject of the law, is correct and from it derives the value of the second contracting party and its supremacy to emit security and happiness. This initial assumption about the first contracting party makes things complicated on two levels: differing inequality continues to maintain the vertical sovereign relationship, and the individual bears the burden of negativity, as a threat to security and to what Beccaria calls – 'damage brought to the nation'. The following passages from *On Crimes and Punishments* clearly show the principle of force that, according to Beccaria, allows criminal law to become a platform for the social contract. "For there is no enlightened man who does not love the public, clear, and useful compacts that guarantee the common security, comparing the small portion of useless freedom that he has sacrificed with the sum of the freedoms sacrificed by others who, without the laws, could become conspirators against him" (Beccaria 195: 105); and "[it] was also necessary to protect it from the private usurpations of each individual, who is always seeking to extract from the repository not only his own due but also the portions that are owing to others. What were wanted were sufficiently tangible motives to prevent the despotic spirit of every man from resubmerging society's laws into the ancient chaos. These tangible motives are the punishments enacted against lawbreakers" (Beccaria 1995: 9). From these criminally enlightened overtones of what would later become modern criminology, several problematic points can be singled out, such as the description of volition or free will, then the negative presumption of usurpation of power by the individual in a situation in which power has already been usurped by the sovereign position, finally, the social contract reinforces the vertical axis on which the sovereign relationship takes place, but at the expense of alienation at the foot of the sovereign position, breaking up the relationality between individuals for whom the assumption of mutual relationships is that of a

war of all between all and of mutual conspirators. For the sake of keeping this brief and maintaining the focus on the main argument, these problematic points will not be reviewed separately. But, through an insight from Beccaria on the dangerous individuals or dangerous classes, we will return to the fact that both criminal law and the social contract, i.e. the entire juridical-political machine, very often lays down its justification by singling out bearers of danger, excluding and including in the order those who cause the intervention of the law in the name of defending the social order and its effects. In his famous book, Beccaria redirects his research from the action to the author, from the 'damage brought to the nation' to "the observation that such damage will much more likely be brought by individuals belonging in certain social strata than in others" (Beccaria 1995: 35). Apart from the fact that the main goal of the Enlightenment is, in fact, the transformation of individuals through educational and penal institutions, that is, the preservation of civil liberties through the benefit of punishment, it is important to note that the interest in the danger embodied in individuals and groups has a clear historical trajectory, whose effects are also present in the modern understanding of the juridical-political machinery: who should punish whom and in the name of what. Although it seems that whenever criminal law is discussed, we always talk about ensuring safe living in a community, that is, how the system of sanctions can mark the orientation points for democratic societies, the genealogical examination of punishment and discipline (sublimated into strictly prescribed rules and sanctioned behavior) reveals another potential of criminal law, which acquires an anthropological value, as soon as the law as a text needs to name, to determine identities, and not just to prescribe. If name or identity recognition is implied in the discourse that punishes, then this is not simply a dry determination of fact, injury and process. Critical criminology, from this angle, appeals that criminal law can be a political filter for the two main political operations of modernity: inclusion and exclusion, and political allocation of enemies. The sharpness of these theses can upset the general acceptability of law, given that some of its positivist declared principles are precisely neutrality and equality of all before the law. At the same time, the historical overview as well as the contemporary populist challenges for the societies in which we live, give way to an analytical space, where the theses of criminal law for enemies, enemy penology, legal violence, penal populism can be examined; these theses are mainly exhausted through the way that the prominent Italian jurist Luigi Ferrajoli presents the imperative of security in the societies in which we live – illusory, because under the surface of that formalistic juridical political operation, according to him, is hidden: "the ideology of exclusion that criminalizes the poor, the marginalized and more horrifically – the different ones such as the foreigner, the Muslim, illegal migrants exactly under the sign of a racist anthropology of inequality" (Ferrajoli 2008). This mutation of criminal law, mixed with the

political allocation of enemies who will maintain the negative principle of the political, with eternally fixed enemies against whom positive law and positive political values will be maintained, leads to positioning of fear at the center of common living, to the immunization of social relationships and the reduction of social consensus to social control. Critical legal studies responded appropriately to the peak of earlier social change after the fall of the Twin Towers on 9/11 in New York, when under the heading of the fight against terrorism, sanction and surveillance seemed to be subtly but firmly embedded in each other with exclusion and hostility forever. However, the mutation of criminal law or the deformation of the "collective imaginary about deviant phenomena and about the very meaning of criminal law", that is, the creation of "a potential enemy, so [for example] the migrant (if he has a different skin color, even better!), Roma, Muslims are referred to as possible delinquents, dangerous subjects, enemies that suspicion exposes to demands for persecution and repression" (Ferrajoli 2008) has a material history, which precedes the political shift after September 11, 2001, and the figure of the migrant or the stranger bears the burden of that history. Law's great secret that has been unraveled throughout the history of modern migration in America and Europe is that, rather than it being a reservoir of freedoms and rights that make life more equal and fairer for all, law is dependent on the control and processing of the deviant phenomena. Deviant phenomena in this regard is related to the modern postulate of administered life in sovereign units, that is fear. Fear shapes danger and law being container of this danger means that within its space of intervention, the law searches for material realities that will back up what is to be feared of. Taken the figure of the foreigner but also existences of marginal and abject individuals and groups such as queers, homeless, mentally ill, vagrants or addicts, what is to be noted is that there is nothing more material than the body. The law strips down the status of a subject to those who are reduced to threatening bodies. The visibility of bodies makes sure the presence of threat, since bodies without further juridical mediation are seen as an impure attempt to occupy the spaces we consider to be our own, especially when their 'odours, postures, gestures, ways of moving, dressing', in all of living are different than those we associate with the norm or the normal. As the responsible director of one of the most prominent journals for critical criminology *Studi sulla Questione Criminale*, Tamar Pitch denotes the mode of justification for migrants arriving on Italian shored being locked up in temporary detention centers prior to expulsion through use of immunitarian metaphors: "after perilous journeys on small boats (when they arrive alive, that is), [it] is first and foremost as bodies that they are dealt with and viewed when filmed for television newscasts. The police, but also medical personnel, whatever their intentions, appear intent on marking them as dangerous bodies, different from 'us', potential bearers of physical, social and cultural 'deviance'" (Pitch 1995: 65. So, nothing more

than human in which form the foreigner appears in the society is a body, life itself or mere life perceived by the law either as outlaw, since it comes outside law's frontier and the territory of its application (nation-state) or as potential threat to its inside. Law draws life within its terrain by claiming its possible dangerous capacity, and subjects it to a form suitable to the juridical-political order, makes of it a subject of law or a political individual, whose subjectivity is immunized or abandons it by refusing this form of life as not worthy enough. Including by exclusion in this sense means that the law draws within its inside every and each form of life, even the outcasts, since exactly their existence and the threat they represent is the negative reflection of law's positivism. Law will always remain needy for threatening bodies only because otherwise its effectivity will have to reinvent its main reference other than fear.

The answer to the question of how to incorporate large masses of newcomers in the midst of the society, breaks down social control contained in law, scattering out the power to prescribe *NO* and the power to propose acceptable behaviors, on which depends the inclusion of subjects of law and belonging to the wider community. "What is often today expressed through the rhetoric of "social *exclusion*" was therefore, first and foremost, "social *inclusion*," whether by choice or by force – very similar to the way in which, at the dawn of modernity, both "deserving" and "undeserving" poor would be institutionalized in basically the same "workhouses," but the former as a form of relief and reward for their willingness to be included, and the latter as a form of punishment for their unwillingness to be included" (Melossi 2008: 20). From this thread, in an exemplary study *Carcere e fabbrica* (1977) from the field of critical criminology, Dario Melossi and Massimo Pavarini investigate the interdependence of two institutions – the factory and the prison. As Melossi points out, there is a stable historiographical insight into the association of mobility with danger, since the time of the barbarians in the ancient *polis*. The capacity for action in the human being, following on from this, in no other situation of harnessing forces is more present and proven as much as in mobility. If this formula in which movement and danger really have a historical trajectory, as is proven by Melossi in several of his books, then it is not difficult to come to the conclusion that the search for dangerous individuals or dangerous classes, with success staring at the law and the social body ends by naming or identifying the foreigner, whose main distinguishing feature is exactly – movement. The second characteristic of the foreigner is his lack of property, he or she is without possessions and therefore cannot participate in the exchange with society and law, they have no share in the social circulation that would allow them to form a recognizable base of action, there is no material basis for their involvement on the one hand, and on the other hand there is no material evidence of their inclusion that supports the order.

The rationalization of the civil status is dependent on the possession, and the state of 'nothing more than human' is not sufficient for the subjectivization of singular life into a subject of law, belonging to the wider community. According to Melossi, for example, there is not much difference between early *Dutch workhouses* and Jeremy Bentham's *Panopticon*, given that they are institutions for the rationalization of people and things, postulated on discipline, supervision and sanction, and aimed at the goal that is contained within the social contract: always rebirthing and maintaining order. "They were devised for propertyless men and women deemed unworthy and unable to be a party to the social contract[,] they were intended to transform the members of the "dangerous classes" into fully rational subjects who would at least understand themselves as owners of their own labor, able to dispose of it in the form of a labor contract. The State was also seen as the benefi ciary of such institutions, insofar as a "reformed" individual was able to enter the civil state and leave his or her own private state of nature" (Melossi 2008: 18-19).

The figure of the foreigner has a dual function in the challenge to the order it represents, by being different from the dominant mass and the difference it embodies as such, it is associated with danger. Danger, then, splits into suspicion and guilt. The stranger is at fault for being a stranger and the inner discomfort of this position crosses the limitations of the skin, it works in two directions, both towards the inner self-experience of the foreigner, the intimate self-negation that the social body extorts from him or her, and inwards in the social body itself, in which the need for sacrificial crisis and the allocation of suitable enemies operates, maintaining order. Suspicion surrounding the difference of the stranger is aligned with material deviant phenomena, prescribed by criminal law and thus society's habit of discriminating is rationalized, even questioning the value of the life that is coming, crossing national borders and demanding to be recognized. "The stranger suffer[s] from a double level of guilt, for his strangeness and for his deviance, already implicit and wholly predictable in his being..." - a state recognized by law, in this case, through its political function of antagonizing society, that is, not as a neutral regulation but as a means of persecution or law as legal violence, whose effect "is to transform migrants into 'outlaws' in the face of the 'stigma' that is inscribed onto them" (Melossi 2015: 25, 39). Melossi examines some of these theses through the case of migration in Italy and how the laws that regulate migration have a criminogenic effect, i.e. how the laws paradoxically orient migrants to reach legal status through illegality. "Because the annual entry quota has been transformed de facto into an amnesty for the people already in Italy, due to an unrealistic system of matching supply and demand for labor, Italian

immigration laws produce ‘institutionalized irregularity’. Foreigners enter illegally, find a job in the underground economy and then try to ‘fix the papers’ once in Italy. They use illegality – to the point of committing crimes – in order to become legal. Migrants implement strategies to overcome their precarious condition[,] they understand that the achievement of legal status is attractive because at least it means being safe from deportation… Looking for a way to legality – Ferraris concludes (2009) – they reveal the essential features of the Italian way of life. Furthermore, in the research work of Giuseppe Campesi on detention centers (2015) and Giulia Fabini on the interaction between migrants and the police (forthcoming), a common element emerging is the emphasis on the modalities of (illegal) inclusion and incorporation much more than those of exclusion, as it would appear in much ‘criminology of mobility’” (Melossi 2015: 53).

6. Personhood and the principle of separation of human existence

The preceding philosophical and biopolitical enquiry that positioned Friedrich Nietzsche, Walter Benjamin and Carl Schmitt and their perspectives on the category of guilt and the effects it has on inner life, among Michel Foucault’s genealogical endeavor and Italian critical criminology aiming to demonstrate the condition of life marked as bearer of guilt or as dangerous individual, aspires for two things. Firstly, the body and its capacity to act precede law. The domain of life imbricated with the domain of action is used by the law in a manner that it insists on overlapping the previous with its domain of intervention. Once the domain of law is established, the further thrive of law is not establishing an equal, linear, and inclusive apparatus that arranges relations, controls practices, and emanates knowledge-as-truth by using the stable network of disciplinary institutions. The capacity for action and the force associated with life itself, here forth, are target of the law in its establishing. Though, and here we tackle the second thing previously mentioned, the law does not maintain itself in the same fashion as it constitutes it. In its constitutive phase, law aims to totalize the absorption of life, so that can monitor, control and regulate it and avoid disorders on the one hand, and on the other to found clear signifying and epistemological positions that will serve solidly the norm and the overall system of rules proscribing what is legally and morally approved. This arrangement would be impossible without difference and inequality. Since law encodes difference in inequality, the different individuals and groups are thus fixated into identities of inequality, and in forms of life that matter less or not at all, making them discriminated subjects. The existence of those that are different and other than what the law proscribes as normal and legal, mediated through

negation, the law reaffirms its power to organize singular and communal living, all along including the excluded or unequally treated ones only as a printout of its positivism, as reflection of its own force contrary to threat and danger. Nonetheless danger is associated with something that comes from outside or beyond law's territory, it is however encapsulated also in the interiority of law, forming a limes for those whose identities are perceived as threatening or dangerous. Meaning that those that remain excluded and different are inhabiting the limit or the margin, they themselves being this limit of what does it mean to be law's subject. Legal ideology or overall ideology is an ideology for the category of the subject and his functioning. So, the subject is the destination for ideology, suited as material image of the relationship of individuals to their real conditions of existence. If we continue with the thesis that ideology interpelates individuals as subjects it is clear that what previously was implied as duplicity in founding and maintaining the law, now is to be translated as duplicity or ambiguity of the term subject. In the ordinary use of the term, *subject* in fact means: (1) a free subjectivity, a center of initiatives, author of and responsible for its actions; (2) a subjected being, who submits to a higher authority, and is therefore stripped of all freedom except that of freely accepting his submission. So to say, "the individual is interpellated as a (free) subject in order that he shall submit freely to the commandments of the [Law], i.e. in order that he shall (freely) accept his subjection" (Althusser 1971: 182). The subject of law being drawn in its interiority and reduced to a vital transfer of the norm or simply to a disciplined body, that is organically recognized by the juridical apparatus, does not accord with subjectivity. On the contrary, subjectivity is sacrificed in the name of the subject of law, it is left beside since what is at stake is the subjected existence guided by the force of authority not life itself. For the subject to be a subject of law in a way abandons itself or turns around from its subjectivity. This turning around from the theoretical scene Louis Althusser writes about is caused by the law or the rising legal ideology that hails the subject. Legal ideology acts or functions in such a way that it 'recruits' subjects among the individuals (it recruits them all), or 'transforms' the individuals into subjects (it transforms them all). Legal ideology or the interpellation of subjects, of individuals into subjects, as Althusser explains in his famous essay *Idéologie et appareils idéologiques d'État* (1970), is most conveniently represented in the most commonplace police hailing: *Hey, you there!* When this hail takes place in public space, what is promptly expected is turning around of the face of the subject towards (the face of?) authority that makes the call, by exposing vulnerably its existence before this condemning and firm voice. Althusser does not mistake in commenting that with this mere 180 physical conversion one becomes a subject. The constitutive elements we can discern from this theoretical scene are exactly the physical exposure and a flexion of a body that up until this very moment is recognized only as a body,

without any political or juridical attributes that are to be gained only with answering to this hail, that was 'really' addressed to him, and that it was really him who was hailed. In short, the political and juridical attributes that are contained in the interpellating hail are being exchanged with a body who's turning around to the voice of authority makes him a subject. This scene does not pretend to explicate the complicated relation of bodies or subjectivities with power, moreover it's simple placement cannot describe entirely the particular fates of the subjects of law or of those whose bodies have not recognized the address in this hail, even though their death could be outskirt with it. The contemporary translation of this hail is racialized. Additionally, this scene is not neutral. Turning around to this voice of authority *Hey, you there!* necesarely generates 'guilt feelings' that converse the body more effectively. If this authoritative voice of the law is such that addresses, turning towards it cannot be done if by addressing the effect of conscience and the task to answer are not immediately effectuated. When a very specific subject understands that really he or she are addressed, it is not a sign that only conscience or speech are generated but more importantly, it aligns itself with the law or with law's hail is entering in law's grammar, by being able to use personal pronounce or self-ascription. Namely, the answer *Here I am* is possible only through appropriation of guilt, so by overlapping the guilty feelings with self-ascription. It seems that a subject becomes a subject only after it accepts guilt, meaning that submission to the law is already feeling guilty. The status of a subject of law is possible with self-attribution of guilt, without which there is not an *I* that answers to the interpellating hail. Activating conscience as one of the basic juridical denominators of human nature means that conscience is the attribute to the body, that justifies it. Though, another attribute that remains on an ontological level is guilt nested in a body that submits to the law. Whenever an answer to the interpellating hail is rather to be given, or every time we submit to the law means that guilt is anticipated. It is exactly guilt that is addressed in us with this hail, otherwise it would remain an unrecognizable voice that lacks to connect the body with the subject of the law. "This means that prior to any possibility of a critical understanding of the l aw is an openness or vulnerability to the law" (Butler 1997: 108), since the first association that law has for the body is that it represents force that can transgress. The transformed appearance of the body into a subject of law or the societal suiting of the body is to be done via guilty embrace of the law; guilt 'guarantees' the intervention of the law and, hence, the continuation of the subject's existence. The echo of the policeman hailing is to be heard also in religious nominations, that constitute the faithful member of a congregate only after confessing its sins, by letting go its life in the faith of God. Undoubtedly, there is an overlapping of legal and religious ideology despite their particular interpellation of their subjects. Bearing in mind that the repeated intrusion in the domain of life is to set rule over it,

demonstrating that "guilt and conscience operate implicitly in relation to an ideological demand, an animating reprimand, in the account of subject formation" (Butler 1997: 113). This means that what religion (Christianity in particular) and the law secure as belonging is not neutral, but pressingly accompanied by a possible contrary outcome, that of condemnation. Guilt is not only an ontological pattern for the subject of law or the function that law borrows and positions it in the center of its system, close to sanction, but is what burdens the conscience or makes it bad conscience. This 180 degree turning around towards the policeman is in the same time turning against ourselves. Further on, the theological fantasy that law has when aims to absorb all life forces of its subjects, subjecting them to its authority, actually determines the condition for further existence of this body-subject. And these determined conditions coincide with bad conscience and self-negation, or turning against itself when being pressed by exclusion, condemn and non-belonging. "What are the conditions under which our very sense of linguistic survival depends upon our willingness to turn back upon ourselves, that is, in which attaining recognizable being requires self-negation, requires existing as a self-negating being in order to attain and preserve a status as 'being' at all? In a Nietzschean vein, such a slave morality may be predicated upon the sober calculation that it is better to 'be' enslaved in such a way than not to 'be' at all" (Butler 1997: 130).

The figure of the migrant or the coming foreigner that reminds us that modernity is actually an history of disciplining of bodies, even a history that dissolves bodies as the very consequence of their intense discipling, presents the policeman hailing as embodying and racializing. The body of the migrant is addressed as threat once it puts foot on law's territory that in the time being of its foundation, this body has not been calculated as taking part. The threatening bodies of the migrants "are to be avoided, segregated, regulated and the threats they carry with them prevented" (Pitch 1995: 60). Their appearance is perceived as 'inevitable and impossible to get rid of', and is marked as 'difference'. This difference, once again, is racializing. When elaborating Melossi's significant insights on criminalizing migratory fluxes, it was underlined that migrants are associated with double guilt, and in this case the interpellating hail has a certain continuation – *Hey! You are not from here!* As thoroughly denotes Donatella Di Cesare in her book *Stranieri residenti* (2017) – "Even before whoever is questioned can reply, the recognition is there already: 'you're not from here!' These apparently banal words conceal a condemnation which nails the foreigner to an irredeemable negativity" (Di Cesare 2020: 106). Attempting to immunize its territory, law first addresses the threatening bodies and immediately afterwards does not impregnate them in the juridical reality of the new territory, but attributes to them only the guilt feelings. By immunizing its territory from bodies

that bear a threatening difference and actually from life itself as bearer of guilt, law shapes the nexus between difference and inequality. The territory of the law or more precisely – order establishes a continuous comportment towards migration, it perceives it as latent crime, so those whose capacity for action is expressed in mobility will always be judged on the basis of that previous aggravating fact. From this perspective, in our contemporary times migration is considered both as a crime 'unto itself' and a 'source of criminality', here from 'guilt and punishment' double up. "The immigrant thus becomes the potential criminal, the underhand fraudster, the implicit terrorist, the hidden enemy. There is no place in the nation for this sinister phantasm, who is always-already subject to prejudice (also in the sense of already having been judged), destined to inexistence, awaiting an even minimal recognition, a label, a stamp, a designation" (Di Cesare 2020: 110). Things get complicated in spite of the immunizing stand of the law towards migrants, since it reduces them to threatening bodies impossible to cut off from the established juridical reality, since they are not to be cut off but purified. The purification of the space of being means that personhood or legality for that matter is gained once the body is pure. Purity implies that the body is also flesh – following the Christian logic – given that the source of sin or error is located in the flesh, and the exclusive possibility for salvation of the being is purifying it from the contaminating flesh. If the Christian argument about the flesh being synonym to the completeness of the human individual makes a continuous sense with legal interpellation of individuals into subjects, firstly we have to figure out how law reduces even disables the flesh-body. As according to Christianity as well to the law, the flesh is source of sin and the material site of transgression, the only way out is that of purification and sanction. The perspective on flesh and its living and desiring being, that constitutes the singular existence of each human being, is that it has to be repressed. Guilt then becomes what pulsates as life in the flesh, something of which the individual human being by being live and desiring takes responsibility even when law and Christianity automatically want to make this responsibility a guilty feeling. So, guilt makes of the flesh-body the primary point of imputation, both for the law and Christianity. After all, for flesh to live on must gain the status of a person. "The person – a carnal body, living organism subjected to life and death, equipped with intimate tendencies that qualitatively differ it from everything else – is an individualizing dispositive" (Godani 2021: 173). Our flesh-body being mediated by the law and disciplining technologies, is not a space of a pulse that touches the vast infinity of the cosmos. This outcome is due to the continuous effect of the dispositif of the person that from the time of Roman formalism up to modern history of subjectivization, of freedom does not make 'a certain act' but persecutes the fact that "in act resides the determining cause of each singular person (this decisive nucleus that occidental culture institutes among will, action and

guilt)" (Godani 2021: 175). The topic of personhood and status is duly imposed since the person is the decisive vector of modern interpretation of the law. The figure of the migrant, in these terms, helps us to bring to sense the juridical occupation of the political and life itself altogether with its organic order or *cosmos basileus*. Entering in this part on personhood, it is important to underline the meaning of subjetivization or being subjected *to*, so disciplining of bodies in the following words: the body becomes space for the norm, the norm internalizes itself in the body in a way that becomes physical exactly throughout the subject's body. As Judith Butler brilliantly writes about considering the prisoner as the exemplary subject shaped by power or the prison for that matter as the power's utter edifice: [s]ubjection is, literally, the *making* of a subject, the principle of regulation according to which a subject is formulated or produced. Such subjection is a kind of power that not only unilaterally *acts on* a given individual as a form of domination, but also *activates* or forms the subject. Hence, subjection is neither simply the domination of a subject nor its production, but designates a certain kind of restriction *in* production, a restriction without which the production of the subject cannot take place, a restriction through which that production takes place" (Butler 1997: 84). Rather than restriction, a better term to use would be separation. Subjection is possible via separation and what critique on personhood tackles is how the tradition of personalism makes ever continuant the power that separates and subjugates human beings. The status of person legally separates life from itself, making it disposable and terrain for decisions, and by fixating its status what seems united in human life is now separated in human beings from citizens, existence of the body from juridically and politically qualified existence.

By underlining the concept of person as the best candidate for the juridical, political, economic and social battles of our time, Roberto Esposito begins his outstanding study on personhood *Terza persona* (2007) with this calling *Death to personalism. long live the person*! Separation as principle that implies the status of a person comes as decisive for the modern notion of juridical-political order, since it enables in a continuous way political negation and law's exclusionary feature. If this principle was previously presented via allocating danger in society and separating those that are marginal, different and unequally treated as dangerous individuals and groups from the subjects of law, now separation regards the solemn center of being, of the juridical and political individual. Since, maybe what really is dangerous is the solemn concept of the individual taken that this idea of the individual, breaded or prefabricated for power's purposes during the entire modern period is granted with "the possibility to export danger out of ourselves" (Rovatti Aldo 2016: 194). Yet again, there is no record of a tribe or a language that does not use the personal pronounce *I* and *Me*, without meticulously pointing to

some kind of representation. Marcel Mauss, who initiates his research on the meaning of the person by claiming that probably it was the Indian civilization to show sign of earliest use of the conception of the individual as *I* (*ahaṁkāra*), all the way not shadowing the fact that even though this term is only technical, it actually describes something illusionary. No matter the first record of the use of the individual *I*, the entire overtaking of human existence by the idea of the individual person was established in antique Rome, and with Christianity beside introducing the moral conscience measured within a juridical system, the person is brought on a metaphysical level and is guided by the principle of *one*, soaking all other features into one unique essence, which makes the soul and the body, as well as conscience and action to fall under the undividable meaning of status ('persona in quanto umano rivestito di uno status'). Without clearly distinguishing if *persona* is rather a Latin or Etruscan word, Mauss is convincing in stating that the person is more than a solitary fact that organizes the juridical reality, more than a title of individual existence, and certainly more than a ritual mask. He states that the person is the 'fundamental fact' of the law, a principle that yet today organizes our legal codes. "*Persona* became synonym for the true nature of the individual…Only the slave remains excluded: '*Servus non habet personam*', does not have personality, does not own its own body. Does not have ancestors, neither name or *cognomen*, as well does not own property. The antique Germanic law still distinct it from the free human" (Mauss 2016: 87). What the law does through the dispositif of the person or personhood is that lends the unquestionable worth of human life to transform existence into essence. Essence or status further on separates the living from its cosmological being, searching for what provides credentials of personhood and is there to be qualifying in the domain of law. The legal qualification distances the subject of the body or mediates this rapport, because law needs the body only on the level of discipline, otherwise it masks it or makes it mimetic in regard of the norm. "The problem is not that the law, for contextual or external reasons, fails to protect people when they are deprived of any quality other than the mere fact of being human. The problem is that it's very functioning does not provide for this condition – or, better still, does not prevent it. In this way a human being, understood in the most basic sense, is excluded from the benefits of the law – deprived of rights, in other words - not in spite of being such but *because* of it" (Esposito 2012: 68). The other problem is that law is interested in totalizing use of bodies but not in equal and linear terms, on the contrary, the dispositif of the person allows the law to come up with a measure for the worth of the living and with categories under which the previous falls. As previously mentioned, measure is central to law in regard to human existence and the religious replica applied to the system of the law functions in a way that existence in the form of nothing more than human, or as Hannah Arendt appealingly formulated this condition as 'abstract nakedness

of being human and nothing but human' (1958) is not enough. The law protruded with order, poses clear conditions in which a particular existence merits status, meaning that for the law it is of use to organize these identities of peoples who merit law's title. Additionally, identity makes subjects predictable to the law, such is the case with proprietors, since they refer to categories of citizens that do partake in the political community. Than what is there left to those embodied in the categories of exclusion and non-belonging? "For those who have been excluded because they do not fall into any category, therefore, the only way to get back inside is negative: by breaking the law rather than by complying with it. In other words, since the law will not admit them through any positive avenue, their only option is to violate it. Only this way, by voluntarily taking on the status of a criminal, by losing a state of innocence that is impossible to keep because the law does not recognize it" (Esposito 2012: 69). Weather as criminals or slaves, the law uses the status of a person to apportion essence to its subjects, and on the other side, to left behind or to abandon those whose living form cannot maintain the sheer relation of the divine with the human, the spiritual with the bodily, the subjective with the objective, the juridical with the moral. An existence reduced only to a body is a sign for the law that essence is missing, or simply it is missing what introduces the individual being in political life, what grants it with rights. Human existence is thus separated since the biological body is to be dissected as a site of legal imputation, and only afterwards also as matter that can be abandoned in the name of the continuous relation of negation. The negative contrast to the force of law is to be maintained, since other ways it cannot approve its effectiveness, without producing that which so be protected from. The person coincides with biological existence but they are not the same, since it is superimposed onto the human being, as an 'artificial product' of the very law that defines it as such. Esposito points out that separation and how law uses the body as site of imputation, overturning life as its domain of rule, brings us back to the Roman dispositif of the person, that has been reproduced all along the modern history of the juridical-political order. So, the Roman legal formalism not only succeeds to dwell against the rupture that opens up when life is being measured, but it transfers it from the unique sphere of the individual to the entire fabric of human relations. Human beings were united – in the generality of the law – exactly by what divided them. Or, if you prefer, they were divided by the form that connected them in a common destiny. [F]rom the 'most important division in the law of persons' (*summa divisio de iure personarum),* according to which people were distinguished initially either as slaves or as free men, stemmed the division between those who were *ingenui,* born free [and] *alieni iuris* [those] subordinate in various ways to an external form of mastery that made them objects rather than subjects of law" (Esposito 2012: 76).

Near the end of her eternal living in 1942-3, when she comes back from New York, Simone Weil probably writes her most important essay on the topic of rights and justice, led by and against the vocabulary of the modern trend of thought of personalism. The sacredness of human according to Weil is not his or her person and the status it provides, but what is sacred is this human her or himself, that by being a human is impersonal. With regards to what being a person means in juridical terms, Weil examines the role of rights in providing this status of personalized human life, that does not protect the mere being a human, but rights as we are aware of today, launched with *Déclaration des droits de l'Homme et du citoyen* from 1789, aligned with the tradition of personalism do not fulfil their task. Nonetheless they assign a role for the person in modern living, it remains always in distress feeling 'cold' always looking for a 'warm shelter'. The commercial prospect of rights as used for measuring human life, according to Weil, has been inherited from Rome, and we are not to praise Roman law since it is 'singularly monstrous' that ancient Rome should be praised for having bequeathed to us the notion of rights. Why is that so? Weil argues convincingly: "Romans, like Hitler, understood that power is not fully efficacious unless clothed in a few ideas, and to this end they made use of the idea of rights, which is admirably suited to it" (Weil 2005: 81-82). As she further on suggests, if we examine Roman law in its cradle, to see what species it belongs to, we discover that property was defined by the *jus utendi et abutendi*. "And in fact the things which the property owner had the right to use or abuse at will were for the most part human beings" (Weil 2005: 82). Appropriating human life with intent to establish the principle of property as the main political feature was already examined in terms of the relaying rapport of law with order, and functions on a twofold scale. Firstly, life is used by the juridical-political apparatus of power, and further on is being distributed exactly via this status that the person holds, by juridically and politically enhancement of biological existence of some while others are being castaway. Secondly, by internalizing the principle of appropriation, subjects of law or individuals that hold the status of a person reproduce the models of power, by extending the juridical regulation of vital forces into self-regulation, inscribing the self in the functions of the juridical-political apparatus. The status a person holds or personhood indicates to an automated sacrifice of what is living in the person, that subjects themselves in the name of belonging to a juridical-political order. Here from, a legitimate question emerges in another important study on personhood written by another mystic militant: *Qué es lo que hay en la persona humana para que el Estado y la sociedad exijan su sacrificio*? Maria Zambrano in her book *Persona y democracia* (1958), in a way affirms the juridical-political function of personhood just to right away disclose this form of existence, declaring it as such that sacrifices what is most valuable, as such that downgrades what is real and material for what is illusionary and fabricated. What

is utterly alive in the person, according to Zambrano, shown through a certain animal analogy is precisely the possibility for life to transform itself in numerous forms that emerge from subjective dispose of forces that produce history as history of changing forms, and further on produce the future since life is something irreducible, always new, a "future that opens unexpectedly, the life of the future. [Where] something alive appeared for the first time, there was already the whole future of the life, it was his deposit, his manifestation" (Zambrano 1958: 146). The exclusionary dispositif of personhood could be deactivated only by claiming this potential of life for transformation, of all forms that constitute difference not as a point for imputing inequality but as sign of lively existence and modality to produce history that reflects itself in the future. Especially because what is perceived as contemporary reality of being here must be a space of appearance, revealing wide horizons of knowleges of the uncertain and unknown, that are not be immediately equated with disrespect of the norm but as a capacity for yet 'unknown enquiries' or 'unprecedented energies'. The line of argumentation against personalism passes through the experience of what has been lived, the lived everyday life contrary to essentialist interpretation of fixed meanings and privileged status, whose confirmation contains only in negating the opposite sites of life. Essence equips existence with exclusionary privilege, or interpreted through modern political philosophy, this privilege we are talking about is equipping the political individual or the subject of law with rights that are distributed in an exclusionary key, all along with essence being associated with the status and personhood. "For the full expression of personality depends upon its being inflated by social prestige; it is a social privilege. No one mentions this to the masses when haranguing them about personal rights, [b]ut they feel it; their everyday experience makes them certain of it" (Weil 2005: 84). Even though Weil's essays I've been quoting begins with the acknowledgement that is rather difficult to express with words the respect for human personality, further on in the text she finds a way to oppose personhood to something she calls impersonal, establishing this opposition through critique of codified human rights that do not accomplish their internal task to acknowledge and protect each and every existence. To her, rights are not aligned only with privilege or the principle of property ascribed some as holders of rights and others not, but rights are accompanied with obligations that oblige us to take care not only for the self's wellbeing but also for that of others bringing the effectivity of rights to the condition of inter-dependence. The measurement of the previous is the other's pain that affects us and directs us to a contact, that of the self's soul with injustice in general, since other's pain is to be protested as injustice and this protest is impersonal. Without this contact, not only injustice scatters, but the ontological condition becomes what briefly before her death Lauren Berlant described as 'the ontological misery of being a person'. The status of misery,

according to her, comes from “the violent pressures to resolve the irresolvable, to underdetermine what overwhelms. [We] would like the world against which we defend ourselves to take less of our best good energy. Life can be different; it can be better or worse. Just not simple, in the sense of resolved once and for all” (Berlant 2022: 10).

III. Community as Law

1. Perspectives on transindividuality: on defining the individual as relational

The following chapter is led by the rationale that critique in the same time by being an instrument for allocating the negative or destructive is also construction of meanings, knowledges, discourses and strategies of resistance, same as embodying ways of life that confront with the previously described juridical-political complots of power, whose end is to enable law as the ultimate space for the living. In this space of the law, let us remind ourselves, the living is brought under question if it is not reshaped into a subject of law, that is to say if it is not inscribed in the constituting gesture of order. To shortly put my intention to use critique not only for addressing the destructive powers, but also the constructive forces: *pars destruens pars construens*. This positioning of critique is something that supports also Benjamin, in his famous essay on violence quoted above, namely that critique is not only an instrument for describing the negative potentials of violence that are to be demonstrated exactly via the application of the law, underlining their indistinction. On the contrary, critique comes before and after violence since exits from it towards opposing, differing and emancipatory arrangements, as with 'divine violence' in Benjamin's essay. Before continuing with possible exits towards other scenes of existence, relations and the community, it is important to note that law either as order or as norm functions through the paradigm of immunization. As order necessitates its immunization from whatever other force that is not encapsulated in law's enforcement, as norm immunizes its subjects bringing danger as measure and omnipresent feature of the rules to be subjected to, depressing the relations among forces and subjects just to further on perpetuate the sovereign relation in which the capacity for action is transferred towards the cephalic position of the ruling. Since force-sharing coincides with the community and not the sovereign ruling, it is to be immunized. As Esposito writes about it: "law immunizes the social system as a whole: substituting uncertain expectations with problematic but secure expectations. That is to say, not by eliminating instability, but by establishing a stable relationship with it… [The] outside *is* the inside, conflict *is* order, and the community *is* immunity" (Esposito 2011: 48, 50). Influenced by the paradigm of immunization, the idea about the centrality of the political individual or the legal subject in modern political thinking, or for that matter individualization and subjectivization as processes of power and law, becomes a problem to be confronted with other reality, and anew constructing the idea of individual existence that does not results as completed and closed in being a subject. But opens space for individuation and subjectivity instead of individualization and being subjected *to*,

recognizing the force of the living not as transgression or even breaking of the contract. On the contrary, the force of the living is to be put right next to the meaning of being and being-in common, underlining relationality not subjugation as site of political involvement. The force of the living or the capacity for action, here from, trespasses the calculated formulas of modern political philosophy, having the Leviathan as its landmark or its commonwealth as the matrix of every possible theory of ideology. This othering and differing organization or another philosophical practice, refers to the individual only in terms of the inadequate idea of individuality, who performs in an over-identifying manner with the system that produces it: always towards finite ends that tautologically (re-)affirm clear-cut identities. What could be possibly gained with critique of the modern, disciplined, and strictly juridically and politically positioned individual? The tradition of interpretation of Baruch Spinoza's *oeuvre* that unfolds the term of transidividuality, gives very interesting answers to the previous question especially because it manages not only to move the idea of individual existence, to depart from subjection only to arrive to subjectivity, or from alienation to relationality, but these motions are made possible only because materiality and affects are brought to sense. The main, of course, is how to think of a new political ontology that opposes to the centrality of the individual and of essence in philosophical practices. Transindividuality comes with the task to in-depth question the modern politico-philosophical anthropology, that completely relies on the idea of human nature and essence concentrated in the question *What is a man?*, whose answer undoubtedly refers to essentialization of particular form, modality or nature that can be further on politically acclaimed as individual. Namely, individualization is a political motion that inaugurates the modern political anthropology enclosing it from the inside and alienating the mere living from, since its value does not emerge from a solemn nature of life but from political qualification. Therefore, a human nature is matter of politics insofar if man that is a social animal or a wolf in war with all. The natural right of life an individual can possess is not a right given by birth, since it is gained with the sovereign transfer, in an order in which the natural right to life is a political essence. The natural right to life, the human nature and the individual are a triad that regarding essence effectuate the following form of human life: an isolated, self-affirming subject that opposes to other existing natures or phenomena that could possibly contaminate the unique meaning of essence. This opposition is not to be understood as an everlasting front, but an exponential tendency that runs towards destruction of what could be perceived as opposing essence, and that contaminates the unique natural right. Within a differing framework that does not annul the previous neither rejects individualization by negating its effects. The perspective of transindividuality, having Spinoza's *Ethics* as precious source, actually enunciates a definition of individuality as transindividuality, or, better yet, as a 'process of

transindividual individua(lisa)tion'. The previous claim made by one of the most influential interpreters of transindividuality, Étienne Balibar, in a very simple way distinguishes the terms we are interested in, and proposes a defining framework for understanding it in the following quotation. "The individual is obviously not a 'substance', as in Aristotle, but conversely substance (or God, or Nature) does not 'precede' individuals: it is nothing *other* than their multiplicity. It designates in the same way the infinite process of production of individuals and the infinity of causal connections existing between them. Secondly, an individual is a unity: any real individuality is composed of distinct parts ('atoms' or *corpora simplicissima* are therefore not individuals, and do not have any separate existence). Above all, individuals are given neither as a 'subject' nor as separate matter, nor as a 'form' organizing matter, nor as a 'compound' of matter and form following an end or a model, but the effects or moments of a process of individuation and, indissociably, of individualization" (Balibar 2020: 43). In these lines what Balibar denotes critically is exactly human nature as essence, and what should be consisted of or what should exclude so it can identify itself with essence. On the traces of Spinoza, Balibar sums the characteristics of human nature that still should not be declared as essence for the existence of the individual to be possible, showing in a prudent way that a possible definition of the individual cannot be based on separation of body from mind. Equally, rationality cannot be declared as the supreme fashion for action only if we discredit affects as an important reservoir for the individual's capacity to act and here from – to act freely. Separating body from mind, in the name of human nature and its political valence, in the perspective of transindividuality is overpassed, since action is not associated with only one feature (either corporal gestures or rational decisions), since it is always directed to causality and the touching of bodies with anything that exists beyond the skin. The body being affected goes along with increasing or decreasing the power to act. According to Balibar, actually our power to act and our power to resonate are not separated but united in the singular power of individual existence. The two reservoirs of power spill over in one another. The body is plural since its different parts, that are modeling parts, rely on what is to be touched and what touches, revealing the multiplicity of individual practice of freedom. This stands also for the effect of many natural causes which produce the individual existence not as essence for itself and by itself, but "the way in which we consciously form ideas that transgress a 'restricted' or 'limitative' concept of the individual" (Balibar 2020: 77). Individual existence as modeling and practice, does not aim to attach the body to a unique human nature determined by essence, but operates with the internal, organic plurality that can diversify itself in so many ways in which expressions of freedom can be encountered. It is important to emphasize though that freedom in these terms is not the '*reversal* of the natural order', but the 'active side' of individual

existence. A modeling body that multiplies the sites of its capacity for action, directed to touching exteriorities, becomes other to itself in so many ways in which actively searches for otherness that affects and defines. The individual is in synergy with other individuals, reproducing the numerous forms that a body can impose in different images of the active side of individual existence. Actually, the individual cannot identify itself apart of this synergy, the conscious of being a self that pronounces *I* is incomplete without the individual entering in relations with others, exactly because this self is mediated by the other. This is not a rationale of how we understand ourselves. Since, imagination and not rationality, affects and not calculations bring us to causal identifications of our image with that of others, and our entrance in the others' images for themselves. In this combination of forces, where *I* has its own part, the identification with other individuals happens since we are in a search for 'partial resemblance between them and us', the affects that touches us are already in advance projected on those we are being touched by. If *I* is already existent as a product of the process of individualization, the previous is perceived as something that precedes individuation, individuality here from precedes transindividuality, and subjection precedes subjectivity – in the critical framework that not only critiques but constructs meanings and realities.

I'd keep my focus on the topic of transindividuality a little while, now following the interpretative line of Vittorio Morfino that together with Balibar curated possibly the best issue on this topic titled *Il Transindividuale* (2014). As well, according to Morfino the best attainment of interpreting Spinoza in the key of transindividuality is emphasizing the fact that the social being of the individual cannot be aligned with essence but with. It not only eludes the Western hierarchy that necessitates essence so badly, but proposes a new philosophy for individual existence whose main premise is being a non-idealist philosophy. Lastly, eluding essence does not only relax the vertical relations of discriminating power, but brings under question property perceived as interiority of essence, since essence is not to be shared or given but possessed. Within the framework of the new or second philosophy for individual existence, relations constitute the social being of the individual. Or as Morfino brilliantly puts it: "the individual is neither substance nor subject (neither *ousia* nor *hypokeimenon*)… The individual is a relation between an outside and an inside paradoxically constituted by this very relation. [This] relation constitutes the essence of the individual, which is now nothing other than its existence-power" (Morfino 2014: 63). Interiority, exteriority, and touching refer to a presupposed instability of relations, them being as wave motions in which something as property easily drowns altogether with the isolated *I* whose nature-essence (*conatus*) does not matter much in such a challenging surrounding. Relations constitute the human individual, and

the defining space of its interiority is that of *between*. Interiority itself is a mere effect of relations, and more importantly they do not stay enclosed in there, pressed to produce an identifying essence and signifying meaning. Exteriority on the other hand, equally enters in the social being of the individual since it is the space in which the other has its appearance, and the waves in the sea ravish even more. The metaphor with the sea is not accidental, it serves to what Morfino calls 'restless surface' of singular exitence that is free in absence of essence to shape the individual in numerous forms, not one being the final and definite. The most accurate image that recollects the form of our metaphor, the sea, of its inconstancy but also powerful firmness is the wave or as Spinoza with poignancy writes: "we are in many respects at the mercy of external causes and are tossed about like the waves of the sea when driven by contrary winds, we waver and fluctuate, unsure of the outcome and of our fate" (quoted in Morfino 2014: 65). This metaphor in any case is not stuck only on being a metaphor, it transfers us to the material reality of our contemporary living, in which the sea is the content that either brings life that ever anew announce the force of individual existence as existence-power, or in the same time is a surface that holds proof for the presence of violent fortresses, pressing the coming others to stay in the outside of communal living, excluded and outlawed. The figure of the migrant reflects with great accuracy what we are now calling existence-power, since it elicits all other signifiers that tend to impose exclusionary and essentializing control over bodies, except of the appearance of life that firstly appears as body. A definition of the self that floats in a rubber boat, actually does not seek for anything else than defining relationality that modulates life as livable, without seeking for essence that determines and secures the *I* in spite of everything else living. The figure of the migrant actually demonstrates that all the possible relations in which we enter are consistent of essences in plural that compose and decompose in diverse states of the living, and what matters is our memory for it that once again brings attention to affects, so, not memory based on juridical demarcation. In such constellation, the other is not questionable but indispensable, since our existence cannot be left without being affected by otherness. Contrary to fear, as the main affect modern political anthropology deals with, translated in the text of the law as penal code that insistently persecutes difference as danger and others as dangerous individuals, the provisions for relationality to affect the juridical textual strata is by inserting the principle of trust (fiducia). Why trust? The social being of individual existence opposes its strength to the persecuting nature of law, not negating or rejecting it, but aiming to transform the effects of law through political mobilization for inclusion and changing the way it affects communal living. Individuation does not negate individualization but transgresses it, the abundance of social realities that witness the existence-power are not to be negated as well, but articulated as rights and instituting practices whose

focal point are relations, not fear. The precarious collectives of individuals that are colored, queer, and poor beside being what the law imposes, discriminated and outlawed, they are a juridical *avant garde*. “[The] subversive efforts of those in the juridical *avant garde* in the end will contribute to the adaptation of the law and the juridical field to new states of social relations, and thereby insure the legitimation of the established order of such relations” (Bourdie 1987: 852). Additionally, collectives that root their appearance in relationality and not essentialist belonging to the nation for instance, or what we have called juridical *avant garde*, penetrate the text of the law, though that does not mean that the law reconfigures its mythic indistinction from violence. But, this indistinction is awakened with the requirement for changing the structure of the law from vertical to horizontal. “In short, admitting that in law there is a horizontal dimension based on the recognition of the other is the only way to include in it the dimensions of relationality, solidarity and fraternity… That we can call ‘juridical politics of respect and trust’ also passes through a legislation that can be as clear as possible, close to people’s needs” (Greco 2021: 153, 82). Further on, by moving the body and its needs in the center of communal living and how this motion brings changes in the text of the law, we come to a fact that not only this particular stratum undergoes change. The critical perspectives on law’s effects that in the ‘70s of the previous century are being shaped in a particular research discipline, that of critical legal studies, are also influenced by the presence of the body. As a matter of fact, critical legal studies cannot pose critique on the effects of law if not admitting the embodied signal for the domain of life that overlaps with the domain of the law, that is without acknowledging the body as law’s main point of imputation. The body and the difference that embodies in the juridical domain immediately recall feminist epistemology as a critical vocabulary for addressing the effects-products of power and law. This assemblage that brings together feminist epistemology and critical legal studies has enhanced both research disciplines into something that becomes decisive for understanding law and sociology of law in our contemporary times, that is juridical feminism. Juridical feminism is a piercing recourse for critical thinking and social mobilization that make the conditions for collective organization of life more just and equal. Claiming juridical feminism enhances the critique on negative effects power brings into life, also opens a constructive space for thinking relationality. Ilaria Boiano in a recently publicized volume that brings to attention the Italian tradition in juridical feminism – *Femminismo giuridico. Teorie e problemi* (2019) – writes: “juridical feminism is understood either as a horizon of meaning and in continuous internal dialogue, constituted of subjectivity in relation[,] or as an external limit of the law” (Boiano 2019: 57). Problematizing the lack of interest for the corporeal dimension of the subject of law, bearing in mind the effectuated corporality of a female body either in restrictive even criminalizing terms or in

terms of auto-reflective emancipatory tradition, Boiano points out that what juridical feminism is in search for is exactly the incarnated perspective: "the capacity to describe the world in its complexity and multiplicity of subjects bounded in relations, situated, that have a body" (Boiano 2019: 120).

The political straight-forward interpretation of transindividuality, lastly, is to be initiated with what Jason Read, another important author from this tradition, calls imaginary identities (2015), referring to Spinoza's *ingenium*. If we depart from the solemn negation of humanity as kingdom in kingdom of which Spinoza himself was convinced, all along his meditations about the Hebrew state, it becomes clear that imaginary identities pretend to overdetermine individual and collective existence, tying it up to the nation even though the nation neither precedes nor naturally determines human life, but results as difference of language, of laws, and of established customs. The organization of these aspects is not accidental, but directed to unifying point of identification where imaginary identities compound with the role of language, memory or to be more precise, of the institutional articulation of memory into set of rules that construct the system of national law. These aspects are not ideologically neutral but represent a particular line of understanding collective and individual existence, clearly reflected in the nation's pursuit for a people of its own. The people as main reference for the existence of a nation is equally non neutral, but intercepted by identitarian acknowledgment of a particular race and ethnicity that are to be acclaimed as essence of the nation's people. The modern tendency to fully overlap nation with the state, and the people with racially and ethnically unity, contaminates the legacy of democratic political historicity, actually democracy itself is brought under risk every now and then, when the ideologically pressed attempts to maintain the purity of a nation or the indisputability of its essence are done in the name of racialized collective subject. Two problems emerge from aspect of transindividuality: the circulation of effects within the nation and its members subjectivized as *homo nationalis* is interrupted by separation and discrimination, as a precondition for the existence of a racialized collective, since the other is under risk and relationality that includes it is restrained by the auto-referential aspects of the kingdom of the nation. Secondly, the nation-state is based on a strange coincidence, on one hand via individualization are produced individuals that are members of the nation and affirm its existence by their belonging, on the other hand stands open a transindividual process of individuation of individuals that have rights and obligations enabling life in a community. These two individual figures coincide in a way that conflict becomes part of political life, and even more vividly, it is wherefrom the different individuations and different politics emerge.

When this conflict is not reshaped as the most needed dissensus in collective life, it becomes an expression of cruel, biopolitical violence whose supportive basis is exactly racialization of relations and exclusion of the others. The political imaginary of cruelty or cruel politics, with Balibar's words, contains of violence directed to individuals or collectives that are defined 'racially nationally, or ethnically as an existential threat'. Cruelty as way to affect the other, in this case, is overdetermination of affects or better put overdetermination of essence of which an individual existence is consisted. The nation's pursuit for a cause in the state, contaminates democracy with essence. The individualization of the members of the state is a parallel process to that of nation's barricading towards its interiority disabling interference with individuation and transindividuality, disabling also the relational defining of individual existence. To enable this possibility yet again, firstly, the leading cause should be such that *absents* itself, making the political scene ever absent. Whereas its potentiality should be perceived only as a democratic effect, or better, only as deideologized and deesntialized democratic method for instituting of society. In Lefortian terms, instituing the community by power not being dispersed with legal ideology or for that matter any ideology that seeks for essence, but by power referring to an 'empty place' and to a society 'without any positive determination'. Certainly, it becomes more comprehensive that overdetermination mentioned above does not lead to a democratic society but to a totalitarian one, and that the experience of internal divisions of society if do not generate constitution, they lead to violence and cruel politics. There is no such thing as democratic violence, therefore alleviating democracy from the burden of overdetermination with essence means deideologization of democracy. "Deideologization of democracy or her transformation into an empty method of politics brings us to a contingent kernel of political value, pushing towards new social subjectivities of transformation, shaking up the margins of a system [in which] predispositions of human nature are to be synchronized with political institutions" (Frckoski 1992: 241, 244). Even though the last statement could be perceived as risky, a brief moment of attention for the obscure Roman phrase *vitam instituere* brings us to how human needs or even imagination unfold instituting power. The discussion on instituting power spreads along the modern political thought, and it divides itself on the one side into a model which places the political and the juridical before the social. Whereas the other model of affirmation of the social being of individual existence altogether with its needs and imagination departs from societal living in common, adapting law to politics. "By disconnecting institution and law, shifting the latter onto the side of the negative and reserving a positive connotation for the former", as Esposito writes, it is more clear that the law encloses "human action inside boundaries marked by obligations and prohibitions", and contrary to that "institutions provide functional models to facilitate its realization" (Esposito 2022: 48).

Disconnecting law from institutions, and affirming human action instead of constraining it into penalty is important for the political imaginary, since this perspective on society liberating itself from transcended theological-juridical constrains demonstrates how politics is the "self-reflective capacity through which society overcomes its alienation to external powers and recognizes itself as the master of its own destiny. Only then can it be said that a society fully assumes its own historicity" (Esposito 2022: 55).

2. Transforming capacities of the community: on guilt becoming care for other's radical particularity

How do we consider the effect caused by the call of Paul about justice being outside or possibly obtained apart the law, *choris nomou* (Rom 3:22), when thinking the capacity for action? With a cautious examination of how the effect of this call imposes on the conditions of the political arena, we notice that the capacity for action without catastrophically being in conflict with the law, detours the juridical administration of justice. At this moment, it is important to emphasize that a detour of juridical administration of justice is not immediately a risk, that spills over in a state in which bare violence determines the relations among the singular beings. Thinking justice apart of the law does not exclude all the other (institutional) ways of obtaining justice, perplexing them with open and uncontrollable violence seen in the negationist perspectives of the sovereign figure of power. But, it is more about a situation in which the law confronts with something different and other, possible law or at least a principle of justice that emanates new forms of connecting and new meanings of the political. Without any great ambiguity, the aforementioned could be echoed in the act and moreover in the words of Sophocles' Antigone who despite the ban and Creon's *ius dice* nevertheless mourns and buries her brother Polynices. *Yes, I confess: I will not deny my deed* are her words that do not concentrate on breaking the law emerging from the sovereign voice of Creon, but are words of a figure that transforms guilt into stand for kinship, and make her criminal mark to displace justice outside the law. Antigone's act being confessed, brings her closer to her death but in the same time closer to a new beginning, an appearance of a political figure that on a multilayered level invigorates the possibility for justice to be admitted, recognized and embraced outside the law. In the same manner, her speech ironically calls out the technical, emptying blindness of law's validity only because it is the law and as such represents an insurpassable authority. This outcry – It's the law! – not only confirms the technical blindness, but every time anew confirms

the transfer of forces towards the law enforced, but lets the law to perform its force of subjection. While on the contrary, no other force is acknowledged as equal and is allowed to be performed in equal terms. It is never up to performative equality in the domain of forces, but of two sides and the first that possesses truth, having an indisputable and incontestable status. To challenge this unequal position, it already sounds familiar, means procuring to a criminal conduct since exactly this act goes for proving the original wrongness of human action, in the same time to which it can be attributed the possibility for justice, not juridically administered.

What is important about Antigone, as she whose act is marked as criminal is that by challenging the law, she does not obviate from guilt but her act is beyond sanctioned guilt, she embraces guilt while embracing her death also, bringing it in her tomb. Antigone's led by rules that are not yet known, about which the state not knowing enough confronts them violently, though they only impregnate conditions in which a meaningful order of things is vanquished or at least curtailed and by this critically open towards distinctive possibilities for justice. Knowingly that institutions and rules are a material proof for the existence of order, taken in their particularities apart of law's gross effect upon the organization of life, can be addressed through particular acts for them to be challenged and altered. The problem consists in the fact that "[n]orms do not unilaterally act upon the psyche; rather, they become condensed as the figure of the law to which the psyche returns[,] the psychic relation to social norms can, under certain conditions, posit those norms as intractable, punitive, and eternal. In other words, anyone who commits the deed that he does will be guilty" (Butler 2000: 30-31). When challenging the authoritarian rule of the state, Antigone incarnates kinship as a condition for politics, she initiates a sphere that conditions the possibility of politics, and the fact that her confession sprouts from her marked criminality means that she absorbs the juridical language of the state against which she rebels. From a juridical perspective, if Antigone is perceived as an impure guardian of the criminal in the state, or if her subjected self dissolves in a juridical irrelevance, closer to death than life, this does not mean that the established law defeats her capacity for action later confessed; but, apart the law, and the space in which what is not an obeyed law is immediately crime, a question arises of whether there might be 'new grounds' for communicability and for life? When Antigone makes her claim for justice, even though she operates within the terms of the law it is important to recognize what this claim contains, to be recoginzed her act's effect in bringing justice though outside the law, when the challenged rules and institutions are opened towards every and each particularity or in this case, each life's particularity until the moment of death even each death being properly valued. By insisting that

her brother is 'irreducible' to any law, Antigone's claim for justice renders citizens 'interchangeable with one another'. Even if at stakes is a 'scandal' and a 'threat of ruination to the universality of law', what Antigone is claiming by being the confessed author of a deed is an-other's radical particularity. When law does not absorb every and each radical particularity, each form of being and acting their place is outside or marginalized, as justice remains apart of the law.

In continuation, what I'll try to examine as a political possibility for reestablishing of community or relationships, and of singular investment in common living revolves around the following question: what if soul's guilt breeds this differing political possibility, and if human action cannot be distinguished from bearing guilt, not as a juridical basis for transforming life into soil of the nation or law's domain of discipline? What if quilt as an equivalent of human action can be examined as a basis for interdependence and establishing relations, of community by designing a context for the singular being not concentrated on commandment but on what beforehand was other's radical particularity, that somehow breaks the normative bind of subjection? The Czech philosopher Jan Patočka, whose dissident actions to promote the civil initiative *Charta 77* (declared as an act of political criminal by the state authorities) clashed him with the totalitarian system that violated human rights grossly, who died after a long interrogation by the secret police (StB) suggests that guilt is our basic position and in very direct terms it means "wanting to participate in universal justice as the only condition in which the soul can exist as such, as a being soaring out of the fall" (Patočka 2022: 258). In his essay on Faust (1973), not only he echoes Paul's call but implicates that human action, indistinguishable from guilt is not solemnly related only to the religious or juridical position of the singular human being, but of a life's position confronted with uncertainty, when wanting to act not always goes along with being able to foresee the outcome, speaking of which we come to terms of radical equality measured exactly via each and everyone's singular position, wherefrom a human is pushed to act. This bottom of equality also affirms freedom, since "there can never be freedom without an act, but an act is always finite and guilty" (Patočka 2022: 18). The burden that is now associated with guilt is not overthrown over the fate of a human being menaced by punishment for his impure actions, but with soul's condition confronted with uncertainty, "soul's guilt over action in the face of uncertainty [that] forms the basis of community – one that does not rely on national identity or any other form of identity but that responds, in anxiety, to the basic situation of human action" (Patočka 2022: 18). Guilt that does not correspond to an end but to a beginning of action i.e. it is its basis is however aligned with

a specific condition in which what comes alive, what characterizes with a visceral feature is not the bonded with a numb image of a tamed and pure subject whose referential point is his subjection to the supremacy of the law, or for that matter to any system that reaffirms the myth of the origin, ruling over the finitude of life and imposing the one truth about it. This guilt does not come from what we commit, but from what we are and in this sense it is not judgment but justice that emphasizes our self-understanding as deviation, rupture and ruining. In the sixth of his heretical essays, Patočka writes about something that he calls the solidarity of the shaken, piercing to a thought that embodies the positioning of relations among human beings that remain strong despite the shaken fate or in more technical terms despite the shaken formalizing understanding of the self, mediated by norms and within the realm of officialdom. The focus is on the force that every time anew with each singular acting is released into the common. The common that being not impropriated by no one is actually the space that formulates the community, and guarantees its historicity. Historicity in these terms is not interested only about power over life and right to death but "in the present circumstances involves not only the basic level, that of slavery and of freedom with respect to life, but needs also to entail an understanding of [that] Force we are releasing" (Patočka 1996: 135). The shaken formalistic signifiers of the self, that emerge from the system of law or the sovereign unit of the state, are to be exposed in a space of risk but in the same time of the abundance of the political, and the bottom line that gives us some orientation is that by betraying the solidarity of the shaken, actually what is done is the aberrance of the political and getting closer to the field of war or the sidelines where living is to live off 'the blood of others'.

The assumption that the existence of the self is noted as existence only if it is situated within the law, elicits an image of the subject as bearer of guilt by underlining the mutually informing relationship with punishment and sin notwithstanding the possibilities of the political and in the same manner the possibilities for action that remain blocked by this image. Things get complicated when life itself whose existence is such only because it is marked by bearing guilt and is even constituted through guilt and the original erring has been the form of subjection, can serve at all for something that we could shape and denote in political and ontological terms as community? Our defect, seen through genealogical enquiries of exclusion and normatively declared enmity, has been fashioned by the law as reason for criminal pursuing and for juridical targeting of dangerous figures. The immunized historicity of the law, with regard to his hermetic system, makes the subjects of law subjugated and risky to each one. In respect to penalty, the breaking of the law reformulates its primacy if we consider law only as nothing else than a tautological proscription of law's own dutifulness, being a context in which

the commandment to obey the law makes it impossible to escape guilt, taken that the capacity for action buckles in. Though, the more appalling effect spills over from the system of law where the subjects' positions are reduced to what is lacking, what is not good enough because it is a defect and cannot support the existence of the self and of others. In respect to community, taken as *res* for the mutually unrelated singular human beings, the last ones are bearers of responsibility for the force that affirms what is in common, even when what is common is based on defect or a lack. Starting from the meaning of *delinquere*, it is important to note that what constitutes us as beings-in-common is lacking and that the germ of the common is overlapped with defect. "It's in this sense that guilt, that is, our *delinquere* as a lack of community toward which we are inclined and whence, though contradictorily, we come, is presupposed as the transcendental condition of our common humanity" (Esposito 2013: 21). The defect of the self, within the system of the law is the reason for the juridical dynamic of the infernal machine – to search for and to allocate danger, on the contrary, the defect of the self within community is a premediate directing to the other, not only because everyone has to do something with someone other than himself, but because the other rounds off ourselves from deep within. This experience with the other seems almost requisite but also very difficult and almost elusive or possible at least in an ever-flawed way, same as experiencing community would be. Probably, what directs us to others, beyond the possession of a self and each one's singular existence directed to sharing among each one's defected beings within the space of the common, entitled as beings-in-common or being-there-with is this ascertained condition of being indebted for its intimate nonfulfillment. This condition has two outcomes, alike as we've seen the two outcomes of guilt. The first outcome is within the law, and tackles the process of subjectivization that does not end with producing subjects of law, but with their being subjected to and their subjugation, meaning voiding of their existence or their existence being displaced in formal truth about what does it mean to *be*. So, instead of affirming the potential of subjectivity, law reduces as in subjectivized individuals, it undoes our subjectivity. The radical suggestion of the law for the singular lives is "the destitution of the subject to whom it addresses itself[,] it unconditionally prescribes the unfulfillable. Law administers a statute of continual nonfulfillment. Law is an inextinguishable debt" (Esposito 2013: 22).

Debt in a rather amusing way can be divided, on one hand it is this debt issued in the sphere of legal obligations of which Nietzsche write in *Guilt, Bad Conscience, and Related Matters*, pertinently attaching the effect of guilt to a plausible economic category but that within itself bears the explanation for law's creditor stand towards its debtors, indebting its subjects in a state of vague anguish that is very specific for indebted person. On the other, debt

can be transformed or be synonymous to gift in a way that self-giving and giving of what ceases to be proper is a direct bid in community and being-in-common, since the common does not only outgrown the debtor's anguish but the overall instrument for indebting – that is property. Coupling subjectivity with this plausible economic vocabulary is possible at the level of the self, but not as fixing the position of I, but as sharing, as a self that is possible only within sharing relations since the opposite is a risk of voiding the self's potential within the sovereign transfer of forces, risking not only its subjectivity but also the political possibility for communing. Put in a more plane though possibly confusing sentence: the community of the law or the multitude of law's subjects cannot disable the mere community, but the last one should be indemnified as law – so, the community as law – through various programmatic transformation that ease this conduct. One of which I've already engaged with through the example of Antigone, where we can discern that guilt can be released from the juridical burden when it is transformed into care for an-other's radical particularity, that should not be abandoned or excluded but completely and equally acknowledged. If care determines community or is put as basis of the community, the sovereign relation becomes loose even breakable, in a way that its inscribed servitude releases itself from the meaning of the singular I, recognized as such it is the I who obeys the law and my I's potential to invest myself in the communal living is only through obeying the law. Unlike it, the existence of I becomes relevant for the community when this existence becomes coexistence, especially because we are in this world even before ourselves, our administrated selves detached from sense of communal living. Communal living therefrom addresses each capacity for action through giving – as a proof for this capacity and as a possibility for establishing community so, to give being ta direct expression of the political. If this is the case with the political, then the singular human beings are not mutually related if not through the gift, a gift that is to be given rather than received. This recognition for the gift that establishes the communal relations is not only confronting with the logic of juridical indebting or to law as inextinguishable debt, but has the effect of reducing the initial distance in the community. The logic of the gift though is not spontaneous or ceremonial as trivially could be supposed, since we are talking about a particular gift whose materiality is enhanced with an obligatory character that makes gift a necessary equivalent of sharing and of gratitude that demands new donations. Sharing realines the gift with the semantics of duty.

Roberto Esposito makes a significant turn in contemporary philosophical thinking of community and her refreshed discharge from the legacy of totalitarian regimes from the 19 century, somehow being the most significant achievement in his philosophical oeuvre. Namely,

in one of his most famous books *Communitas* (1997), right at the first pages of its Introduction, Esposito attempts via semantics and something that is characteristic for contemporary Italian thought – linguistic archeology, to come up with the meaning of community both on the level of language and on an intrasubjective level. One of the words that form the word community, though unexpectedly is *munus* (from the root *mei–* and the suffix *–ties*, linked together through their social conotation*)*. This term, in fact, oscillates in turn among three meanings that aren't at all the same…*onus, officium,* and *donum*. In truth, for the first two the meaning of duty *[dovere]* is immediately clear: obligation, office, official, position. The third appears, however, to be more problematic". Without hiding his amazement of this semantic scheme, Esposito poses the question – "In what sense would a gift *[dono]* be a duty? Doesn't there appear, on the contrary, something spontaneous and therefore eminently voluntary in the notion of gift?" (Esposito 2010: 4). Gift more as *munus* than *donum*, because of the clearer social connotation of the first and especially evoking Marcel Mauss' famous *Essai sur le don* (1925) considered ethymologicaly but also in a wider sense implies that property or ownership do not determine the relations in community. Actually, property wherefrom emerges this debt of which Nietzsche writes in *Guilt, Bad Conscience, and Related Matters*, attached to law's product, the subjectivized individual is something that collapse into irrelevance for the gift that is given and obliges, that enforces the mutual relation whose existence is not only to support the attached property to a subject of law, concentrated in the statement – you owe me something. The reversing the last statement into – I owe you something is decisive for the subject of community, since it is "what makes them not less than the masters of themselves, and that more precisely expropriates them of their initial property (in part or completely), of the most proper property, namely, their very subjectivity. We thus come 180 degrees back to the synonymy of 'common-proper,' which the philosophies of community unconsciously presuppose, and to the restoration of the fundamental opposition: the common is not characterized by what is proper but by what is improper, or even more drastically, by the other" (Esposito 2010: 6-7). Finally, this debt that with its specific state of anguish activates the sphere of the law is transformed by the gift, reducing it to an imprint of the mutual interdependence among the singular subjects that share the common space of being.

Conclusion

> "The migrant undoes our 'self.' The uninvited guest exposes our (arbitrary) rules of conduct and, in insisting on staying, drags into the light the ignored premises on which such rules depend on their authority. No longer external but internal, the foreigner, the stranger, the immigrant, like the space between our words—silent but essential for meaning—becomes integral, central, to another conception of the world we all inhabit" (Chambers 2008: 121)

The thesis I'm concluding, has been devoted to a very spontaneous glance that takes place in urban environments, towards unknown individual existences whose burden on the contrary is all too known: they are not from here. The landscapes of contemporary living in the Western world is changing and will not cease to change further on, bringing to attention the painful divisions of populations, later on reflected in political discourses and gaining power. The main move towards these changing landscapes is movement of persons, either as migrants or coming foreigners or nomads. The migratory flux, in the last several years, has been the main political topic that not only reshapes the structure of society but follows a paradoxical development: the figure of the migrant on the one hand is the main investment in the political

sacrificial crises, and on the other, it represents the potentiality of transformation not only of the social being of individual existence but of the meaning of the political and communal living also. Taking this paradox as orienting, what is to be questioned is not the question of the accepting quota decided upon by Western countries, but the main sites of modern political thought such are the political individual or the legal subject, as well as the dispositifs of law and power. By bringing to sense the sacrificial yet again the transformative figure of the migrant, I've tried to critically position the functioning of law either as order or as norm, unfolding it under the paradigm of immunization, meaning that the law functions towards the outside, extending its force towards the living that aims to control, regulate and discipline it; and towards its inside where the main task of sustaining is nevertheless violent.

The image I've been led by is that of a machine or as somewhere in the text stands – infernal machine, that activates its clogs, it's subjects by figuring pressure, whose functioning is tautological and alienating. The machine of the law affirms nothing else than law itself, and it's loyal, subordinated clogs remain alienated among themselves, since the centripetal structure of the machine directs the forces towards the authoritative force of law, not the force of the numerous singular clogs that make it going. This description of the sovereign relation, actually refers to what modern political thought invented as transferring the individual forces and capacity for political action towards a cephalic monster-ruler whose ruling is based on negation. For a political reality to be established, another should be negated or excluded or annihilated. Same goes for subjects of the juridical-political order, for some to be included others are to be excluded. This separation of political realities, or separation of living beings that are to be legally and politically interpellated or not, separating persons from bodies is what weakens the political potential of community and of singular investment in a more just and equal communal living, even though in the same time enforces the essentialist translation of discrimination as politics. This principle of separation in modern politics, enabled by the propositions of negation and negativity, in this text, was elaborated on the textual strata of the law, where separating the subject of law from the outlaws is enabled not only by a strict following of penal code, but by the genealogical examination of how forms of life that do not align with the normal and positive have been perceived as dangerous even before a deed has been done. The criminal interest in how the author of a possible deed appears in the world, of its characteristics and its self-understanding, of its representations of particular features that are to be named as difference, therefore, reveals an important turn of legal persecution of dangerous individuals as a parallel process of political allocation of enemies in the society. This turn without further complications is not directed towards preventing criminal actions, but

by assigning criminality to particular individuals and groups, separating them from the law's subordinates because of their impurity, blindness and overall juridical and political abjectivity. Michel Foucault's genealogical enquiries consist of a long and in-depth examined history of legal persecution of individuals whose bodily presence has been nothing than threatening, dangerous and abnormal.

Yet again, my interest went along the contemporary relating condition of migrants, assigned with criminality even though migration by itself is not a deed, politically marked as threatening bodies, and legally persecuted as doubly guilty: for demonstrating the capacity to act in the most utter gesture that affirms this capacity – movement, and for allocating force beyond the capsule of law, the subject of law, politically recognized as a member of a nation, as documented individual. A body that signs force that keeps on living, entering into relations that are concentrated on life not on authority and its dictum, therefore is threatening body, since law's end is not to allow force outside its order. Each sign of capacity to act is transgression, a body that represents only life itself or a human that appears in the abstract nakedness of being nothing more than human is a target. The criminalization of the migratory flux, in a clear-cut way shows this paradoxical yet again very intense clash between a ponderous system such as national law is and human life arriving on the shores, bringing to question – why the appearance of a life that survives death is so threatening, why life in its most primal expression, only through the materiality of body that inhabits destiny, becomes the principal problem for politics? Not depending too much on the answer to the previous, what comes as undoubted is that the mode of individualization upon which rests modern politics makes everyday life numb, up until confronting with other forms of individual existence takes place, those of subjectivities not of subjects, of transindividuality not of individuality, of relationality instead of nationality. The main move of national law after primarily declaring the illegality of human life appearing only as such, is to reproduce the scene of danger that unweaves the migrant not only as illegal, but also as criminal. Criminalizing those whose survival has been perceived as transgression, means that the law relates to those forms of life only through one feature, that of guilt. If life itself is marked by guilt, this means that guilt represents the threshold of law, it is neither outside nor it only pulsates as the secret heart of the law, it is neither penal nor only ontological, but its contingency pierces human life, entering in its inner processes where it nests the negative potential of the law and the principle of separation. A survived illegal migrant is burdened by this negativity that contaminates its capacity for action, the mark of guilt marks its overall conduct further on, and the law has gained another author of criminal deeds even before they are to be undertaken, a dangerous person that in political discourse is easily translated as an

enemy.

Apart from the overlapped process of producing dangerous individuals and political enemies, to yet again reaffirm the force of law, the figure of the migrant remains possibly the unique reflection of force, modality, practice, relational investment of the singular being in the common, of giving and caring, of being valuable only as nothing more than human, as well as a signifier of our end times in which the capacity to act is not to be directed to ever a new constitution of a sovereign order (*nomos basileus*), but of recognizing the organic synergy and inter-dependence of all forms of the living whose survival as that of the Planet is to be acknowledged equally and just in a transformed order of communal living, that of *cosmos basileus*.

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