

**DECISION OF FORMS OF LIFE:
RECONSIDERING AGAMBEN IN THE CASE OF
MAINLAND MOTHERS IN HONG KONG**

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Submitted to
Central European University
Department of International Relations and European Studies

In partial fulfilment of the requirements for the degree of Masters of Arts

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13 540 words

Budapest, Hungary
2010

Abstract

The thesis unfolds the puzzle constituted by the exponentially growing number of expectant mainland mothers who go to Hong Kong in order to give birth in the city. As the concept of territorial sovereignty proves to be inefficient to explain what the difference between the two territories is, Giorgio Agamben's understanding of sovereignty is evoked as a „decision on life.” Consequently, the thesis acknowledges and discusses the possibility of recognizing not only the distinct sovereignties of the mainland and Hong Kong, where life is inscribed in the political order differently, but the sovereignty of mainland mothers, who also perform a decision on the life of their children. The contribution of the reconsideration of Agamben's thought in this context is first, the identification of the source of sovereignty of the “citizen,” and secondly, the delineation of possible further research on the theoretical implications of introducing another sovereign into the original relationship between *homo sacer* and the sovereign power.

TABLE OF CONTENTS

CHAPTER 1: THE CASE OF MAINLAND CHINESE MOTHERS.....	1
IN HONG KONG.....	1
CHAPTER 2: FROM TERRITORIAL SOVEREIGNTY TO SOVEREIGNTY AS DECISION; CARL SCHMITT ON SOVEREIGN POWER	10
CHAPTER 3: TOWARDS SOVEREIGNTY AS “DECISION ON LIFE”; GIORGIO AGAMBEN ON SOVEREIGN POWER.....	14
3. 1. The nature of exception.....	14
3.2. Capturing life in the form of the exception	16
3.3 Homo Sacer	18
3.4 Zoé and bios	21
CHAPTER 4: THE RISE OF BIOPOLITICS AND THE TRANSFORMATION OF THE POLITICAL ORDER IN MODERNITY	25
4. 1. A vanishing division: the rise of biopolitics.....	25
4.2. The modern nation-state and the transformation of the political order	29
4.3. “Lives unworthy of being lived”: second children in China	31
CHAPTER 5: THE SOVEREIGNTY OF HOMO SACER	35

CHAPTER 1: THE CASE OF MAINLAND CHINESE MOTHERS IN HONG KONG

Introduction

In 2001, the Court of Final Appeal of the Hong Kong Special Administrative Region (HKSAR) has announced that every baby who is born in Hong Kong will automatically receive Hong Kong permanent ID card, that is, the right for permanent residence.¹ As a consequence, the number of those babies that were born in Hong Kong to mainland parents had increased strikingly. As Cheung and Yip indicates based on the statistics provided by the Census and Statistics Department, the “number of Type II babies has increased more than fiftyfold, from 458 in 1998 to 25,269 in 2008.”² The authors define those live births as “Type II”, in case of which both parents are Chinese nationals and not Hong Kong residents. Besides the sharp increase in their number, the resoluteness of these women is also worth mentioning. The head of the obstetrics in one of Hong Kong’s public hospitals say that “they are in pain, they have complications...the problem is that we have absolutely no idea about them – no data, no ultrasound, and the gestation periods [they give] are wrong.”³ Such an unregulated influx of mainland women has finally led to strict regulations, established by the Hospital Authority. According to these regulations, non-local expectant women are imposed fees and are obliged to book their medical services in advance. Otherwise, they are not allowed to be provided with them, moreover, such bookings are checked when they cross the border of the Hong Kong SAR. As a result of the introduction of such measures in January 2007, the Immigration Office reported that by the end of that year, 32,468 pregnant visitors were

¹ Karen S.L. Cheung and Paul S.F. Yip, “Hong Kong and the Pearl River Delta: Cross-Boundary Demographic Dynamics and Policy Implications,” *Journal of Youth Studies* 13, no. 1 (2010): 10.

² Cheung and Yip, 10.

³ George Wehfritz, „More Diapers, Please,” *Newsweek (Atlantic Edition)*, Jan 15, 2007.

<http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=23703977&site=ehost-live> (accessed April 1, 2010).

allowed to have examinations in Hong Kong, and the 7, 7% of the arriving persons, 2,499 women were denied the access to Hong Kong hospitals. The “arrival check of all visitors who are at an advanced stage of pregnancy” and “whose purpose of visit is believed to be giving birth in Hong Kong” has contributed to a 90,5% drop in the number of deliveries via Accident and Emergency Departments, “from a weekly average of 209 in December 2006 to 19,8 in December, 2007.”⁴ In the next year, the Immigration Office reported on 36, 836 successful entries in the HKSAR and 1,971 denials, furthermore a drop in the daily average of the number of deliveries of non-eligible persons via the Accident and Emergency Department from 4,7 in 2007 to 2,7 in 2008.⁵ This affirms the success of regulating efforts of the Hospital Authority on the unexpected emergence of mainland mothers in Hong Kong maternity wards.

The direct cause of the phenomenon could be well defined in the form of the decision of the Court of Final Appeal, and the expansion of the Hong Kong Individual Visit Scheme in 2003.⁶ Besides these institutional settings, however, the main motivation behind such a move is lightly outlined, and so is the information regarding the mothers and the future fate of the children who are born this way. As Cheung and Yip writes, “we know very little about the profiles and characteristics of the parents and the life trajectories of the newborn children. No follow-up study has been done to investigate their life aspirations (whether they will come to live in Hong Kong, and, if so, when and where) and needs.”⁷ Regarding the possible explanations on the intentions of these mothers, the most emphasized are the (1) access to better medical treatment due to the higher quality technical equipment and the better trained doctors comparing the mainland, (2) the acquisition of the HK permanent ID, and (3) a possible evasion of the strict regulations of China’s family planning. “Some women seek to

⁴ Hong Kong Immigration Office, “2007 year End-briefing on Non-local Pregnant Visitors,” <http://www.immd.gov.hk/ehhtml/20080128.htm> (accessed 28 May 2010).

⁵ Hong Kong Immigration Office, “2008 year end-briefing on Non-local Pregnant Visitors,” <http://www.immd.gov.hk/ehhtml/20090119.htm> (accessed 28 May 2010).

⁶ Cheung and Yip, 10.

⁷ Cheung and Yip, 10.

avail themselves of the Hong Kong's superior medical care or dodge China's strict family-planning rules, to be sure. But the majority seeks something they believe will give their newborns a leg up in life: Hong Kong citizenship."⁸ "By giving birth on Hong Kong soil, mainland mothers are securing their children's future – they get right of abode, along with free education and social welfare."⁹ "Children...automatically receive permanent residency status, entitling them to benefits including free education, free medical care and Hong Kong passport with visa-free access to more than 100 countries."¹⁰ Another very convincing line of argument is the one which associates the act of mainland mothers with the evasion of China's family planning regulations, also known as the "one-child policy." An article published in the South China Morning Post quotes the official Guangzhou Daily, which said that "80 percent of babies born in Hong Kong through services provided by birth agencies were second children." According to the author, "on the mainland, hospitals do not allow woman to have a second child, and any additional children will not receive subsidies for medical care or education...therefore, for many...the biggest attraction is that Hong Kong provides them with an opportunity to escape the one-child policy."¹¹ Whatever the reason would be in the individual cases of the above-mentioned, due to the decision of the Court of Final Appeal, the mainland mothers make their choice on where their children are born, and consequently, on where they will have the access to social services such as education and health care, housing and many others. The reason for this is that in China, the so called *hukou*, "registration by permanent residence" defines the access to these services.¹² These social services, however,

⁸ Wehrfritz, "More Diapers, Please"

⁹ Siliang Li, "From "Private" to "Public" Pregnant Women Redefine the Boundaries of Public Sphere in Hong Kong" (paper presented at Joint Conference of the 4th KSGSC and ECRC, Edinburgh, 2007), 4.

¹⁰ Keith B. Richburg, "In Hong Kong Maternity Wards a Deluge of Mainland Mothers," *The Washington Post*, Dec 20, 2009.

<http://search.ebscohost.com/login.aspx?direct=true&db=n5h&AN=WPT323035782009&site=ehost-live> (accessed 30 March, 2010)

¹¹ Chloe Lai, "Strict One-Child Policy Driving Mainlanders to Give Birth in Hong Kong," *South China Morning Post*, June 14, 2009. <http://archive.scmp.com/showarticles.php> (accessed 30 March, 2010)

¹² Congressional-Executive Commission on China, "China's Household Registration System," 6. <http://www.cecc.gov/pages/news/hukou.pdf?PHPSESSID=138c4d8d204e9ba60e6295d0050d2fb8> (accessed 15

may vary depending on the “labeling of hukous as agricultural, non-agricultural, blue-stamp and other types,”¹³ not only in relation to the mainland and Hong Kong, but representing high diversity within the mainland also. Having made a choice on the birthplace of the children, these mothers also make a choice on what type of social services will they be eligible. Accordingly, “children would be deprived of the much-desired mainland *hukou*, the residence permit that provides holders with such services as education and health care.”¹⁴

What is so puzzling about the multifold increase in the numbers of the mainland mothers who intend to give birth in Hong Kong and the following regulations on their arrival and medical treatment as a result of which the previous weekly average of 209 mothers who has popped up in the Emergency Department has dropped by 90,5%? Why is their action different in relation to Hong Kong and the mainland, comparing to other differences in the social services hoped to be accessible on the basis of registration of permanent residence within the mainland? The phenomenon is puzzling either one accepts that the main motivation is the acquisition of Hong Kong permanent residence or the evasion of the family planning regulations. Both assumptions imply that Hong Kong counts as an outer space which is distinct from the Chinese order, and in which different conditions of life could be acquired. On the other hand, in legal terms, Hong Kong constitutes the part of the PRC, it belongs entirely to its jurisdiction, and there is no such thing as Hong Kong citizenship any more. In spite of the historical antecedents, that Hong Kong was under British sovereignty between 1842 to 1997, under the conditions of the Joint Declaration of the Government of Great Britain and the Government of the People’s Republic of China signed in 1984, Hong Kong (and the belonging Kowloon and the New Territories) returned to Chinese sovereignty on the 1 July

May 2010); for more see also Human Rights in China, <http://hrichina.org/public/PDFs/Reports/HRIC-Migrants.pdf>

¹³ Congressional-Executive Commission on China, “China’s Household Registration System,” 6.

¹⁴ Lai, „Strict One-Child Policy Driving Mainlanders to Give Birth in Hong Kong”

1997. Since then, the territory of Hong Kong belongs to the PRC, in the form of a Special Administrative Region, and its residents are exclusively Chinese citizens. To put it more straightforwardly, in terms of territorial sovereignty, there is no other state within China that could provide a different citizenship with broader rights to its citizens; being born in Hong Kong does not provide another nationality, and the city does not possess the basic attributes of statehood: it cannot make decisions on its foreign relations and its defense. The autonomy that is practiced in terms of the Basic Law of the city is embedded in the PRC's jurisdiction under the conditions defined in Chapter II of this constitutional document. "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government."¹⁵ Both its autonomy and its embedded status in the Chinese legal system could be illustrated by the Article 17 of the Basic Law which says that "the Hong Kong Special Administrative Region shall be vested with legislative power..." but, "if the Standing Committee of the National People's Congress...considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region...may return the law in question...Any law returned by the Standing Committee of the National People's Congress shall immediately be invalidated."¹⁶

Still, although there is no geographical border and legally the jurisdiction of the People's Republic of China seems to be uninterrupted, the choice of the mainland mothers signifies an important distinction between the territory of Hong Kong and the PRC. In order to

¹⁵ The government of Hong Kong Special Administrative Region of the People's Republic of China, "The Basic Law of the Hong Kong," http://www.basiclaw.gov.hk/en/basiclawtext/chapter_2.html accessed 20 Feb, 2010), Chapter II, Article 12.

¹⁶ Ibid., Article 17.

understand the real nature of this distinction, however, the framework of traditional, territorial sovereignty is not able to provide sufficient explanation. For in this regard, there is no difference in sovereignty of the two territories, however, there must be a difference clearly manifested in the determinate action of the mainland mothers. In the next Chapter, we shall find an answer to the question what comprises the distinctness of the two spaces within the same country, the same territory over which the legal jurisdiction of the National People's Congress seems to be even and unquestioned. Thus this puzzling phenomenon that mainland mothers arbitrarily make a decision on their children's birthplace and they are devoted to get to one of Hong Kong's hospital on time leads to the question, *how are they able to cross borders with this decision and what kind of borders are crossed if they obviously cannot be conceived as territorial limits?* In the attempt to answer this question, an alternative conceptualization of sovereignty must be taken into consideration that is not limited to interpret it as only a juridical order in a certain territory defined by fixed, spatial limits.¹⁷ One of the most prominent figures, who transcended this territorial understanding of sovereignty was Carl Schmitt. According to his insights, in order to understand the operation and proper place of sovereignty, not only the territory, or localization (what he calls *Ortung*) on which sovereignty is practiced and not only the jurisdiction, legal order (*Ordnung*)¹⁸ must be taken into consideration, but the way the becomes related. In other words, in opposition to those, who defined sovereignty as the "supreme rule of a juridical order"¹⁹, Schmitt locates sovereignty *outside* legal order, however conceives it in close relation with law: for him, sovereign is the one who makes a decision as a result of which a legal order in a given territory can function. This argumentation of Schmitt serves as a ground for the theorization

¹⁷ Nick Vaughan-Williams, *Border Politics: The Limits of Sovereign Power* (Edinburgh: Edinburgh University Press, 2009), 116.

¹⁸ Giorgio Agamben, *Means without End: Notes on Politics* (Minneapolis: University of Minnesota Press, 2000), 43.

¹⁹ As, for example, Hans Kelsen, quoted in Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press), 28.

of Giorgio Agamben, who at certain points challenges his thoughts and completes it in many ways. First, accepting that sovereignty must be re-defined in terms of a decision on a certain territory as a result of which factual regularity of life could be established so that law gains validity and a legal order can function²⁰, he argues that what is truly at stake is not only how a legal order is applied on a certain territory, *but how law establishes its reference and relation to life on a given territory*. To put it in other words, the decision as a result of which legal order establishes its validity is indeed a *decision on life*. As soon as sovereignty is conceptualized as a decision, and as it is defined as a decision on life by Agamben, the overlap between the operations of different sovereign powers within the same territory becomes theoretically intelligible. But at that very moment, the following question emerges: *In the case of mainland mothers, who makes a decision on life, who has the capacity to practice sovereignty? Furthermore, if sovereignty is re-defined in terms of the decision on life, then such a decision can be recognized not only on the territory of the mainland of the People's Republic, and on the territory of Hong Kong, but in the decision of those mothers who, giving birth in Hong Kong, actively determine the status of their children in the legal order*. Consequently, the question that must be answered in the case of these mainland Chinese mothers is how they are able to make *their* decision on life?

As it has already been indicated, the literature discussing the empirical background of the phenomenon is very restricted. Li's attention is focused on the way Hong Kong mothers put pressure on the Hong Kong government to regulate the influx of mainland mothers and describes shortly the background of the phenomenon; however, this perspective suggests its relative importance. As Cheung and Yip writes, analyzing the various social, demographic and economic relations between the mainland and Hong Kong, there has been no study

²⁰ Carl Schmitt quoted in Agamben, *Homo Sacer*, 16.

conducted on the life aspirations of these children. The novelty of the phenomenon is manifest in the fact that the source of accessible information in most of the cases is the electronic media that has already acknowledged this movement across the border of the two territories, either associating it with the acquisition of the Hong Kong permanent residence, as George Wehrfritz or with the evasion of the Chinese one-child policy such as Ella Lee, Chloe Lai, or Keith B. Richburg in their articles. In opposition, the Chinese one-child policy has already gained considerable scholarly attention presenting a multiplicity of approaches, ranging from the ethnographic research by Tyrene Whyte through the anthropologist perspective of Ann Anagnost up to the Foucauldian biopolitical standpoint of Susan Greenhalgh and Edwin A. Winckler. Publications in the electronic media are also more accessible on this topic, providing an insight into its present practices, as the writings of Jane Macartney or Bill Schiller.

In the course of answering the above-delineated questions, the thesis reconsiders Agamben's thoughts along the problematic of sovereignty as decision-making capacity of subjects, relying on his intellectual predecessors such as Carl Schmitt, Hannah Arendt and Michel Foucault. It aims at highlighting what is often overlooked in the literature that builds on Agamben's insights; instead of asserting the impossibility of political action against the sovereign decision that comprises life under the rule of law, it is argued that the case of the mainland Chinese mothers represent the fundamental nature of the relationship between sovereign and the subject, which necessarily involves the potential to make a decision, that is, the possibility of sovereign action. Besides identifying the source of this capacity in the fact that in modernity, bare life has become both the object and subject of state politics²¹, thus its utmost abandonment coincides with its utmost inclusion; the main contribution of the thesis is to raise the possibility of reconsidering Agamben's insights in terms of introducing another

²¹ Agamben, *Homo Sacer*, 148.

sovereign power into the relationship of the sovereign power and citizen, who is homo sacer exposed to the threat of death and at the same time the “earthly foundation of the state’s legitimacy and sovereignty.”²²

²² Agamben, *Homo Sacer*, 127.

CHAPTER 2: FROM TERRITORIAL SOVEREIGNTY TO SOVEREIGNTY AS DECISION; CARL SCHMITT ON SOVEREIGN POWER

In an attempt to answer the question that has emerged from the puzzle of mainland Chinese mothers who go to Hong Kong “whose purpose of visit is believed to be giving birth”, namely, how they are able to cross borders and what type of border is the one between the mainland and Hong Kong, the second chapter aims at moving from the concept of territorial sovereignty towards an alternative understanding of it provided by Carl Schmitt. Schmitt’s insight is that sovereignty must be localized in the decision which gives order to a certain territory; and this act is performed by the decision on the exception, as for him, the exception is indispensable to formulate a norm, given that the “exception explains the general and itself.”²³

Facing the puzzle of those mainland Chinese mothers whose choice on the birthplace of their children demarcates a dividing line between the mainland of the People’s Republic of China and Hong Kong, one of its Special Administrative Regions, the “territorial epistemology” in IR: one that transposes the historically unique Westphalian system into a generalized model of spatial organization²⁴ proves to be completely ineffective. The source of the ineffectiveness of this territorial epistemology is that it cannot conceive overlap of sovereignties within the same territory. It displays states as territorially distinct entities surrounded by clearly drawn boundaries, geographical borders; and it understands sovereignty as “the supreme rule of a juridical order.”²⁵ In opposition, Carl Schmitt completely re-defined the concept of sovereignty and argued that the relation of the sovereign power to the juridical order is one of a different nature, as the sovereign is the one who makes the establishment of

²³ Agamben, *Homo Sacer*, 16.

²⁴ Vaughan-Williams, *Border Politics*, 50.

²⁵ Hans Kelsen quoted in Agamben, *Homo Sacer*, 28.

that order possible. Consequently, it must not be understood as being located within the legal order, nevertheless it maintains a fundamental relation to it. “The sovereign stands outside of the normally valid juridical order, and yet belongs to it, for it is he who is responsible for deciding whether the constitution can be suspended *in toto*.” From this formulation, two things are important to be acknowledged: the first is that the sovereign is placed outside the legal order, in the sense that “authority proves itself not to need law to create law,”²⁶ and secondly, that the essence of sovereignty is articulated in the form of a decision.

These two attributes are intrinsically linked in the concept of the *exception*. Both the position (for Schmitt, being outside the legal order) and the function of the sovereign power (namely, the “ordering of space” by “taking of a land” (*Landesnahme*) – the determination of a juridical and territorial ordering (of an *Ordnung* and an *Ortung*)...²⁷) is explained by this concept. The reason is that in the understanding of Schmitt, the establishment of a legal order requires first of all a “factual regularity” which is indispensable for the “rule’s immanent validity,”²⁸ therefore the juridical ordering must comprise the “normal structuring of life relations” that the law needs.²⁹ “To create...order and thereby establish the normal situation is the prerequisite for legal norms to be valid. Every norm presupposes a normal situation, and no norm can be valid in an entirely abnormal situation.”³⁰ Here the fundamental nature of juridical ordering is revealed; because what is at stake is the applicability of law to facts, and the way law is applied. This literally means that prior to the existence of law, or in case of the suspension of the normal operation of the legal order, that is, in the *state of exception*, there is a decision on law’s reference to the life relations which are previously not ordered by it. In Agamben’s formulation, “in suspending the norm, the “state of exception” reveals, in absolute

²⁶ Agamben, *Homo Sacer*, 16.

²⁷ Ibid., 19.

²⁸ Ibid., 16.

²⁹ Ibid., 26.

³⁰ Carl Schmitt, “*The Concept of the Political*” (Chicago: The University of Chicago Press, 1996), 46.

purity, a specifically juridical element: the decision.”³¹ The decision “concerns neither the *question iuris* nor a *question facti*, but rather the very relation between law and fact...The law has a regulative character and is a “rule” not because it commands and proscribes, but because it must first of all create the sphere of its reference in real life and *make that reference regular*.”³² As Schmitt writes, law cannot be applicable to chaos,³³ its applicability must be preceded by a decision on the way how law will regulate life relations, on the way how the “factual regularity” will be established in which legal order gains validity. As a consequence, however, the decision is made independently of the juridical ordering the operability of which it aims to create. As Schmitt writes, “it cannot be ...made to conform to a preformed law” or “the precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. What is entailed...is an “independently determining moment.””³⁴ On the other hand, for the same reason, the connectedness of that decision to the legal order is also unquestionable; and as a result, what concerns Schmitt here is “what must be inscribed within the law is something that is essentially exterior to it, that is, nothing less than the suspension of the juridical order itself.”³⁵ In consequence, by analyzing the nature of the decision and its relation to the normal operation of the legal order, he comes to the conclusion, that sovereignty is, although intimately linked to law, is located outside the legal order. As Agamben quotes his Political Theology, “the state of exception seems to “subtract itself from any consideration of law (Schmitt 1921, 137)”³⁶ and it brings about a “suspension of the entire existing juridical order (Schmitt 1922, 13/12).”³⁷ He is the one who has “the

³¹ Giorgio Agamben, *State of Exception* (Chicago: The University of Chicago Press, 2005), 34.

³² Agamben, *Homo Sacer*, 26.

³³ *Ibid.*, 16.

³⁴ Schmitt quoted by Fitzpatrick in Norris, *„Politics, Metaphysics and Death: Essays On Giorgio Agamben’s Homo Sacer”* (Durham: Duke University Press, 2005), 58.

³⁵ Agamben, *State of Exception*, 33.

³⁶ *Ibid.*, 33.

³⁷ *Ibid.*, 32.

monopoly to decide”³⁸ and the decision is revealed when the reference of law to life relations must be settled.

To conclude with, the Schmittian understanding of sovereign power is able to transcend the traditional concept of territorial sovereignty. For sovereignty is not defined as the supreme rule of a juridical order which exclusively reigns within the clearly defined spatial limits; it is the power that, prior to the existence of the legal order, makes a decision on the state of exception, when the reference of rules to life relations is defined. “Only because its validity is suspended in the state of exception can positive law define the normal case as the realm of its own validity.”³⁹ Thus, wherever a decision on the exception takes place, wherever a monopoly for a final decision on how certain life relations will be regulated within a legal order can be identified: sovereign power is in operation. What this implies for the case of mainland Chinese mothers at hand is that it facilitates the conceptualization of different sovereignties “overlapping” on the territory of the same country; and it supposes the possibility of the transition of limits between different sovereignties not necessarily as transitions of geographical borders but as transitions between spheres where the regulation of life relations takes a different form.

³⁸ Agamben, *Homo Sacer*, 16.

³⁹ *Ibid.*, 17.

CHAPTER 3: TOWARDS SOVEREIGNTY AS “DECISION ON LIFE”; GIORGIO AGAMBen ON SOVEREIGN POWER

Agamben in the *Homo Sacer* quotes at length the Schmittian formulation of the position of sovereignty as he describes it in *Political Theology*, which clearly indicates its significance for him. Agamben challenges and more importantly, develops the Schmittian thoughts on the two, above-mentioned points: on the proper place of the sovereign power in relation to the legal order and on its identification as the one who decides on the exception. For Agamben, the exception, besides being the situation in which “the decision in its absolute purity”⁴⁰ unfolds, as the application of the norm is not yet established or it is suspended, it takes the form of an exclusive relation which includes *life* into the hold of law. He also personalizes this exception in the figure of *homo sacer*, in other words *bare life* or *naked life*, who stands for the living exception embodying the site of the sovereign decision.

3. 1. *The nature of exception*

For Agamben, the very nature of the exception is not only the absence of a norm or a rule, but the *suspension of it*. “The exception does not substract itself from the rule; rather, the rule, suspending itself, gives rise to the exception, and maintaining itself in relation to the exception, first constitutes itself as a rule.”⁴¹ What has to be noted here that the exception is a special kind of relation, because what is excluded from the general in the form of an exception does not ceases to remain in relation with it. As Schmitt wrote, “the exception explains the general and itself...it thinks the general with intense passion.”⁴² As a result, the exception always contributes to the articulation and strengthening of the general, from which it is

⁴⁰ Agamben, *Homo Sacer*, 16.

⁴¹ *Ibid.*, 18.

⁴² Schmitt quoted in Agamben, *Homo Sacer*, 16.

excluded. In this sense, the exception is a relation of an inclusive exclusion, which by the fact of being excluded, gains an intrinsic connection to the general. It is not irrelevant to it, but derives from the fact that the general has withdrawn from applying in the case of the exception. In legal terms, the exception “is not, on account of being excluded, absolutely without relation to the rule. On the contrary, what is excluded in the exception maintains itself in relation to the rule”⁴³ exactly in the form of “not applying.”

According to Agamben, there are two marginal figures on the edge of legal order that are included in it in the form of an exception. The first is the sovereign power which is not outside of the order, but paradoxically, both inside and outside. In opposition to Schmitt, who understood sovereignty as a power which is clearly located outside the legal order as it is the one that establishes it, Agamben argues that “the paradox of sovereignty consists in the fact the sovereign is, at the same time, outside and inside the juridical order.”⁴⁴ It is not outside, but it is a marginal figure which is related to the juridical order by the exception. Or, in Agamben’s formulation, it is inclusively excluded, because it is involved into the juridical order in a way that it suspends its validity in relation to it. The other marginal figure stands for the life that is captured in the form of the exception in order law’s reference to the life relations could be established. In the following, the real mechanism of this inscription of life within the legal order will be closely scrutinized, and the marginal figure who embodies it: the *naked life* of *homo sacer*.

⁴³ Agamben, *Homo Sacer*, 17.

⁴⁴ Ibid., 15.

3.2. Capturing life in the form of the exception

Agamben intervenes and contributes to the Schmittian reformulation of sovereignty as a decision on the exception with the introduction of the concept of *life* as a fundamental element. Developing Schmitt's thought of ordering as the normalization of life relations, Agamben argues that in the process of territorial and juridical ordering, it is in fact *life* that is embraced into a relation with the law.

“If the exception is the structure of sovereignty, then sovereignty is not an exclusively political concept, an exclusively juridical category, a power external to law (Schmitt) or the supreme rule of the juridical order (Hans Kelsen): it is the originary structure in which law refers to life and includes it in itself by suspending it.”⁴⁵

Drawing on the Schmittian heritage, that the decision is the foundational element in which the factual regularity is created and the law gains applicability to life relations, Agamben emphasizes the duality that is inherited in the concept: on the one hand, the state of exception is indispensable for the decision which necessarily precedes the application of any norm, but the exception is also a situation, where the norms are not yet applied or where their effect is suspended. In other words, the state of exception is an “empty space: on the one hand anomie, juridical *vacuum*, and, on the other, pure being, devoid of any determination or real predicate.”⁴⁶ The state of exception is thus the situation where law and life becomes related to each other depending on the sovereign decision, but the essential character of this situation is that the outside is embraced by the suspension of any norm. Law's only reference for what

⁴⁵ Agamben, *Homo Sacer*, 28.

⁴⁶ Agamben, *State of Exception*, 60.

lies outside of its application is what it can take into its hold in the state of exception, but this hold is immediately established as the direct submission to the sovereign decision. For Agamben, the originary activity of sovereignty is “above all “a taking of the outside,” an exception.”⁴⁷ The state of exception therefore is situated on the margins of the legal order in a sense that it is not a fact of the natural, because it only derives from the suspension of the rule, but for the very same reason it neither can be a juridical case.⁴⁸

The further step what Agamben makes at this point is that in the process of establishing the relation with the nonrelational what is exactly captured within the sovereign’s hold is not simply natural life, but necessarily a life in relation to which law is suspended. This juridical vacuum is what he calls the exception. This is the situation where the arbitrary sovereign decision takes place on how legal order relates to life relations. But the life that has been already captured in the state of exception is not natural, intact life any more: it is a life that is directly exposed to the sovereign decision, a life on which no norm or rule is applied; in relation to which law *suspends* itself. This life is addressed by Agamben as *bare life* or *naked life*, as it is exposed to the sovereign decision. In this sense, “*the originary relation of law to life is not application but Abandonment*. The matchless potentiality of the nomos, that it holds life in its ban by abandoning it.”⁴⁹ and that “if the law employs the exception –that is the suspension of law itself – as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for the definition of the relation that binds and, at the same time, abandons the living being to law.”⁵⁰ To this special form of relation, in which life is embraced by the sovereign power through the suspension of the validity of law in relation to it, Agamben calls the *sovereign ban*, and the one who “has been

⁴⁷ Agamben, *Homo Sacer*, 18.

⁴⁸ Ibid., 18.

⁴⁹ Ibid., 29.

⁵⁰ Agamben, *State of Exception*, 1.

banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable.”⁵¹

“The ultimate subject that needs to be at once turned into the exception and included in the city is always naked life.”⁵² The “nakedness” signifies its distinction from natural life, because naked life is captured already in a relation with the sovereign power. This special relation however, is an exclusive inclusion, because it rests on the suspension of the norm. The resulting nakedness also stands for the deprivation of every status that is acquired in the normal operation of order, as Agamben puts it, “the state of exception ...takes place precisely when naked life – which normally appears rejoined in the multifarious forms of social life - is explicitly put into question and revoked as the ultimate foundation of political power.”⁵³ And third, nakedness also mean that abandonment by the law can always take the form of death, “A life caught in the sovereign ban is the life that may be killed...and the production of bare life is the originary activity of sovereignty...”⁵⁴ and this directly leads to figure of *homo sacer* as the historical figure of the life that is captured by the sovereign power as an exception.

3.3 *Homo Sacer*

Theoretically, in the process of territorial and juridical ordering in the centre of which there is the state of exception, that is, the “taking of the outside”, life that is encapsulated in the sovereign’s hold is as indispensable as the figure of the sovereign itself. As a proof of his theory of sovereignty as *decision on life*, Agamben analyzes the historical figure of homo sacer. In the Roman antiquity, the marginal figure of homo sacer was a man, whose life was

⁵¹ Agamben, *Homo Sacer*, 28.

⁵² Agamben, *Means without End: Notes on Politics*, 6.

⁵³ Ibid., 5.

⁵⁴ Agamben, *Homo Sacer*, 83.

taken neither according to the regulation of the penal law nor pursuant to the religious laws. Interestingly and paradoxically, however, he could be killed by anyone without committing homicide. According to Agamben, the fact that he was not punished by the law and he could not be sacrificed in a religious procedure signifies that he was excluded from the realm of both legal and religious order, or to be more exact, he constituted an *exception*, that, for Agamben, means that these regulations were suspended in relation to him. This is also shown by the possibility to kill him, and the fact that his death had no real significance neither within the realm of criminal law, nor in religious context. “Just as the law, in the sovereign exception, applies to the exceptional case in no longer applying...so *homo sacer* belongs to God in the form of unsacrificeability and is included into the community in the form of being able to be killed.”⁵⁵ As Norris formulated it, its marginal status and its inclusive exclusion is manifest in the form that “it is inside the legal order insofar as its death can be allowed by that order; but it is outside insofar as its death can constitute neither a homicide nor a sacrifice.”⁵⁶

Agamben’s analysis on the operation of the sovereign power and the way how territorial and juridical ordering takes place crystallizes into the construction of political order. On the margins of the legal order, in a symmetrical position there is the sovereign power and the figure of *homo sacer*. What is common in them that they are both in the threshold between law and life: “There is a limit-figure of life, a threshold in which life is both inside and outside the juridical order, and this threshold is the place of sovereignty.”⁵⁷ In Agamben’s understanding the two are intrinsically linked as the sovereign power, whose original activity is the “taking of the outside” in order law’s reference to life to be established, captures life in the form of the exception: by suspending the law in relation to *homo sacer*, whose naked life will be exposed to the sovereign decision. “The ban is the force of simultaneous attraction and

⁵⁵ Agamben, *Homo Sacer*, 82.

⁵⁶ Norris, *Politics, Metaphysics and Death*, 10.

⁵⁷ Agamben, *Homo Sacer*, 27.

repulsion that ties together the two poles of the sovereign exception: bare life and power, *homo sacer* and the sovereign.”⁵⁸ What this implies for the case of mainland Chinese mothers who go in Hong Kong is the following: If sovereignty is the power that decides on life, that is, on the life in relation to whom the validity of the juridical order is suspended, on the life who will be inclusively excluded from the legal order, then it is not only the government of the People’s Republic which possesses and practices the capacity to make a decision on life in such a way, but the government of Hong Kong as well. The transgression of the borders of the SAR is in fact the crossing between the two juridical ordering in which life is embraced differently. At the moment, however, when we solve the problem of the crossing of borders within the same territorial jurisdiction and re-define sovereignty as the decision on life, the following question emerges: *If sovereignty is indeed the capacity to make a decision on life, then not only these two governments, but the border-crossing mainland mothers are making their respective decision on life. They also perform a decision in the form of a choice on the juridical order in which their children will be inscribed. Or to put it another way, they choose between the sovereign which is operating on the mainland and the one in Hong Kong because they intentionally avoid the sovereign on the mainland and expose their children to the decision of the sovereign power in Hong Kong.* The next chapter is an attempt to scrutinize the situation how it becomes possible to see those lives (the mainland mothers) who are subjected to a sovereign power within a juridical order perform their own decision and practice sovereignty, but first, shifting our focus from the “decision”, the status and meaning of “life” must be presented in a detailed way.

⁵⁸ Agamben, *Homo Sacer*, 110.

3.4 Zoé and bios

In order to understand the originary construction of political order, that is built on the inscription of life into the sphere of law in the form of exception and in the figure of homo sacer, the relation between the “natural” and “nonrelational” life and “life relations regularized by the juridical order” must be demonstrated. The originary construction of the political order, based on the exclusive inclusion of natural life in the form of the exception, and thus the assertion of the sphere of law within which political life can unfold could be illustrated by the paradigmatic model of the Greek city-state, the *polis*. The Greek understanding of political life clearly represents the fundamental distinction between natural life and the political life that was regulated by human-made laws. For that reason this two, separate spheres of human life was addressed by different terms. The “simple fact of living”, that is, natural life, was regarded by them as a common characteristic of all living beings, animals, men and the gods, equally⁵⁹, and it was addressed by the term *zoé*, which “significantly enough, lacks a plural.”⁶⁰ The other realm of human life where political life could be established was a particular way of life, a “form or manner of living peculiar to a single individual or group.”⁶¹ To name the latter, they used the expression “*bios politikos*,” and, as Arendt describes, “the rise of the city-state meant that man received besides his private life a sort of second life.”⁶² The maintenance of life, the biological necessities common to all living beings were absolutely irrelevant for the political way of life, as in this regard a human being were not different from an animal. The political sphere was designed to assert what made man as living being truly human; as Arendt evokes, in the political sphere, men could be among his fellows, and discloses himself by words and acts that distinguished and individually described him: “human plurality is the paradoxical plurality of unique

⁵⁹ Agamben, *Means without End*, 3; Agamben, *Homo Sacer*, I.

⁶⁰ Agamben, *Homo Sacer*, I.

⁶¹ Agamben, *Means without End*, 3.

⁶² Hannah Arendt, “*The Human Condition*,” (Chicago: The University of Chicago Press, 1998), 24.

beings...speech and action reveal this unique distinctness. Through them, men distinguish themselves instead of being merely distinct; they are the modes in which human beings appear to each other, not indeed as physical objects, but *qua* men.”⁶³ Political life was designed so that equal men as fellows could appear to each other as human beings and thus they could be remembered by the community. This realm of life was what “Aristotle called *bios politikos*, namely action (*praxis*) and speech (*lexis*) out of which rises the realm of human affairs...from which everything merely necessary or useful is strictly excluded.”⁶⁴

To conclude with, Agamben – incorporating the Schmittian formulation of sovereignty as the monopoly to decide in the state of exception when norms are retained from application, on juridical ordering; that is, on the way life relations will be normalized in order the rule to be valid – reformulates the definition of sovereignty as a decision on life. For him, the originary activity of the sovereign power is the “taking of the outside”, the establish law’s reference on a certain realm of natural life. In order any kind of decision to be made on life, first, the norms must be suspended to let the ground for the decision. Therefore, according to him, “*the originary relation of law to life is not application but Abandonment*. The matchless potentiality of the *nomos*, its originary “force of law” is that it holds life in its ban by abandoning it.”⁶⁵ As it has been discussed, the figure that embodies the life which is produced so that it can serve as ground of the sovereign decision is the naked life of *homo sacer*. He is separated from the sphere of the natural as he is captured in the hold of sovereign power and he is excluded from the sphere of law as he is the one in relation to whom the validity of the rules is suspended. In consequence, the construction of the political order is built on the separate realms of the natural, the outside or the nonrelational on the one hand, and realm of life on which the regular reference of law is established. In-between dwells the sovereign

⁶³ Ibid., 176.

⁶⁴ Arendt, *The Human Condition*, 24.

⁶⁵ Agamben, *Homo Sacer*, 29.

power and the homo sacer, linked intrinsically by the fact that they are both inside and outside of the sphere of law: the sovereign decision could not be prescribed by any rules, and it takes place in the state of exception when the application of the norms is suspended. The homo sacer is related to the juridical order only in the form of its exclusion: as an exception. These two figures on the edge between the sphere of nature and the sphere of law are on the other hand, intrinsically linked. The naked life of homo sacer is the site of the sovereign decision on life. This political structure rests on the distinctness of natural life and the realm of law, or political life. As in the ancient Greek cities, natural life or *zoé* remained for the most part “nonrelational” to the *bios politikos*, to the particular way of life in the political realm; the biological necessities and the problems of the maintenance of life and reproduction were rendered to the *oikos* or *household*⁶⁶, completely out of the concern of political life conducted in the agora of the *polis*. “The “good life,” as Aristotle called the life of the citizen, therefore was not merely better...or nobler than ordinary life, but of an altogether different quality...No activity that served only the purpose of making a living, of sustaining only the life process, was permitted to enter the political realm...”⁶⁷

For Schmitt, sovereignty was the monopoly to decide on the state of exception⁶⁸ and this formulation was incorporated in Agamben’s theory on sovereignty in a way that the decision in fact is performed on life, on homo sacer whose naked life is exclusively included in the sphere of law, thus demarcating it. What does this imply to the case of the mainland Chinese mother who go to Hong Kong? At the moment when sovereignty is re-defined as the monopoly on the decision on life, this immediately raises the question, how many sovereign decisions on life could be identified. Certainly, there is a juridical order in the mainland and one on the territory of Hong Kong that embraces life and “normalizes life relations” in an

⁶⁶ Arendt, *Human Condition*, 30.

⁶⁷ *Ibid.*, 37.

⁶⁸ Agamben, *Homo Sacer*, 11.

entirely different way – as it is obvious from the choice these mothers make. But immediately, the *decision that mainland mothers make* on which sovereign power should decide on their children must be reconsidered. In fact, if sovereignty is a decision on life, the decision of mainland mothers must be taken into account, as it is the submission of the life of their children to the sovereign power of Hong Kong and its decision on life – at the same time annulling the decision made on them on the mainland. In order, however, to get a clearer picture on the nature of this decision on life, first of all the content and position of life must be reconsidered. The next chapter provides a comprehensive picture about the fundamental change of the concept of “life” that has taken place in modernity. This turn has affected both the original construction of the political order and the “division between the public and the private realms, between the sphere of the *polis* and the sphere of household and family... a division upon which all ancient political thought rested as self-evident and axiomatic.”⁶⁹

⁶⁹ Arendt, *The Human Condition*, 30.

CHAPTER 4: THE RISE OF BIOPOLITICS AND THE TRANSFORMATION OF THE POLITICAL ORDER IN MODERNITY

Even if the concept of sovereignty has been redefined as a decision on life that makes the difference between the mainland of the People's Republic and Hong Kong intelligible, it raises the question whether we only face two decisions on life in that case and problematizes the decision of mainland mothers. The above-discussed Agambenian model of sovereignty seems to be inadequate to describe two essential elements of the problem at hand: first, that the decisions are performed on life, but on attributes that are associated with biological life (reproduction, child-bearing), on the other hand, it assumes decision-making capacity on behalf of the subject. The chapter thus explores the content of the concept of "life" in modern politics; the change in the status of biological life with the rise of *biopolitics*, and the transformation in the construction of the political order with the emergence of the *nation-states*. In this context, the decision on life acquires an entirely new meaning, and we can come closer to understand what happens on the borders of Hong Kong.

4. 1. A vanishing division: the rise of biopolitics

There are two fundamental transformations in modernity that - keeping intact the core assumption that sovereignty is a decision on life - has changed the original meaning of this formulation. The first concerns the "self-evident and axiomatic" distinction between the household and the city, that is, the distinction between the realm of life associated with the biological necessities and the maintenance of life, and the political sphere. Approximately from the end of the 18th century, as a consequence of the growth of the population (as it was remarked by Hannah Arendt)⁷⁰, or demographic explosion and the processes of

⁷⁰ Arendt, *The Human Condition*, 43.

industrialization (according to Michel Foucault)⁷¹ politics has become more and more concerned with the different aspects of biological life of human beings. These two thinkers acknowledged and described the same phenomenon, and interestingly, they point out the same developments in human societies; on the other hand, their different conceptualizations could be illuminating here.

As a result of the above-mentioned reasons, those biological necessities of man that were entirely excluded from the sphere of politics have gradually penetrated into the political life of the community. Hannah Arendt addresses this phenomenon as the rise of the “social” which is distinct both from the privacy of the household and the commonly shared sphere of the political. “The emergence of society – the rise of housekeeping, its activities, problems, and organizational devices – from the shadowy interior of the household into the light of the public sphere...blurred the old borderline...and changed beyond recognition the meaning of the two terms.”⁷² For her, the concept of the social symbolizes the involvement of the household affairs – biological necessities, reproduction and maintenance of life – into the public sphere. Foucault, who directed his analysis on the changes in the technologies of power on man, comes to the conclusion that “...the new technology...is addressed to a multiplicity of men... to the extent that they form...a global mass that is affected overall processes characteristic of birth, death, production, illness and so on.”⁷³ This transformation required new types of knowledge on man as living being, and there is a striking similarity in the way both Arendt and Foucault addresses the emergence of the “social sciences” such as “economics and statistics” that are designed and adapted to provide appropriate information on biological attributes of the aggregate of man. In the Arendtian formulation, “the assumption that man behave and do not act with respect to each other, that lies at the root of

⁷¹ Michel Foucault, *Society Must Be Defended*, (New York: Picador, 2003), 249.

⁷² Arendt, *The Human Condition*, 38.

⁷³ Foucault, *Society Must Be Defended*, 243.

the modern science of economics, whose birth coincided with the rise of society and which, together with its chief technical tool, statistics, became the social science par excellence.”⁷⁴ Foucault, at the same time, argued that “processes – the birth rate, the mortality rate, longevity...together with a whole series of related economic and political problems...in the second half of the eighteenth century, became biopolitics’ first objects of knowledge and the targets it seek to control” and that “they begin to measure these phenomena in statistical terms.”⁷⁵ At the heart of this transformation there stands the penetration of biological life and political life, the gradual embracing of *zoé*, natural life as the main concern of politics. Or, to put it more straightforwardly, the “simple fact of living, common to all living beings” that makes any distinctions impossible either with regards of one man and the other or between man and animal, the realm of human life that was not regarded to be worthy of being dealt with in the political sphere, was put into focus. Most significantly, “household was the sphere where necessities of life, of individual survival as well as of continuity of the species were taken care of...man existed in this sphere not as truly human being but only as a specimen of the animal species man-kind”⁷⁶ and “a seizure of power that is...massifying, that is directed not at man-as-body but at man-as-species...*what I would call a “biopolitics” of the human race.*”⁷⁷

This is one of the fundamental turns in modern politics, which, of course, has not escaped the attention of Agamben. One of the immediate consequences of such a change is that the “decision on life” from that moment on does not only comprises the isolation of the life of homo sacer that is exposed even to the threat of death. As Agamben writes, “with the emergence of biopolitics we can observe a displacement and gradual expansion beyond the

⁷⁴ Arendt, *The Human Condition*, 42.

⁷⁵ Foucault, *Society Must Be Defended*, 243.

⁷⁶ Arendt, *The Human Condition*, 45.

⁷⁷ Foucault, *Society Must Be Defended*, 243. italics mine.

limits of the decision on bare life.”⁷⁸ (In a similar fashion, Arendt writes that the “social realm, where the life process has established its own public domain, has let loose an unnatural growth, so to speak, of the natural”⁷⁹) With the disappearance of the sphere of *zōē*, or, better to say, the involvement of it in the city implies that “the biological given is as such immediately political, and the political is as such immediately the biological given.”⁸⁰ What Agamben indicates, however, as a fearful element is what follows from all the attributes of sovereign power and its operation: the fact that what is exposed to the sovereign decision necessarily lacks the protection or “mediation” of the normal application of rules. From the two equal juridical elements, the decision is only revealed if the validity of the norm is suspended. As, evoking the Schmittian conceptualization, Agamben writes, there are “two fundamental elements of law: norm and decision. In suspending the norm, the “state of exception” reveals, in absolute purity, a specifically juridical formal element: the decision.”⁸¹ If natural life enters into the structure of the city, it automatically becomes naked life or bare life, and it becomes possible to perform a decision on it, to include it as an exception. If everyone and every aspect of life is now exposed to the sovereign decision, but among the two fundamental elements of law, the decision can only operate and is only revealed in the situation when the application of the norms is suspended, this at the same time means that the permanent possibility had opened up for the sovereign power to suspend the validity of the norm: in relation to *every one*. Hence writes Agamben, that “if today there is no longer any one clear figure of the sacred man, it is perhaps because we are all virtually *homines sacri*.”

⁷⁸ Agamben, *Homo Sacer*, 122.

⁷⁹ Arendt, *The Human Condition*, 47.

⁸⁰ Agamben, *Homo Sacer*, 127.

⁸¹ Agamben, *State of Exception*, 34.

4.2. The modern nation-state and the transformation of the political order

The other change, that has irreversibly affected the construction of the political order in modernity, could be connected to the birth of the modern nation-state in the course of the French Revolution. During these subversive events, in 1789 a symbolic document was issued: the Declaration of the Rights of Man. Its symbolic significance derives from first, the fact that in its first article, it defines man, the living being as bearer of rights: “men are born and remain free and equal in rights”⁸² by which it politicizes human life, that is, establishes an intimate relationship between human life and sovereign power which basically mean the capturing of *human life as naked life* into the sovereign’s hold; and second, in the third article, it states that “The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.”⁸³ This latter provision implies that a new way of delineating a political community is established, which is based on a fundamental element of natural life: the principle of *birth*.

These provisions are the symbolic turning points; as a result, the political community has been founded upon the naked life of its members; on the “fiction...that *birth* immediately becomes *nation* such that there can be no interval of separation between the two terms,” and in the figure of the “new sovereign subject”⁸⁴, the citizen, “the new status of life as origin and ground of sovereignty” has been defined, meaning “that birth – which is to say, bare natural life as such...becomes the immediate bearer of sovereignty.”⁸⁵ When natural life is incorporated entirely in the political, then everyone becomes potentially naked life; in the political construction of the nation-state every human being becomes related to the sovereign power as the nation is the ultimate source of sovereignty, but then the citizen can always

⁸² Yale Law School, Lillian Goldman Law Library, “Declaration of the Rights of Man”, http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed 8 May, 2010), Article 1.

⁸³ Declaration of the Rights of Man, Article 3.

⁸⁴ Agamben, *Homo Sacer*, 128.

⁸⁵ Ibid., 129.

potentially be “banned”. In the Agambenian understanding, the figure of homo sacer, that was a definite category in the antiquity⁸⁶, is now recognizable and separable in the life of every citizen. Similarly, as Arendt notes, “from then on Man, and not God’s command or the customs of history should be the source of law...in the new secularized and emancipated society, men were no longer sure of...rights which until then had been outside the political order and guaranteed not by government and constitution, but by social, spiritual and religious forces.”⁸⁷ What both Arendt and Agamben point out here is the potentiality in the sovereign power to make a decision on who would be the ones to be isolated and separated as homini sacri. This separation and isolation, the exclusive inclusion of naked life does not take place on the margins of the political and the natural any more. As the original distinction between zoé and bios, natural and political is blurred, the distinction takes place in the same realm; both the ones who are not (yet) kept as an exception and those who are rendered “only” naked life, that is, those whose naked life has been isolated from their “multifarious forms of life abstractly recodified as social-juridical identities”⁸⁸ are inhabitants of the same space. As an ever menacing consequence, not only the potentiality is there to draw and re-draw these boundaries, “it is as if every valorization and every “politicization” of life necessarily implies a new decision concerning the threshold beyond which life ceases to be politically relevant...and can as such be eliminated without punishment.”⁸⁹

These two, quite dreadful developments and change in the construction of the political order in modernity, the unlimited decision on all aspects of life and the comprehensive politicization of it on the one hand; and involvement of homo sacer in the city so that the “threshold beyond which life ceases to be politically relevant” is drawn and is constantly re-

⁸⁶ Agamben, *Homo Sacer*, 140.

⁸⁷ Hannah Arendt, “*The Origins of Totalitarianism*” (New York: Harcourt, 1976), 291.

⁸⁸ Agamben, *Means without End*, 6.

⁸⁹ Agamben, *Homo Sacer*, 139.

drawn not on the borders of the city, but within the city, re-defines the content of the sovereign capacity of the decision on life. The decision on life in modernity takes the form of a decision “on the value (or the nonvalue) of life as such;”⁹⁰ on the citizen who could – in an instant, based on the arbitrary, unprecedented sovereign decision, – be rendered bare life, and be not only exposed to the threat of death, but “be eliminated without punishment.” In order to illustrate these changes in their entirety, the Chinese family planning or “one-child policy” as an illuminating, tangible and relevant example will now follow.

4.3. “Lives unworthy of being lived”: second children in China

In the theoretical discussion on the nature of sovereignty, Agamben traces the originary structure of the political order, in which law becomes related to life through the production of the naked life of homo sacer. Sovereign is the one who decides – on life, because he is the one who captures homo sacer in the form of the exception, suspending the normal application of law, thus opening up the space where the *decision* on this relation can be made. In modernity, contrarily, the decision on life has transformed fundamentally, as it now concerns the biological life of the nation, ensuring that all forms of life “unworthy of being lived” be eliminated in the name of the political community., without punishment and without any retaliation. In the form of the Chinese family planning, or one-child policy, the arbitrariness of the sovereign decision, the defenselessness of a human being in the exception, and the ruthlessness of the sovereign power can equally be illustrated.

“When the regime finally resorted to specific and increasingly strict birth limits in the 1970’s, it seemed only an incremental step forward on the path toward a nationwide birth control program. In reality, it was a leap forward into an

⁹⁰ Agamben, *Homo Sacer*, 137.

uncharted territory in which the state became the arbiter of life, deciding who would be given a ration ticket (birth permit) and who would not, deciding which children would be deemed legitimate (within the plan) and which would not.”⁹¹

“When China adopted a one-child-per-couple birth limitation policy in 1979, the state claimed dominion over the most intimate personal behavior of its people, sovereignty over the production of life itself.”⁹² As Tyrene Whyte writes,⁹³ the roots of the one-child policy are almost coeval with the socialist regime, although it has been institutionalized in the 1970’s, first with the motto of “‘Later, Longer, Fever’ meaning later marriages, longer intervals between births and fewer children per family...”⁹⁴ As a result of gradual aggravations, in 1979, the possible number of children per couple was limited in one. At present, the provisions of the Population and Family Planning Law of China are the following: “The State shall maintain its current fertility policy encouraging late marriage and childbearing and advocating one child per couple; arrangements for a second child, if requested, being subject to law and regulation.”⁹⁵ Apart from the various incentives (ranging from remarkable welfare benefits to the „Certificate of Honor for Single-Child Parents”⁹⁶) and disincentives, the Article 36 and 41 prescribes the payment of social compensation fees for „citizens who give birth not in accordance with the stipulations in Article 18.” In addition to the astonishing legal regulations, the implementation of the one-child policy perfectly highlights the penetrations of the sovereign power in the biological life of the citizens: “the

⁹¹ Tyrene Whyte, *China’s Longest Campaign. Birth Planning in the People’s Republic, 1949-2005* (Ithaca: Cornell University Press, 2005), 247.

⁹² *Ibid.*, 1.

⁹³ Whyte, Chapter 2 on the origins of birth planning

⁹⁴ Betsy Hartmann, *Reproductive rights and wrongs: the global politics of population control* (Boston Mass: South End Press, 1995), 159.

⁹⁵ United Nations Economic and Social Commission for Asia and the Pacific, “Population and Family Planning Law of the People’s Republic of China (Unofficial Translation),”

http://www.unescap.org/esid/psis/population/database/poplaws/law_china/ch_record052.htm 03.05.2010 (accessed 20 Feb 2010), Article 18.

⁹⁶ Population and Family Planning Law, Article 27.

decision when to have children became a community affair, with local birth planning units giving permission to couples to become pregnant”⁹⁷ or, as Anagnost quotes a discussion with a township-level official from 1991: “We used to manage production, now we *just manage babies*.”⁹⁸ The coincidence of politicized life with the realm of politics and the resulting concern for the body of the nation, “the unconditional assumption of a biopolitical task...of giving form to the life of a people,”⁹⁹ is manifest in the connection of the quality of people that was meant to be developed by the reduction of the quantity: “the idea is to reproduce less in order to reproduce better,”¹⁰⁰ and also in the underlying conviction that the economic, intellectual, social advance of the nation is intimately linked to the size of the population. As Anagnost writes, “this relationship between *luohou* (backwardness) and overpopulation goes without saying.”¹⁰¹ As a consequence, “limiting the number, raising the quality, and the optimizing the location of China’s population have become central objects of statecraft.”¹⁰²

The Chinese family planning illustrates not only the politicization of life, but the relation of naked life with the sovereign power in the form of the suspension of law and the ruthlessness of the unmediated sovereign decision. The threshold between the worthy and unworthy life is drawn between the first and the additional children, and between the parents who are awarded with the certificate of honor for complying with the regulation and those who have more children than the prescribed; and this threshold, as the valorization of life is constantly changing. Every citizen is exposed to the arbitrary sovereign decision on life. Those rendered naked life, that is, life unworthy of being lived are exposed to the direct operation of the sovereign power in the form of “abuses such as late-term abortions, sterilizations and even

⁹⁷ Hartmann, *Reproductive rights and wrongs*, 160.

⁹⁸ Ann Anagnost, “*National Past Times: Narrative, Representation and Power in Modern China*” (Durham: Duke University, 1997), 128. italics mine.

⁹⁹ Agamben, *Homo Sacer*, 149.

¹⁰⁰ Anagnost, *National Past Times*, 127.

¹⁰¹ Ibid., 132.

¹⁰² Susan Greenhalgh and Edwin A. Winckler, “*Governing China’s Population: From Leninist to Neoliberal Biopolitics*” (Stanford: Stanford University Press, 2005), 2.

the killing of the newborn babies;”¹⁰³ or in the form of “losing one’s job, apartment, food ration tickets and urban residency permit.” Additional children, if they survive all the regulations that attempt to prevent their existence, and those that threatens them before and after the moment of birth, are denied the residence permit, which equates with complete social exclusion. Apart from the social compensation fee that is imposed upon their parents, they are not allowed to access health care, education and dwelling, which are all dependent on the *hukou*, the registered permanent residence. Given the settings of the modern politics and the determinedness of Chinese leaders, it is not surprising that “people...in the 1990’s “joke” that the best development policy for China would be to kill off the half of its population or when intellectuals suggest that more play should be given to competition and “survival of the fittest.”¹⁰⁴

¹⁰³ Jane Macartney, “China’s sterilization captives” *The Times (United Kingdom)*, 17 Apr 2010. <http://search.ebscohost.com/login.aspx?direct=true&db=n5h&AN=7EH34618505&site=ehost-live>China's sterilisation captives (accessed 23 Apr 2010.)

¹⁰⁴ Anagnost, *National Past Times*, 121.

CHAPTER 5: THE SOVEREIGNTY OF HOMO SACER

For Agamben, the originary activity of sovereign power is a decision on life, which is performed through including homo sacer in the sovereign ban, necessarily including him as an exception, “through the abandonment to an unconditional power of death.”¹⁰⁵ Capturing natural life this way, the establishment of law’s reference on a well delineated sphere of its realm may unfold. „In modern biopolitics, sovereign is he who decides on the value or the nonvalue of life as such,”¹⁰⁶ this time not at the margins of society, but as the exclusion of those from society, whose life is considered to be “unworthy of being lived.”¹⁰⁷ Having the theoretical background and its practical realization in the form of the Chinese one-child policy at hand, the nature of the decision performed by the mainland mothers arises anew.

Reformulating the question regarding the decision of mainland Chinese mothers in this theoretical context, what unravels is the operation of the sovereign power - deciding “on the value and nonvalue of life” – in its most extreme, unconstrained totality in the mainland, where the state regulates all the aspects of human reproduction, and superficial children could “be eliminated without punishment.” On the other hand, mainland Chinese mothers, the citizens of the mainland who are in an intimate relationship and bound with the sovereign power as they could be rendered naked life, be deprived from their “multifarious social and juridical identities” and submitted to the unmediated operation of sovereign power at any moment, perform a decision on life. Even more strikingly, they perform a decision on those lives that were decided to be unworthy of being lived by the very sovereign power which could render them naked life. By going to Hong Kong, they choose another sovereign power – and thus a different decision on the value of life, according to which their (second) children

¹⁰⁵ Agamben, *Homo Sacer*, 90.

¹⁰⁶ Ibid., 142.

¹⁰⁷ Ibid., 142.

could be inscribed into a political order. Instead of being rendered naked life in the mainland, they are submitted to another decision on life that predictably acknowledges them as life that is “worthy of being lived”; in addition, they gain one of the multifarious social and juridical identities: the Hong Kong permanent resident. How does it become possible for a citizen, virtually a homo sacer, to practice sovereignty and at the same time, resist the sovereign ban? How is this possible in spite of the dreadful developments of modern political life, where homo sacer, “the limit, on which the politicization and the *exceptio* of natural life in the juridical order of the state depends...has moved inside every human life and every citizen?”¹⁰⁸

In order to provide an answer to this question, Agamben should be reconsidered again. There are numerous elements in his theory that could be evoked to explain the capacity of mainland mothers’ political action. First, one of the core statements of him, namely, that the exception is necessarily a *kind of relation*. Abandonment is not possible without relation, without the inclusion of the abandoned in the form of “not applying,” withdrawing and suspending. What is excluded retains its relation with the general and “thinks it with intense passion” as Schmitt had written. The establishment of a relation with the homo sacer, however exclusive it may be, politicizes life, includes it in the political realm. In modernity, this inclusion had gained a deeper meaning. With the politicization of natural life, with the incorporation of *zoé* in the city, the original distinction between nature and law has been blurred; consequently, the marginal line that had separated the two – and also connected them in the figure of homo sacer, has moved within the realm of law or, better to say, within the realm of a permanent state of exception, as Agamben writes, “when life and politics – originally divided, and linked together by means of the no-man’s-land of the state of exception that is inhabited by bare life – begin to become one, all life becomes sacred and all politics becomes the exception”¹⁰⁹; thus

¹⁰⁸ Agamben, *Homo Sacer*, 139.

¹⁰⁹ Ibid., 148.

the constant redrawing of the boundaries attach an additional meaning to exclusion, for the content of “value and nonvalue of life” is contingent and based on the arbitrary sovereign decision. As a consequence, what is excluded, in opposition to the original figure of the homo sacer, it is now excluded only reversibly and temporarily. The constant re-location of boundaries and the different arbitrary decisions on life that is worthy of being lived are changing since the thin line between the “forms of life” and “bare life” are subject to constant modification.

Secondly, as Agamben writes, “the multifarious forms of life abstractly recodified as social-juridical identities...all rest on naked life” and that “naked life...normally appears rejoined to the multifarious forms of social life.”¹¹⁰ This implies that although in modernity we are “all homines sacri,” in a way that on the one hand, our naked life could be isolated and exposed to the death of threat, and on the other, because we are all born naked life due to the inscription mechanism that links birth immediately to nation¹¹¹ as the basic principle of constructing a political community; this statement does *not* imply that all citizens *are actually banned*. Agamben’s formulation refers to the permanent possibility of, but not to the permanent existence of the sovereign ban in relation to everyone. To relate it to the case of mainland Chinese mothers, those mothers who has not yet given birth to their second or additional children are temporarily accepted as life “worthy of being lived.”

Thirdly, and more importantly, however, if the ultimate attribute of sovereignty could be identified in the action of mainland mothers, the locus and origin of this sovereignty shall be exactly identified. Paradoxically, the fundamental transformation of the modern political order, which irrevocably involved homo sacer in the realm of politics and identified it as a

¹¹⁰ Agamben, *Means without Ends*, 5-6.

¹¹¹ *Ibid.*, 43.

“new and more dreadful foundation for the sovereign power,”¹¹² was intimately related to another transformation, one of an opposite direction. On the one hand, as a consequence of the blurred dividing line between the political and the natural, and the complete incorporation of the latter by the former, this new political realm became “the place for both the organization of State power and the emancipation from it.”¹¹³ On the other hand, although these developments has turned naked life every member of the political community, that is, a possible target of the unmediated sovereign decision, at the same time, this naked life has been defined as the “ultimate bearer of sovereignty.” In the newborn figure of the *citizen* in the nation-state, “...man as a living being presents himself no longer as an *object* but as the *subject* of political power”¹¹⁴ or, as Agamben articulates it elsewhere, “the principle of nativity and the principle of sovereignty...are now irrevocably united in the body of the “sovereign subject”.”¹¹⁵ The implications of this statement are crucial, as it sheds on the conceptual pair of abandonment and inclusion a different light. Because accordingly, precisely at the moment when the sovereign power involves naked life into its hold and embraces it so that the sovereign capacity to suspend the norm and to perform a decision could gain ground, the naked life of homo sacer becomes endowed with the capacity to perform a political action, that is, with the capacity of decision-making on the same realm as the sovereign, the decision on life. Agamben is very illuminating at this point: “...citizenship names the new status of life as origin and ground of sovereignty...and, therefore, literally identifies...”the members of the sovereign”.”¹¹⁶ To put it another way, interestingly enough, in the modern political settings, bare life, the site where the sovereign decision unfolds, is at the same time the bearer, the ultimate source of sovereignty, and possesses this capacity

¹¹² Agamben, *Homo Sacer*, 120.

¹¹³ *Ibid.*, 9.

¹¹⁴ *Ibid.*, 9.

¹¹⁵ *Ibid.*, 128.

¹¹⁶ *Ibid.*, 129.

irrevocably. The expansion of the sovereign relation, which is, in fact an “untying”¹¹⁷ and abandonment – in the sense of isolating bare life in “every human life and every citizen”, as Agamben put it – necessarily correlated with its utmost inclusion into the political realm; the investment of sovereignty in its body, in its naked life. In this context, not only the case of mainland Chinese mothers is thought-provoking as the manifestation of the sovereignty of forms of life; but two short remarks by Whyte in relation with the implementation of the Chinese one-child policy in the Chinese population: “...the most important obstacle to overcome...was the *resistance* from within the party - from a predominantly male cadre force, much of it rural and poorly educated, that *saw birth planning as a loathsome intrusion into one of the very few areas of life that had remained traditional and conservative...*”¹¹⁸ and, more strikingly and illuminatingly, this capacity is identifiable as the real reason behind the catastrophic consequence of the one-child policy, the more and more distorted sex ratio in certain provinces and the “missing girls of China.”¹¹⁹ “...As new birth control technologies and surgical advances facilitated the state’s move to engineer childbearing, so did technology become the medium through which couples struggled to engineer the sex makeup of their offspring. They may have accommodated the state’s birth limitation policy, but they sought to do it on their own terms.”¹²⁰

Besides, however, the implications of these changes in modern political life and the comprehensive abandonment *and* inclusion that elevated naked life to be both the object and subject of political life at the same time, the most important contribution could be delineated in the simultaneous existence of two, equal sovereignties operating within the territory of the mainland and Hong Kong. As in this case, the “latent” ability of political action to perform a

¹¹⁷ Agamben, *Homo Sacer*, 90.

¹¹⁸ Whyte, *China’s Longest Campaign*, 247. italics mine.

¹¹⁹ See Avraham Ebenstein, “The „Missing Girls” of China and the Unintended Consequences of the One Child Policy,” *Journal of Youth Studies* 13, no. 1: 99. on the rising sex ratio among first births in China.

¹²⁰ Whyte, *China’s Longest Campaign*, 207.

sovereign decision on life is manifest in the presence of another sovereign. Although the case clearly problematizes the introduction of another sovereign and its influence into the relationship between the sovereign power and naked life, the theorization of this possibility is entirely lacking in Agamben's work. The limited scope of the thesis has not permitted to explore this possibility; but, considering the fact that Agamben has not theorized the way how the presence of an equal sovereign power and, consequently, another unquestionable decision on life influences the original relationship between naked life and the sovereign power, a potential direction of further research could be indicated here; both regarding the theoretical implications of this triangle and in relation to further empirical cases where seemingly marginalized figures perform a decision on the value of life, even if it takes the form of the suspension of an already existing sovereign decision, and thus reveal genuine sovereignty.

Conclusion

Since the decision of the Hong Kong Court of Final Appeal in 2001 that every baby, who was born on Hong Kong soil will acquire the right of abode in Hong Kong, the city had faced an exponentially growing number of expectant mainland women, who had arrived with the purpose of giving birth there. The restricted number of literature cannot provide satisfactory answer neither to the main motivation of the mothers, nor on the further fate of the children who return to the mainland as Hong Kong permanent residents. Nevertheless, the government of the Special Administrative Region was compelled to restrict drastically the number of these mothers. What constitutes the puzzle in this case is that the decision of the mainland mothers implies a kind of distinction between the two territories, but the existing territorial epistemology, characteristic of our traditional understanding of territorial and juridical ordering, could not identify what constitutes this difference. In order to solve this puzzle, the traditional definition of territorial sovereignty had to be re-conceptualized; based on the

insights of Carl Schmitt, the attention was shifted from sovereignty as the supreme rule within the juridical order to its special attribute, what must be defined as the monopoly to make a decision on the exception. For Schmitt, the sovereign power should not be located within the juridical order as he is the one who establishes it in a given territory. Determining the state of exception, the sovereign suspends the application of the norms in order the decision to gain ground, as the equally fundamental juridical element which defines the normalization of life relations or factual regularity that are indispensable for the rules to be valid and applicable. Giorgio Agamben has further developed this model of sovereignty, arguing that the original activity of sovereignty, is in fact the “taking of the outside;” the establishment of the relation of law to life; but this creation –indispensably requiring a decision – necessarily takes the form of the exception. According to him, law is not applied directly to the sphere of nature, but establishes its own reference first as the very suspension of itself, through a materialized exception where the decision on life is indeed performed. The figure, whose natural life is captured by the sovereign in the form of the exception is *homo sacer*. For Agamben, his naked life is the site of the final decision which creates the reference of law to life. Consequently, as sovereignty is reconceptualized as the decision on the exception, more concretely, a decision on life, the following questions had emerged: *In the case of mainland mothers, who makes a decision on life, who has the capacity to practice sovereignty? Furthermore, if sovereignty is re-defined in terms of the decision on life, then such a decision can be recognized not only on the territory of the mainland of the People’s Republic, and on the territory of Hong Kong, but in the decision of those mothers who, giving birth in Hong Kong, actively determine the status of their children in the legal order.* This has directed the attention immediately to the question, how these mainland Chinese mothers are able to make *their* decision on life?

In modernity, the decision on life is not the exclusive inclusion of homo sacer on the margins of political and natural life, but a decision on the value of life as such. As a consequence of the fundamental transformations which – making political life concerned with the attributes of biological life, thus establishing the exclusively including relationship with every human being, and identifying man as the foundation of sovereignty in the modern nation-state, where the citizen had become both the object and subject of political life, the site of sovereign decision now dwells in every human being – but this site, at the same time, is the proper locus and bearer of earthly sovereignty. *This ambivalence of the utmost abandonment by law (being rendered naked life) and the simultaneous utmost inclusion (being exclusively invested with sovereignty) constitutes the possibility that not only the sovereigns on the mainland and Hong Kong, but a citizen, the mainland mother can also perform a decision on the life of her children.* As a contribution, the thesis had reconsidered the Agambenian formulation of the attributes of modern politics, and pointed out the source of authentic political action on behalf of the subject – which is usually suggested to be impossible in current IR theorizing – and, most importantly, it has outlined the possibility of further research by outlining the question of how the relationship between the naked life and the sovereign changes in the simultaneous presence of another sovereign power.

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