History, Theory and Reoccurring Debates around the Question of Refugee

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Abstract

The crisis of refugees in recent years presents the international community with one of the most controversial challenges to international human rights. This paper will locate and read this crisis through the lens of Schmitt's theory and its critique by contemporary theorist. Namely the work of Agamben and his concept of 'Homo Sacer' will be used to illustrate its relevance to the 'stateless' reality of refugees and the denial of their basic human rights. For this purpose, the German constitution will be reviewed as the set model of Schmitt theory before looking into the reoccurring debates around this theoretical framewrok. This paper argues that the reoccurring of Schmitt and the unfortunate consequences on human rights should be regarded as an alarming development that calls for a reconsideration of international norms to protect refugees' basic rights and other vulnerable groups due to this practice.

Keywords: Refugees, Constitutionalism, International law, Schmitt, Human Rights, 'Homo Sacer'.

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1-Introduction

Since 2011 the number of displaced and people seeking refuge has increased worldwide by more than fifty percent(1). In the first two months of 2016(2), 82,636 asylum seekers crossed into EU territory(3). At the end of 2018, while with less pressure(4), the refugee crisis continues, there were 1,294,000 asylum claims made in the European Union let alone other parts of the world that received similar sort of pressure. In the wake of this flux of refugees, the conjectural puzzle of most public discourse regarding refugees in the receiving states in the West and EU, is that of how many asylum-seekers the EU, for example, will or could accept. Notwithstanding the importance of that questions, universality of human rights approaches this discourse from a different angle asking the inverse question of how many applications for asylum will be rejected? On the opened ground offered by this question, international human rights standards beg the fate of these rejected seekers. Normative standards in normal times regardless of the refugee international system are also clear, as per the UDHR article 6 stating that 'everyone has the right everywhere to recognition as a person before the law', however the practice renders big percentage of these individuals who had their asylum claim rejected stateless while still physically on the land of law and human rights that is not including them with a legal status or basic fundamental protections.

Looking back into international law and history this situation could closely compare to displacement following the World war II(5). In 1951 the UN enacted the Convention on the Status of Refugees in an attempt to contain the humanitarian crisis at the time. Due to the definition of refugee offered by the Convention, the most critical obligation on the state signatory is the duty of non-refoulment which means that the state is expected not to return the refugee to a country or a territorial jurisdiction where he/she will potentially

(1) UN High Commission for Refugees: Global Trends: Forced Displacement in 2015.

(2) See Eurostat Tables in index indicating the top figures reached in terms of asylum seekers starting 2015-2018. See also figures with regarded to accepted or rejected applications. Available at http://appsso.eurostat.ec.europa.eu/nui/ last visited on 15/11/2018.

(3) Dimitria Groutsis, The Biggest Refugee Crisis Since World War II Needs a Similar Response, Sydney Morning Herald (Dec. 30, 2015), http://www.smh.com.au/comment/the-biggest-refugee-crisis-since-world-war-2-needs-a-similar-response-20151229-glw655.html [http://perma.cc/Y2R2-D3DQ]; Euan McKirdy, UNHCR Report: More Displaced Now than After WWII, unhcr-displaced-peoples-report/.

(4) Supra note no1 available at http://appsso.eurostat.ec.europa.eu/nui/ last visited on 15/11/2015.

(5) UN High Commission for Refugee: Global Trends: Forced Displacement in 2015.

face prosecution[6]. Nonetheless the Convention does not oblige the states to affirmatively take in asylum seekers. As result of this gap in the current international framework offered to refugees, states have a rather preserve inclination to prevent the initial entry into their territory and so to avoid legal obligations towards refugees. It the wake of this crisis many states introduced laws and policies that restrict or limit their legal and political obligation to offer protection for refugees. These techniques and policies vary between visa requirement and deterrence policies that limit even territorial rights of individuals in the absence or towards gaining a refugee status. States such as US refugee policy[7], Hungary and its emergency legislation[8] in the awake of the crisis and Australia Border force Act[9] created a wall against issues relevant to accepting or considering asylum applications which in turn of course affects the rights and limitations of human rights protections for these individuals. Needless to say, that constitutionality of these national legal instruments is itself under question considering that almost all of them are based on emergency legislations that allows stepping out of the basic protections and guarantees offered in terms of civil rights and international human rights standards and so individuals who are rejected remain in a grey area completely out of the law.

(6) Pierre-Michel Fontaine, the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: Evolution and Relevance for Today, 2 Intercultural Hum. Rts. L. Rev. 149, 156 (2007).

(7) Each of US and UK refugee policies in this regard could be traced back to these countries fight against terrorism and its exceptional practice. These laws have particularly received intense legal and political debate over its legality and constitutionality especially about the ramification it imposes on human rights protections and creating since maybe 1922 until 2001 a community of stateless people. This was very evident in cases of anti-terrorism acts post 9/11 and Guantanamo Bay reality. The argument of security and need to such measures was recently reproduced in the face of refugee crisis. See for example WILKINSON, P. (2007) Homeland Security in the UK: Future Preparedness for Terrorist Attack Since 9/11 Routledge and ACKERMAN, B. (2005) Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism. Modern Law Review, 68, AOLAIN, F. N. (1995) The Emergence of Diversity: Differences in Human Rights Jurisprudence. Fordham International Law journal 19, 101-115.

(8) Hungary Declared a State of Emergency over refugee crisis. The application of emergency legislation does affect not only the refugees who are kept at some stage out by establishing a fence on the border but also extended to affect territorial rights of Hungarian citizens by given police the right to enter and check houses without prior permission http://america.aljazeera.com/articles/2015/9/15/hungary-declares-emergency-over-refugee-crisis.html last visited on 15/11/2018

(9) Australia's Border Force Act 2015. The act is in its turn similar to other similar policies around the world has developed in the country throughout history and specifically since the African refugee crisis in 1992 see for example Mark Isaacs, Argument, The Intolerable Cruelty of Australia's Refugee Deterrence Strategy, Foreign Policy (May 2, 2016).

This paper while informed by the factual continuation of the refugee crisis regardless of root causes whether political, environmental or cultural, will focus specifically on the historical and theoretical frame behind the dichotomy of sovereign states practices and the emerging reality of 'stateless' legal concept on another hand. While this discussion is central to the debates on each of constitutionalism and the universality of human rights, the paper will be reading into the development of theory and the reoccurring debate on 'Homo Sacer' advanced by Agamben as a critique to Schmit's theory on the legality of unconstitutional practice in times of need. Moreover this paper will explore the question of to what extent a challenge of refugee crisis recreates an ever-existing debate over 'stateless' legal reality but without being able to offer a clear solution to such a permanent gap in law. This paper argues that the concept of 'Homo Sacer' applies to today's refugees' status and thus makes another example of individuals with alienable rights. It attempts further to highlight the need to reconsider norms of protections for refugee and see this reoccurring reality as an alarming development that requires more focus on individual rights.

For that purpose, this research will attempt first to locate the discussion into its context by tracing the origins; highlighting first the infamous example of dictatorship as a form of acting out of established constitutions. After that the experience of the German constitution of Nazi state will be addressed as the backdrop example of the Schmitt theory which is central to this research pursuit. By Setting this exact background, the paper moves to look into the theoretical frame of Carl Schmitt of dictatorship that have been revived repeatedly throughout history and specifically so by the refugee crisis. From this theoretical structure springs out the concept of 'Homo Sacer' which runs in parallel to the refugee 'stateless' legal reality. This concept is illustrated as a major critique of the non-constitutionalism or extra legality measures by Giorgio Agamben who argues fiercely against the legal concept of 'stateless man' or out of law area no matter how and why it is created.

2-Origins of the Contemporary concepts of Alienable Rights

The earliest example of a crisis condition that called for a response out of the standing government is found in ancient Greek cities[10]. Exhausted by

(10) Aristotle (1962) The Politics, Book III, Chapter 14, Penguin Books, p. 136. He remained in power throughout his life, for a stated period, or until certain tasks were accomplished. His task was to restore or maintain the civil peace and he would not usually abdicate his power until peace and order were properly restored. The usage of the term 'tyrant' may be confusing since it has a different meaning today than in ancient Greece, nonetheless some elected tyrants were also very much tyrants in the modern sense of the term.

civil strife, the people would elect a respected and powerful man to rule the city, who 'was in fact a kind of elected tyrant'[11]. The Roman Dictatorship however stands as the main historical model as a mean of crisis settlement that lasted for approximately 300 years during the Roman Republic[12]. This system has been greatly admired by some legal scholars[13]. According to Rossiter, nowhere in all history has the belief that a constitutional state can alter its pattern of government temporarily to preserve it permanently been more resolutely asserted and successfully proved than it was in the storied republic of ancient Rome[14].

The Dictatorship[15] was created 'as a temporary revival of the monarchy used in times of emergency when it was necessary to concentrate the whole power of the state in a single person'[16]. The dictatorship as part of the regular constitutional system did not survive as long as the republic. In 217 BC, there was already a departure from the established practice when the dictatorship was conferred by election[17]. Eventually, the authority of the dictator was severely undermined when they were frequently appointed to perform a

(11) A.L. Svensson-McCarthy (1998) The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs, Martinus Nijhoff Publishers, p. 10.

(12) See C. Rossiter (1948) Constitutional Dictatorship: Crisis Government in the Modern Democracies, Transaction Publisher, pp. 3-61; O. Gross & F. Ni Aolain (2006) Law in Times of Crisis: Emergency Powers in Theory and Practice, Cambridge University Press, pp. 17-26; A. L. Sevensson-McCarthy (1998) pp.11-19.

(13) Machiavelli (Discourses, I, 34) and Rousseau (Social Contract, IV, 6) generally agreed on the value and necessity of dictatorial power if it is limited in time and subscribed by law and kept under the supreme authority of the people. In contrast, Bodin (Six Livres de la République, III, 2) referred to dictatorship as a commissioned office that differs from and contrasts with the ordinary magistracy, and thereby set the stage for Carl Schmitt. Spinoza (Tractayus Politicus, x, I) disapproved of dictatorship as an instrument of the government in an aristocratic republic and maintained that even the briefest assumption by the republic of this monarchical form of authority was of more danger than value.

(14) C. Rossiter (1948) Constitutional Dictatorship, p. 15.

(15) With the fall of the monarchy in 509 BC, the Roman Republic moved to establish an executive branch of government that was headed by two chief magistrates or consuls. The two consuls had immense power at their disposal. Significantly, they had the full and ultimate power to lead the army and to exercise jurisdiction in all matters. However, in order to prevent reversion to a monarchical structure of government, the newly established executive offices of the republic were based on two principles: the principle of equal power and the principle of limited non-renewable terms of office. At the same time, the Romans were aware that a co-equal partnership at the helm might not be adequate in times of extreme peril—that in such precarious times, there might be a need for swift and decisive action. Thus, another institution was created; see A.L. Sevensson-McCarthy (1998).

(16) C. Rossiter (1948) Constitutional Dictatorship, p. 17.

(17) H.F. Jolowicz (1939), Historical Introduction to the Study of Roman Law. p. 54.

variety of special tasks considered not directly linked to the security of the republic[18]. The de facto disappearance of the dictatorship in Rome stemmed from a number of factors including, primarily, the end of the civil wars in Rome[19].

It is now essential to make a significant leap forward in time to find the origin of the contemporary legal concepts relating to crisis measures and alienable rights in the German Constitution of the Empire[20]. This is in fact is the standing constitutional practice that developed the whole of the debate over alienable rights and its consequences on democratic values and democratic states practice.

-The German Empire

The enactment of a new constitution by the Weimar Republic in 1919 supplanted the rule of the imperial German Empire[21]. The widespread despondency felt after World War I led to a series of socio-political upheavals that eventually culminated in the German Revolution (1918)[22], which paved the way for the new constitution. By early 1933, the Nazi government lead by Adolf Hitler had usurped authority from the constitution, which enabled Hitler to legislate in defiance of the constitution. In essence he had become a 'sovereign dictator'[23]. Carl Schmitt, the controversial legal philosopher, sought to justify

(18) Ibid.

(19) After the departure of Hannibal to Africa in 203 BC, the republic was no longer subjected to any external threat or aggression against which it needed to defend itself. The dictatorship, though remaining a lawful institution, became a dormant concept from 203 BC until the dictatorship of Sulla (978–79 BC) and Caesar (49–44 BC) (Rossiter, pp. 26-28; see also Svensson-McCarthy, pp.13-19).

(20) In reflecting on the historical example of Roman Dictatorship, Carl Schmitt articulated a defence of using exceptional measures while reflecting on the German experience of the Weimar constitution and the Nazi state. His reading of the state of emergency, as a historically laced phenomenon, provides an important theoretical framework to the study of dictatorships. In particular, he differentiates between two forms of dictatorship, using the Roman practice as a model: the classical notion of commissarial dictatorship, which is constricted in time and range and has no authority to alter the existing constitution or the legal order and a sovereign dictatorship, as of Caesar and Sulla who used the institution to alter the constitution and further their absolute power. This theoretical account was be articulated further in the literature, especially with reference to Agamben's critique on Schmitt and some other theorists and with regard to the use of emergency powers after 9/11.

(21) The history of the imperial German empire (1871-1918) was extremely complicated by diverse political factors, for more information on the Second Reich refer to: E. Feuchtwanger, (2001), Imperial Germany, Routledge: London, pp. xvi-xx.

(22) E. Kolb, (1988), The Weimar Republic, Unwin Hyman Ltd, pp. 3-10.

(23) A. McElligott, (2009), Weimar German, Oxford University Press, p. 35.

the circumventing of the constitution in order to legalise Hitler's rise to state sovereign. He established a theoretical and legal framework using emergency mandate to supply the extra-legal endorsement for the Nazi seizure of power. In particular, temporary emergency measures were sanctioned by article 48 of the Weimar constitution. This gave provisional power to rule by decree, which enabled the state to terminate basic rights and freedoms in response to exceptional crisis situations. According to Schmitt, article 48 instituted a 'commissarial'(24) type of government in which constitutional authority was not annulled, but facilitated a temporary dictatorship to govern in times of crisis.

Due to the constant state of instability in the country, the Weimar Republic resorted periodically to emergency decree in order to surmount the multiple crises it faced. For example, article 48 was used on 28/7/1930 to counteract the financial meltdown(25). Schmitt, in particular, argued that article 48 had to be enacted at this time in order to implement necessary economic changes and avoid social rebellion(26). This gave President Bruning overriding powers to rule without Parliamentary consent. Consequently, the ruthless nature of the 'austerity policies'(27) enacted during this period enabled the Nazi Party to exponentially increase and mobilise its support. As a result, Bruning was emphatically swept aside in the 1930 election, which saw him replaced by Von Papen(28). The new Chancellor wasted little time in declaring a state of emergency, which enabled him to enact further austerity reforms. These repressive measures lead to further social discord, providing ample pretext for political change. Hitler's succession to power, on 30/1/1933, was immediately followed by the suspension of basic legal rights, which granted him as the sovereign dictator the legislative power to enact new constitutional laws. The bypassing of the constitution placed the sovereign power, as Paul Kahn stated, "not just at the border of law, but deep within the law as well"(29). This essentially terminated the Weimar constitution, ushering in a new phase of governance, which Schmitt described as a "triumphant national revolution… of a unified national will"(30).

(24) Ibid

(25) H. James, (2009), The Weimar Economy' (in Anthony McElligott, 'Weimar German', Oxford University Press, p. 113.

(26) Ibid.

(27) D. J. K. Peukert, The Weimar Republic, Penguin Books, London, 1991, p. 261.

(28) H. Heiber, Weimar Republic, Blackwell Publishers, Oxford, 1993, pp. 197-218

(29) P. Kahn, The Question of Sovereignty, Stanford Journal of International Law 40, 2004, p. 63.

(30) C. Schmitt, (1934) Deutsche Juristen Zeitung, 38 (cited in Cristi and Renato, Carl Schmitt and Authoritarian Liberalism: strong state - free economy, University of Wales Press, 1998, p. 41.

There are two important lessons that can be inferred from the use and abuse of emergency decree during the Weimar Republic. Firstly, the justification for the persistent use of emergency provisions centred on trying to 'restore public security'(31), which was solely based on Article 48. Secondly, these extra ordinary measures gave the state a means to apply political and economic reforms without consulting Parliament, rendering this legislative body weak and ineffectual. The bypassing of the Parliament enabled the President to rule by decree in times of crisis and thus abuse of power grew excessively during this period.

It is essential to emphasis the relevance of the Wiemar constitution as the standing example of Schmitt's theory. The historical and theoretical relevance of this constitutional practice is paramount specially as the international community vowed to fight such exceptionalism and worked towards more individual rights protection since the end of World War II. Yet the highlighted debate below aims to prove that history unfortunately seems to repeat itself in different forms.

3- Contemporary Debates on International Crisis, Refugees as 'Stateless' and the State Right to Act out of the Constitution

In the wake of the international crisis of refugees and the concerns raised on states practice with regard to opting out of international standards for protections of refugees rights by denying territorial jurisdiction(32), much has been written about constitutionalism of measures and its legal, social and cultural effects. Various publications, books, essays, journal articles, and newspaper editorials have continued to view the global reaction to refugee crisis which by its turn was regarded as a continuation and a result of the global war against terror, many liberal democracies have used emergency powers to place certain groups of individuals outside the law with no essential protections or basic human rights.

A number of these publications have sought to apply political-theoretical insights derived from the thoughts of philosophers like Carl Schmitt, Walter Benjamin, Hannah Arendt (on Violence), Michel Foucault (on biopolitics) and Gilles Deleuze. Writers like Agamben and Paye have used this theoretical background to prove how contemporary practice can speak to existing

(31) J. Jacobson, Weimar: A Jurisprudence of Crisis, University of California Press, 2002, p.13.
(32) UN Convention on Refugee Rights.

theory[33], while others have used the recent events and policies to argue that this new practice presents a novel stance in political legal theory, which then will justify the practice[34].

The debate over the constitutionality of these measures has a long history in legal and political theory. The subject is crucial because it is directly linked to the rule of law and liberal democratic values, which seem to be most threatened in the context of response to security crisis when preservation of the democratic regime promotes a temporary shift to the rule of man. The question then becomes how to preserve these liberal values and the basic rudiments of a law-based state. The theoretical background presented here focuses on the work of Carl Schmitt and his famous critique and problematic challenge to liberal democracies, especially in the context of international law. Schmitt's work and the critique of his theory will be reviewed mainly through the work of a number of contemporary theorists and researchers.

-International Law and Constitutionalism

Considered to be one of the most significant political philosophers, anti-liberal legal theorists, and leading jurists during the Weimar republic[35], Carl Schmitt (1888-1985) defined the sovereign vis-a-vis a state of exception as being "the one who can proclaim a state of emergency"[36] in what has been described as the most famous line in his theory in the context of a state of emergency[37].

(33) G. Agamben, (2005), The State of Exception, Chicago University Press. See also J. C. Paye, (2007), Global War on Liberty, Telos Press Publishing and G. Agamben, (1998), Homo Sacer: Sovereign Power and Bare Life. Stanford University Press, See also by the same author, (1996), Means Without End; Notes on Politics, University of Minnesota Press.

(34) O. Gross (2003), 'Chaos and Rules: Should Responses to Violent Crises always be Constitutional?', Yale Law Journal, Vol. 112, Gross & F. Ni Aolain (2006). Law in Times of Crisis: Emergency Powers in Theory and Practice, Cambridge University Press, and D. Dyzenhaus (2006), The Constitution of Law: Legality in a Time of Emergency, Cambridge University Press. See also D. Dyzenhaus, The State of Emergency in Legal Theory, (2005), in V. Ramaraji, M. Hor & K. Roach (ed), Global anti-Terrorism Law and Policy, Cambridge University Press.

(35) C. Schmitt, (1922), Political Theology: Four Chapters on the Concept of Sovereignty, the University of Chicago Press, p vii. See also D. Dyzenhaus, (1998) Law as Politics: Carl Schmitt Critique of Liberalism, Duke University Press, p1 and p23; see as well P. Stirk, (2005), Carl Schmitt, Crown Jurist of the Third Reich; on Preemptive War, Military Occupation, and world Empire. Edwin Mellen Press, p vii-xi..

(36) C. Schmitt, (2005), Political Theology: Four Chapters on the Concept of Sovereignty, the University of Chicago Press, p 5.

(37) P. Stirk, (2005), Carl Schmitt, Crown Jurist of the Third Reich; on Preemptive War, Military Occupation, and world Empire. Edwin Mellen Press, p vii-xi.

In one of his most seminal pieces, 'Political Theology', Schmitt defines the proximity between the state of emergency and sovereignty[38]. According to Schmitt, the kernel of sovereignty lies in declaring the state of exception. The state of exception is constitutive of the judicial order in the sense that no rule exists without an exception, that is, «Order must be established for judicial order to make sense. A regular situation must be created, and sovereign is he who definitely decides if this situation is actually effective»[39]. It is precisely the exception that makes the subject of sovereignty relevant.

Schmitt viewed the 'state of emergency' or 'state of exception', as translated from German, as the inherent weakness of liberal democracy. He considered the state of emergency to be the factual situation within which the supremacy of the 'rule of man' prevails over the 'rule of law'; accordingly the whole legal order could be placed in jeopardy[40].

Schmitt claimed that it is impossible to identify and legalize crisis measures in conformity with abstract legal principles because it is not possible in the first place to determine in advance, through these principles, the scope of political power that is needed to deal with unique and unpredictable crises. For that reason, he believed the sovereign power to be a supreme political authority operating unconstrained by constitutional requirements. According to Schmitt, "What characterizes the state of exception is principally unlimited authority, which means the suspension of the entire existing order"[41].

In the context of international law, Schmitt considered liberalism, particularly as manifested in the Weimar Constitution, to be inadequate for the task of protecting a state and society threatened by the great evil or crisis which was the possible victory of communism at that time[42].

According to Schmitt, the norms of international law respecting armed conflict are unrealistic as applied to modern ideological warfare against an enemy not constrained by notions of a nation-state and that adopts terrorist methods

(38) C. Schmitt, (1922), Political Theology: Four Chapters on the Concept of Sovereignty, the University of Chicago Press.

(39) C. Schmitt, (1922), Political Theology, p 6.

(40) C. Schmitt (1922), Political Theology pp5-20 see also H. Bielefeldt, (1998), 'Carl Schmitt's Critique of Liberalism; Systematic Reconstruction and Countercriticism' p 26 in D. Dyzenhaus (ed), 'Law as Politics: Carl Schmitt Critique of Liberalism', Duke University Press.

(41) C. Schmitt (1922), Political Theology, p 6.

(42) C. Schmitt (1922), Political Theology, p 5.

and fighting with irregular formations that hardly equate to traditional armies. Thus, the foe must be viewed as absolute and be deprived access to any kind of legal rights. In this respect, the Executive must be freely permitted to utilise any kind of implement it can to combat and subdue this enemy. Conversely, the power to prosecute the war must be vested without reservation in the Executive "in the words of Reich Ministerial Director Franz Schlegelberger In Schmitt's classic formulation: a total war calls for a total enemy"[43], which is not to say that in Schmitt's view, the enemy was somehow "morally evil or aesthetically unpleasing"; it sufficed that he was "the other, the outsider, something different and alien"[44].

In his most controversial piece, Schmitt (1921)[45] establishes a theoretical framework in which he separates and articulates a legal duality of dictatorship in two distinct ways: commissarial and sovereign dictatorships. The platforms upon which these two mutually exclusive concepts diverge are critically important to any rendering of states of emergency[46]. Firstly, within the paradigm of commissarial dictatorship, authority is allocated to a governing proxy that remains within the constraints of the law and is subject to its enforcement. Hence, in this model of dictatorship, the law is still in place but suspended for an allotted time so the dictator can decide on necessary measures for specific tasks and eventually restore a previously standing legal order. In contrast, the sovereign dictatorship provides absolute power, giving the dictator the full capacity to suspend the law and re-enact it according to his or her political will. In other words, the sovereign does not aim to restore the old law, but rather to install a new state of law.

Pertinent to Schmitt's approach to the two models of dictatorship is his argument

(43) C. Schmitt, (1939)"Total Enemy, Total War" in Four Articles, 1931-1938 (Simona Draghici, trans) Plutarch Press, p 7.

(44) These thoughts are developed throughout Schmitt's work, but particularly in Der Begriff des Politischen (1927), Frieden oder Pazifismus (1933) and Totaler Feind, totaler Krieg, totaler Staat (1937) as discussed in his following translated essays and articles "Total Enemy, Total War" in Four Articles, 1931-1938 (Simona Draghici, trans) Plutarch Press , "Neutrality According to International Law and National Totality" in Four Articles, 1931-1938 (Simona Draghici, trans) Plutarch Press ,1950 "The Question of Legality" in State, Movement, People: The Triadic Structure of Political Unity (Simona Draghici, trans) Plutarch Press, 55-64. and 1955 "The New Nomos of the Earth" in The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (G.L. Ulmen, trans) Telos Press, 351-55.

(45) Die Diktatur cited in Schmitt, Political theology.

(46) D. Dyzenhaus (1998) Law as Politics: Carl Schmitt Critique of Liberalism, Duke University Press: London.

that each models/form maintains a relation to the judicial order. While he asserts that the situation will provide for a "suspension of the entire existing judicial order"[47], he also argues the case will always keep this relation as the state of emergency creates a situation where it is neither outside nor inside the law. There fore, although the sovereign stands outside the law, he still belongs to it and so determines what the order is and when it will be suspended.

Thus, in his following work of 1922[48], Schmitt operates from the understanding that dictatorship (commissarial or sovereign) remains within the legal/judicial order. The former operates based on the distinction between norms of law and norms of realisation, so it creates a state of affairs "in which the law can be realised"[49]. The latter, however, operates based on the distinction between constituent power and constituted power. Hence, Schmitt managed to legalise both the sovereign and the state of emergency through the sovereign dictator, which left him open to criticism for creating a favourable intellectual framework that justified the absolute rule of the exception and the emergency powers of the sovereign. In this regard, he is often seen as an apologist for totalitarianism. Yet he has been criticised more because he did not clearly articulate the transition from one of these two forms to the other.

Many theorists considered the policies of many states in the break of the refugee crisis to be an eerie echo of Schmitt's theory of state of emergency and sovereign power, especially with regard to legal techniques to prevent asylum seekers from entering the territorial jurisdiction of states and so limiting international legal obligations to offer them basic rights[50]. It has been said that these policies declared in theory, at least, 'the return of Schmitt'[51] and his problematic theory on emergency, democracy and sovereign power.

(47) C. Schmitt (1922), Political Theology.

(48) Ibid.

(49) Ibid.

(50) see for example Charles T. Lee, Bare Life, Interstices, and the Third Space of Citizenship Women's Studies Quarterly Vol. 38, No. 1/2, Citizenship (Spring/Summer 2010), pp. 57-81 and Kieryn Wurts, 'Agamben's Homo Sacer, Refugees, and the Crisis of European' Values available at http://jcrt.org/religioustheory/2016/03/03/notations-agambens-homo-sacer-refugees-and-the-crisis-of-european-values/ last visited on 15/11/2018

(51) K. Nimmo, (2006) 'Alito Confirmation: Stacking the Supreme Court with Authoritarian', Information Liberation, January 14.

Agamben[52] provides further a critically indispensable contribution to the theoretical debate initiated by Schmitt. He addresses the impending shift from commissarial dictatorship to sovereign dictatorship. Schmitt's depiction of commissarial dictatorship is thinly layered because he argues that the law is still in operation, but its functionality is provisionally suspended so that the dictator can procure the required agency and measures to reinstate the rule of law and restore normalcy. Agamben argues that Schmitt's stand counterposes sovereign dictatorship, in which there is no endeavour to replace the application of the prevailing mandate and the only ambition is to put a new legal order into place. Agamben further contests that Schmitt provided only a definitional differentiation between the two forms of dictatorship, while in his further theoretical articulation he confused the two forms of dictatorship but was desperate to maintain the relation of the sovereign dictator to the legal order[53]. Agamben argues that while the commissarial dictatorship could maintain this relation so long this situation remained temporal and restored the existing order, the other form could not maintain this relation—especially as the temporal element and the task limitation are both opened to abuse [54].

Agamben argues further that many scholars have been capable of denoting only a descriptive separation between the two types of dictatorship but have not been able to define and surmount the "forces that determine the transition from the first to the second form of dictatorship"[55]. Consequently, if they are incapable of distinguishing between the two, then their philosophical scheme cannot clearly discern what is legal and what is not.

Therefore, it appears that Agamben and Schmitt bestow diverging definitions on emergency power. For instance, Agamben views the Nazi appropriation of

(52) Giorgio Agamben was one of many intellectuals who warned against a «generalization of the state of exception" which would strip not only special groups of their fundamental rights but will also extend to all citizens and eventually becomes the norm. G. Agamben, (2005), The State of Exception, Chicago University Press. See also J. C. Paye, (2007), Global War on Liberty, Telos Press Publishing and D. Dyzenhaus, 2006, The constitution of Law: Legality in a Time of Emergency, Cambridge University Press and W. Schulz, (2003), Tainted Legacy; 9/11 and the Ruin of Human Rights. Thunder's Mouth Press, Nation Books New York. See also M. Harde and A. Negri, (2004), Multitude: War and Democracy in the Age of Empire, Penguin and N. Hussain, (2003), The Jurisprudence of Emergency; Colonialism and the Rule of law, University of Michigan Press, and J. Fitzpatrick, (2003), Speaking Law to Power; The War Against Terrorism and Human Rights, European Journal of International Law.

(53) Agamben 2005, p 34.

(54) Agamben, 2005, p 32.

(55) Agamben, 2005, p 8.

authority as an apt illustration of the transition from commissarial to sovereign dictatorship and thus stepping outside the legal. While, Schmitt, prior to his post-1930s amendment, endorsed the Reich's affirmation of exception to safeguard the constitution from its compositional instability in order to thwart the Nazi surge[56]. Here Agamben is particularly critical, suggesting that "all such theories remain prisoner in the vicious circle in which the emergency measures they seek to justify in the name of defining democratic constitutions are the same ones that lead to its ruin"[57]. In other words, the Weimar Republic's distorted fortification of the rule of law, in actuality, fostered a transition to absolute or sovereign dictatorship.

At this juncture, an important question is raised by Agamben (2005): if an exception is taken out of compulsion, despite already being legal, then why does it require constitutional sanction? Furthermore, if an exception taken out of necessity is only actualised pending ratification then how can it have retroactive legal consequence? More significantly, the very establishment of what is defined as "necessity"[58] is somewhat abstract and equivocal because it is a subjective truth and reality. Ultimately, necessity is subject to a decision that is "something undecidable in fact and law"[59].

Most relevant to this discourse is Agamben's theory of Homo Sacer or sacred life/bare life in a permanent state of exception. Drawing from his reading of Schmitt's theory of sovereignty, Agamben revisited the ancient Roman concepts of sovereignty and dictatorship. He envisaged a relation between the sovereign power and a camp where emergency measures are enacted and individual out in the camp are not to enjoy the protections of citizens. Basically, the camp is an exclusive, secret space where the social life within the political legal community is separated from bare life in the camp. Accordingly, he characterises the camp as an indistinctive zone of law and chaos in which the central figure one encounters is that of Homo Sacer or bare life stripped of all its value in the sense that violence against him/her remains unpunished:

> "The camp is thus the structure in which the state of exception - the possibility of deciding on which founds sovereign power - is realized normally…[It] actually delimits a space in which the normal order is de facto suspended and in which whether or not atrocities are

(56) Ibid.
(57) Agamben 2005, p 8.
(58) Balladore-Pallieri, 1970, p. 168.
(59) Agamben, G., 2005, p. 30.

committed depends not on the law but on the civility and ethical sense of the police who temporarily act as sovereign"[60].

Agamben describes the Homo Sacer 'legal' reality:

> "The legal form of that which cannot take on legal form: a legal category describing the absence of law. It is in the state of exception that law relates to life by bringing about its own suspension. The state of exception therefore does not mean a special legal order (Sonderrecht) as, for example, public international law. Instead, the state of exception suspends the legal order as such and in total; it is from this angle that we recognize the state of exception as being a boundary, a threshold. By arguing that in today's political discourse, the state of exception increasingly presents itself as the dominant paradigm of governing"[61].

Nonetheless, the return of the debate on Schmitt's theory started decades before the refugee crisis. Driven by the then current challenges to the fundamental values of liberal democracy, the collapse of the Soviet Union at the end of the cold war and the domination of a single power in world politics, a number of theorists and jurists revisited Schmitt's theory of state of emergency and his powerful critique of liberalism. In Empire[62], Michael Hardt and Antonio Negri had already suggested what they describe as an attempt to reveal the present state of order in which both domestic and international law could be defined by their exceptionality, an exceptionality founded on intervention. Intervention is now the main question in international politics, and the game played on the basis of "a permanent state of emergency and exception justified by the appeal to essential values of justice"[63]. Pushing this focus further in their work since 9/11, they insist that "the state of exception has become permanent and general; the exception has become the rule, pervading both foreign relations and the homeland"[64].

Most pertinent in this context is the now legendary debate between Walter

(60) G. Agamben, Homo Sacer, 1998, pp 170.

(61) G. Agamben, a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot). available at http://www.generation-online.org/p/fpagambenschmitt.htm. last visit 15/11/2018 and see also of the same author, The State of Exception, 2005, pp 30-32.

(62) M. Hardt and A. Negri, Empire, Harvard University Press, 2000.

(63) Ibid, pp.18-39.

(64) M. Hardt and A. Negri, Multitude: War and Democracy in the Age of Empire, Penguin, London, 2004, p 7.

Benjamin and Carl Schmitt in which the correlation between so-called intra-legal and extra-legal violence was intensely and compellingly argued(65). Benjamin's critique of violence postulates the possibility of a "pure" extra-legal violence, wholly external to the law as opposed to both the law-founding violence and the law-enforcing (or law-maintaining) violence of the 'normal' state(66). Schmitt contradicts Benjamin and proposes two forms of intra-legal violence: 1) the so-called Ausnahmenzustand (usually translated as the 'state of exception'), where the violent suspension of the law is located a place within the edifice of the law, thus no longer threatening the legal system from without(67). The core concept of sovereignty includes the paradoxical power of the executive to free itself from any legal restraints to its power that would normally apply; 2) normal law-enforcing violence, or the 'rule of law' that maintains civil obedience and contains criminal violence—Cover's "most routine of legal acts". Although all types of violence would thus be included under right, Schmitt insists that the state of exception and the normal rule of law should be clearly separated from each other in order to prevent any possible conflation of the two(68).

The problem with this proposition, according to Benjamin, is exactly that this latter separation is becoming increasingly impossible(69). He insists that the state of exception is progressively (in the 20th century political context, and maybe more so in the 21st) overlapping the normal state. In other words, the executive resorts more and more to their exceptional powers to suspend the rule of law on behalf of the law itself in order to guarantee that the external threat of pure violence is contained and that things will return to normal.

It is evident from the work of all the above-mentioned researchers that the perpetuation of stateless out of law has become a major area of concern, especially because it developed from within well-established democratic contexts and extended clearly to gain more acceptance internationally specially in the face of crisis that always characterised with a national dimension

(65) H. Bredekamp, "From Walter Benjamin to Carl Schmitt, via Thomas Hobbes" (Melissa Thorson Hause and Jackson Bond, trans) Critical Inquiry 25(2), University of Chicago, 1999, pp.247-66.

(66) W. Benjamin (1921), «Critique of Violence», Translated by Edmund Jephcott, in Selected Writings Vol. 1: 1913-1926, Belknap/Harvard Press, 1996, pp 36-52.

(67) C. Schmitt, Political Theology, 1922, pp 30-53.

(68) Ibid.

(69) W. Benjamin (1921), «Critique of Violence», Translated by Edmund Jephcott, in Selected Writings, Vol. 1: 1913-1926, Belknap/Harvard Press 1996, pp 36-52.

security. While the issue has always been immensely significant, it has become more relevant to the liberal values of democratic regimes in context similar to international responses to terrorism when a shift started to take place more openly in human rights and liberties discourse to security concerns and so the debate and the justification is recreated with regard to refugee crisis. This shift in priorities brought to the fore the everlasting question of the extent to which a democratic government can defend the state without transforming itself into an authoritarian regime. Furthermore, while some theorists argue that this approach is never new and it has been embedded within the practice of most westerns states since the end of the first world war, maybe the openness of this practice, based on the intensity and the shock of media images and the ability to stand on almost every single tragedy made by denial of rights for desperate refugees.

4- Conclusion

The emerging trends in international refugee laws and policies of states that would impose restrictions on both domestic rights and the international system of human rights should be regarded as an alarming development. While security crisis real or perceived historically seems to have made states more inclined to make significant encroachments on rights of individuals, it might be time for the public and legal international discourse to shift focus from a lament on the burdens of the nation-state to a straightforward defense of those rights and individuals that are so acutely and agonizingly alienable. International law needs not to turn a blind eye on such tendencies and perhaps it is also time to make needed development making sure refugee rights are not subject to state discretion regardless of an acute crisis. It is essential to highlight at this level that state responsibility towards refugees doesn't only spring out of humanitarian and solidarity international obligation but also should ideally be addressing the root causes and look into a way to prevent making such crisis impossible to contain in the countries of refugee's origin

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