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The Bare Life and (the) Modern Law. A Journey to Some Key Concepts or Conceptions of Agamben

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Abstract: This text is imitating a journey which tries to explore what is completely unknown. It starts Homo Sacer and traces some key concepts namely der Muselmann, bare life, state of exception, sovereignty and nihilism in law. Doing so, it hopes to reach a general picture of biopolitics or biopower according to Agamben. So, first part of this text generally tries to clarify some fundamental concepts or conceptions in order to use them for its aim. The second part suggests an alternative reading of Agamben, centered around his concept of der Muselmann which is the ultimate figure defined by Primo Levi and Agamben chooses the term because of its resemblance to or representation of Homo Sacer. Der Muselmann was a derogatory term in its origin and very meaning has still been unclear today. So, the second part tries to clarify the meaning of der Muselmann (and unbaptized babies) from a different outlook, not from outside but inside of the referred concept. It tries to show a Muslim's image of a non Muslim world in order to reveal what are the very meanings of sovereignty, law and biopolitics. So at the end of the journey, this text hopes to reach a different picture of modern life and a modern law.
Keywords: Biopolitics, biopower, Bare Life, Homo Sacer, Der Muselmann, Agamben, Enlightenment, Turkish sociological positivism, postmodern thought

Introduction

In the beginning was the Word, and the Word was with God, and the Word was God. The same was in the beginning with God. All things were made by him; and without him was not anything made that was made.

Gospel of John, 1-3

Like the Gospel, postmodern thought (if postmodernists let me call them a logically coherent theoretical and practical movement) puts 'word' –language- at the peak level of their theory and terminology. It could be modesty or falling back after losing the battle with natural sciences. In postmodern thought 'word' is not only in the beginning but also at the end, more truly word is everything or word is all for the philosophical realm. Nothing would be apart from or beyond it. Agamben is a master of 'word' and one of the most popular thinkers of the

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last two decades. Before I dwell upon some concepts of his theory, I prefer to give a little explanation about postmodern thought and its *obsession with language*.

What is the core of postmodern thought of which Agamben is a part? It is not a question which is easily answerable, but the main point of postmodern thought can roughly be summarized in two themes:

1. Denying Descartes and every form or version of Cartesian philosophy.
2. Denying universality and the paranoiac knowledge of Enlightenment.

What is wrong about Descartes related to *Cogito*? As was to be expected Descartes vigorously tried to find a criterion with which we can differentiate what true knowledge is, instead of unpopular religious explanations. When he reached *Cogito (I think therefore, I am)* he believed that every subjective psychological condition resembling Cogito would be as true as Cogito. So he used his criterion in every aspect of his theory and sciences practices. But Cogito was not everlasting as he assumed. Cogito was grounded on its initial character and its priority depended on language. Cogito required or assumed language so not only its priority but also its uniqueness collapsed.

From the postmodern point of view everlasting and unhistorical universal principles which covered every situation and addressed every problem could not be. Every situation or instance deserves to be handled in its special conditions. Especially in law, the sociological revolution –which took place at the end of 19th and at the beginning of 20th century- reflected this understanding before the postmodern era. In the United States American Legal Realism was absolutely against general principles of law, including even highly abstract formulations which were contented in legal rules. In France, François Gény preferred a moderate way but overly stressed the importance of social facts in law. In Turkey (Ottoman Empire) there was a parallel development and Ziya Gokalp tried to construct sociologically based law.[1]

The symbol of modernism is certitude of knowledge. Modern thought accepted that natural and social life was completely open to human mind so human beings were able to have true knowledge about nature and themselves. But modern thought presented some meta-narratives instead of the 'truth'. It certainly accepted that it has the universal truths and

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[1]Ziya Gökalp, *Makaleler (Articles) VIII*., Ed. F. Ragıp Tuncor, 1981, 16-35
Gokalp tried to construct in a series of articles, "Ictimai Usul-u Fikih" (Sociological Methods of Law), a special method of law. His method has two fundamentals: first like the German Historical School, law to be cultural determined and sensitive local differences; second each legal decision, judicial or administrative, should be an outcome of not general principles but special conditions of each case.

everybody had to agree with it. Dissenters of modern thought qualified its gesture about knowledge as being 'paranoiac'.[2]

This certainty, this paranoia (!) has important social, political and legal outcomes: not only the whole world is knowable but also changeable by human beings. Human beings do not have a nature but give themselves "…a historical nature, and does this on the basis of a sedimentation that consists of older nature, which in turn are historically produced sedimentations as well".[3] Human being or Man is not a nature-made creature but a historical or artificial one. He can be forged, bodily and mentally by discipline. Kant opined "… the way a human being turns him- or herself into a subject". But this freedom becomes a problem of truth.

This unfolding of truth as a process would be a history of those ways in which man has constituted himself as at once a subject and an object, explicated his relation to himself, and opened up a space of self-reflection in a 'truth game'. In this perspective Foucault speaks of a 'hermeneutics of self' that would relate not to that which is 'true or false in knowledge, but to an analysis of those truth games, the games with the true and the false in which being constituted historically as experience, i.e. as something that can and ought to be thought.' In this sense, life is also a self-relation, and the power exerted over life is also an emancipation of resistant force *inside* of life.

The term 'Biopolitics' and 'biopower' should then not be understood solely in terms of an action that imparts form to some amorphous mass, but as a complex of action and reaction, control and resistance.[4]

In this context one of the far sources of biopolitics is the assumption of Enlightenment, in which human beings are able to know every aspect of life and even they can be shaped by this knowledge. But it is not enough to create biopolitics solely. At the end of the 19th century rapid development in biology and anthropology got high respect and interest in these sciences which was symbolized by Darwin's Selection Theory. And the same historical period and conditions introduced a new science: sociology, which completely covers whole areas of human life. So social sciences, especially sociology and politics, even law –if we call it 'science'- became gradually more 'scientific'; namely they tried to use natural sciences methods and to emulate them. Biology was the leading science used by social sciences to demonstrate their scientific quality. A similar development occurred in the 17th century but

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[2] Jon Mills, *Lacan on Paranoiac Knowledge*, http://www.processpsychology.com/new-articles/Lacan-PP-revised.htm 3.02.2011, online.
[3] Sven-Olov Wallenstein, *Biopolitics and Emergence of Modern Architecture*, 2009, 8
[4] Wallenstein, 9 Wallenstein's italic.

instead of biology, physics, especially mechanics, was the model science which was thought should be imitated to be as scientific as natural sciences.

For example, legal positivism was a product of the aforementioned development or general tendency to apply natural sciences' techniques to social sciences in order to reach congruent objectivity and success. This tendency reached a peak in the modern era and went beyond its limits with a softly declined curve. One of the current theories, for instance Niklas Luhmann's system theory, is completely grounded in biology with its key concept: autopoiesis. So biopolitics is a reflection or appearance in human area which is deliberately 'biologized'. It can be easily described that 'to be taking continual control of human bodies by the state'.

This modest definition is used in this article for the sake of argument. Der Muselmann (that roughly refers people who were at the point of death because of starvation and inhumanly conditions in the camps) as Agamben has said, could be considered an example of the extreme in the camp, namely that a human body is absolutely controlled.

I. La Nuda Vita (Bare Life or Naked Life)

"The protagonist of this book is bare life, that is the life of *homo sacer* (sacred man), who *may be killed and yet not sacrificed,* and whose essential function in modern politics we intend to assert."[5]

Is it extremely interesting? Is it a shocking sentence? I think it is not, but Agamben's and his masterpiece's popularities assert so beyond any discussion. So in political theory and in philosophy of law or legal theory every current study must confront some of Agamben's concepts, especially the most famous one: La Nuda Vita (bare life).

According to de la Durantaye, 'bare life' is not only a translation but also "a quotation without quotation marks from Benjamin", specifically his concept of 'das bloße leben' which Benjamin invoked and employed in his *Destiny and Character* and *The Critique of Violence*.[6] But whatever its origin bare life belongs to Agamben, it was an old project that had taken a long time to be realized.[7]

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[5]Giorgio Agamben, *Homo Sacer Sovereign Power and Bare Life*, Trans. D. Heller-Roazen, 1998, 8 Agamben's italic.

[6]Leland de la Durantaye, *Giorgio Agamben A Critical Introduction*, 2009, 203

[7]In mid of 1970s Agamben, Rugafiori and Calvino decided to publish a journal with the keynote that "most pressing cultural problems and fundamental 'categories' of thoughts and experience". "The journal never materialized but the work that went into it took many forms, the most singular of which was *Homo Sacer*". Homo Sacer was one of the three categories which Agamben chose to work on. These categories are: tragedy and comedy, biography and fable, law and creature which become bare life. de la Durantaye, 200; Schütz, Anton, Thinking The Law With And Against Luhmann, Legendre, Agamben, in: *Law and Critique* **11:** 107−136, 2000, 126

Agamben's biopolitics, indeed debatable, are special to him. It is quite different from Foucault's. It can be said that his thoughts are closer to Heidegger's and Arent's than Foucault's. He has a unique or specific style which is briefly discussed in the last part of this article. The hero of its biopolitics is *Bare Life*, *that is another name for the human creature and is the life of homo sacer*.[8] Bare life is not a prior substance like state of nature or initial position, but instead what remains after the withdrawal of all forms.[9] It may just be similar to Weber's archetypes. Similar to Weber, who uses archetypes to explain and to interpret complex situations, Agamben uses bare life to show deep contradictions in modern institutions like politics and law. Or if it was needed to find a more historical example, his bare life would be compared to William of Ockham's razor because his concept (bare life) is as sharp as the razor.

Not only bare life but also other key concepts of Agamben have a special function which brings back to the reader Ocham's razor. But before discussing these concepts and impact of its outcome upon law, Agamben's argumentation should be traced briefly. To clarify bare life, he writes "The living being has *logos* by taking away and conserving its own voice in it, even as it dwells in the polis by letting its own bare life be excluded, as an exception, within it" and he accepts that politics is a fundamental structure of Western metaphysics which means politicization of bare life and Modernity shares the task.

The fundamental categorial pair of Western politics is not that of friend/enemy but bare life/political existence, *zoē/ bios,* exclusion/inclusion…Instead the decisive fact is that, together with the process by which the exception everywhere becomes the rule, realm of bare life —which had originally been situated in a relation of abandonment at the margins of the polis—'gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, *bios and zoē*, right and fact, enter into a zone of irreducible indistinction'. At once excluding bare life from and capturing it within the political order, the state of exception actually constituted, in its very separateness the hidden foundation on which the entire system rested.[10]

Alike the statute of homo sacer (bare life) in archaic Roman law where "human life is included in the juridical order in the form of its exclusion (that is, of its capacity to be killed), modern Western politics and legal order rested on the exceptional situation not as exception but as a rule. Agamben links Western politics to Aristotle, who associates politics with

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[8] De la Durantaye, 201-202 mine italic; Agamben, *Homo Sacer*, 9
[9] De la Durantaye, 203
[10] Agamben, *Homo Sacer*, 8-9 Agamben's italic.

activity. So because it is defined in relation with *ergon,* politics is politics of activity and not of inactivity or potentiality and *ergon,* as a certain kind of life, is defined mainly by the exclusion of bare life.[11] Aristotle's definition in an aporetic style carries politics to biopolitics because it limits politics to the realm of individual human activities and bares differentiation and articulation of *zoē.* Agamben sums up the matter: "The political, as the work of man as man, is drawn out of the living being through the exclusion –as unpolitical- of a part of vital activity".[12] About 'work of man' he carries far his main source's thoughts. Aristotle separates nutritive life as a base condition of all forms of life, and Agamben finds, in this conception, the roots of Western philosophy and as a bare life, of modern biopolitics:

Aristotle's isolation of general presupposition of nutritive life, Agamben sugges**ts**, served to mark divisions *in the human* –between vegetative and relational life, animal and human- which were then expressed in the political realm in the form of those distinctions between *zoē* and *bios,* and mere life (zen) and that good life (eu zen) that play a central role in Aristotle**'s** determination of *telos* of politics and work of man".[13]

II. Sovereignty

Another crucial concept in Agamben's biopolitics is *sovereignty* which is defined by ban, a poetic phrase 'inclusive exclusion'. Additionally, Agamben's sovereignty is posited against Schmitt's articulation about the matter in his *Political Theology.* Schmitt defines sovereignty as an ability to decide on exception and it resembles miracle in theology because when miracle happens everybody has to accept that God exists, so when state of exception is proclaimed everybody has to accept that the sovereign which was able to decide on it exists. Agamben modifies Schmitt's argumentation and introduces a spatial theory of sovereignty.[14] He speaks of the 'topological structure of state of exception' and state of exception, like bare life, is a threshold that is at a point between inside and outside where it so continually functions in favor of sovereign that it gives him an ability to capture the strategic point.

The sovereign, who can decide on the state of exception, guarantees its anchorage to the juridical order. But precisely because the decision here concerns the very annulment of the norm, that is, because the state of exception represents the inclusion and capture of a space that is neither outside nor inside (the space that corresponds to the annulled and suspended

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[11]Giorgio Agamben. The Work of Man, trans. K. Attel, in: *Sovereignty and Life*, (Ed.) M. Callarco and S. DeCaroli, 2007, 5
[12] Agamben, *The Work of Man*, 6
[13]Jessica Whyte, Particular Rights and Absolute Wrongs: Giorgio Agamben on Life and Politics, *Law Critique,* (2009), 20, 156-157, Whyte's italic.
[14] Ruth A. Miller, *Law in Crisis The Ecstatic Subject of Natural Disaster*, (Ed.) Austin Sarat, 2009, 16

norm)… *being outside and yet belonging*: this is the topological structure of the state of exception, and only because the sovereign who decided on the exception is, in truth, logically defined in his being by the exception, can he be (to) defined by the oxymoron *ecstasy-belonging*.[15]

Agamben elaborately evolves exception theory in his book, *State of Exception*. He does etymological and archeological investigation, gives a lot of example**s** but one of them is more important than others. His gives, as an extreme in biopolitics, Nazi example. Apart from Agamben, Nazi is the best example of unifying biology and politics whole their theory and governmental practices. It is the Nazi's motto that in the Third Reich 'the words of the Führer have the force of law'.[16] He continues his analysis with the anomic character of the state of exception. But this motto, 'the words of the Führer have the force of law' deserves a little more attention in order to clarify the very meaning of sovereignty. But this analysis requires a pause in Agamben's succession of thoughts. It will be interesting (that) suspending his logical succession in order to clarify his theory about suspending a legal order in the state of exception.[17]

In the middle of the 19th century German**y**'s legal life was dominated by F. Carl Von Savigny's Historical school.[18] The main tenets of this school can be listed as follows: (1) every legal system is or should be a production of local culture (volksgeist), law should emerge from this culture like values and other social rules in the course of history. So law (volksrecht) has to have special roots within a society which it prevails, if it governs people**'s** day to day relations. (2) It is meaningless to import any legal rule from external cultures, namely codification is not a good way to posit some legal rules. Because all cultures have authentic and specific complex of values supporting subconsciously whole social rules. Contrary to this social fact, imported rules could not have this support and additionally have compatibility problems. They would artificially be applied only if they were supported too many _outer_-official sanctions. (3) Legal rules can be created or designed like pieces of art. Jurist's main duty is not to create law but to compile it in a logically coherent way and to put it into writing.

However, the German Historical School in the course of time changed and got a conservative character. It tried to limit law with Romanic institutions and concepts, and never

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[15]Giorgio Agamben, *State of Exception*, Trans. Kevin Attel, 2005, 35 Agamben's italic.

[16]Agamben, *State of Exception*, 38

[17] I deliberately prefer not to touch the discussion about the difference between 'a minimum formal being-in-force' and 'a maximum of real application' or ''the *efficacy* of law' and 'the *force of law'*. See Agamben, *State of Exception*, 36-37, Chapter 2nd

[18]Cahit Can, *Oluşum Sürecindeki Hukuk Sosyolojisi (Sociology of Law in the Formation Period)*, 1993, 56-63

let a judge have any discretional space. It called Roman law *Ratio Scripta,* written or printed wisdom**,** and championed *gemeines Recht* and *pandect Recht.*[19] Two schools of thought were brought about as a reaction to this modification in Historical School: *Interessenjurisprudenz* and *Freirechtslehre.* The latter would be one of Schmitt's sources of inspiration, at least as a major contributor to the German climate of thoughts at that time, and had an effect upon Agamben**,** too. Freirechtslehre, *Free law* is an idealistic approach to law and tries to liberate a judge from the wording of statutes. According to *Free Law,* a judge should reach his decision in each case's unique conditions and be only guided by justice or equity which means, so to speak, 'haute couture' decision that is far from the legal**,** positivistic ideal of uniformity. But after the Nazis had come to power they distorted the school's thought and modified its method by national socialist principles. Agamben's quoted phrase from Eichman 'the words of the Führer have the force of law' is only the tip of the iceberg that demonstrates the absolute power of the Führer. The Nazi regime unfortunately or unexpectedly applied the school's principles to law and threatened not only rights but also the concept of law itself. German Criminal Code amendment on 28 June 1935 showed the seriousness of the new concept of laws:

Punishment is to be inflicted on any person who commits an act declared by the law to be punishable, or which, *in the light of basic purpose of criminal law, and according to healthy popular feeling* [gesundes Volksempfinden], *deserves to be punished.* If no criminal law applies directly to such an act, it is to be punished according to whatever law, in its basic purpose, best applies to it.[20]

In a nutshell it means a big change in the fundamental principle of criminal law which is vitally important for protecting rights via law: fundamental principle of *nullum crimen sine lege* became *nullum crimen sine poena.*[21] This change's outcome related Agamben's the state of exception (and sovereignty) theory not only in the exceptional situation but also all times it situates the sovereign a threshold, as Agamben puts it, "the inclusion and capture of a space that is neither outside nor inside" law. So the sovereign's being which bears on the exception is not an exceptional one, it is, so to say, *ever-exceptional* one. Because, thanks to his continual exceptional character, the sovereign is able to be sovereign and if he needed he would suspend law. But in normal times that legal system functions without any exception, the sovereign's position is even exceptional because of being 'anchorage to the juridical order', namely the legal order completely bears on this exceptional character of sovereign like

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[19]Wolfgang Fiedmann, *Legal Theory.* 1953, 159
[20]John M. Kelly, *A Short History of Western Legal Theory*, Vol. II, 2001, 360-361 Kelly's italic.
[21] Kelly, 361

a pole or highest criterion. But his sovereign character is different from, according to Agamben, Schmitt's and Kelsen's because it is not an exclusively political concept. Their sovereign can form and guide juridical order but they cannot be determined by any legal inner factor of it. Agamben differentiates the sovereign position which is determined and formed by the exception, in front of law as follows:

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 the rule of the, juridical order (Hans Kelsen): it is the originary structure in which law refers to law and includes it in itself by suspending it.[22]

In order to illuminate his sovereign position exactly, he uses a legal concept: ban. Ban is one of the fundamental institutions in law. It can be related with 'prohibit' and 'forbid' or old 'Church's curse'. But he took ban from J.L. Nancy and uses it as a special meaning that shows a critical position, a threshold or extreme situation. Nancy wrote in his book *Abandoned being. In The birth to presence*:

[b]andon is an order, a prescription, a decree, a permission and the power that holds these freely at its   disposal. To abandon is to remit, entrust, or turn over to such a sovereign power, and to remit, entrust, or turn over to its ban, that is, to its proclaiming, to its convening, and to its sentencing. The law of abandonment requires that the law be applied through its withdrawal. Abandoned being finds itself deserted to the degree that it finds itself remitted, entrusted, or thrown to this law.[23]

According to Agamben ban is analogous with structure of sovereignty, namely the state of exception, ban's Germanic origin: "…designates both exclusion from the community and the command and insignia of the sovereign". He added: "The relation of exception is a relation of ban".[24] Ban's relation creates a threshold position that is both exclusive and inclusive or banned and abandoned. The person, who has been banned, is neither inside nor outside the law and the juridical order and the life.

He who has been 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

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[22] Agamben, *Homo Sacer*, 28
[23] From (J. L. Nancy, Abandoned Being, in: *The Birth to Presence,* Stanford: Stanford University Press1993, 43-44), , Catherine Mills, *The Philosophy of Agamben*, ,2008, 63
[24] Agamben, *Homo Sacer*, 28

and law, outside and inside, become indistinguishable… *The originary relation of law to life is not an application but abandonment.*[25]

Agamben's description of the original relation of law to life seems extremely pessimistic. A banned person is excluded but at the same time captured by law. Roughly, in its extreme, people subject to law are both banned and held in a position that they have been at the mercy of the sovereign. As a symbol of this relation, abandonment, Agamben introduces us two examples; the first one is old and conceptual but the second one is relatively new and impressive. First one is homo sacer and the second one, as a concrete and modern form of homo sacer is der Muselmann.

III. Homo Sacer and Der Muselmann

The characteristic of Homo Sacer is that he 'may be killed but yet not sacrificed'. Like other concepts which Agamben uses, Homo Sacer is too a threshold situation. It can be asked a question about homo sacer that why could not he be sacrificed although he could be killed? In order to answer this question, one needs to think about briefly two components of the subject: Homo sacer's legal and religious statutes.

First, Homo Sacer's legal status can be illuminating to understand perfectly modern politics and the relation between people and law. Homo Sacer is continually subject to and at the mercy of juridical order and of the sovereign. He is not completely outside or inside the juridical order but he is at the limit position which resembles the purgatory life of souls. Purgatory (Gehenna in Judaism or Araf in Islam) is a unique position, a no man's land which is neither Heaven nor Hell and souls in purgatory are completely left to the grace of God. Their purification cannot depend on their choices like in the world but they are in the hands of God.

The second important point is religious statue of sacrifice, because Homo Sacer cannot be sacrificed. Sacrifice etymologically comes from sacer (holy), so the logical conclusion of this homo sacer, because of being sacer (sacred), should be sacrificed. But it cannot. The determination between sacred things and non sacred (things), profane things is the base difference for a religion. Durkheim asserted that, in *Elementary Forms of Religion*, the core of religion is not related to God or any higher spiritual being but related to sacred things and non sacred things. Additionally a sacred thing or person is set aside and forbidden:

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[25] Agamben, *Homo Sacer*, 28-29, Agamben's italic.

Sacred things are those things protected and isolated by prohibitions; profane things are those things to which such prohibitions apply and which must keep their distance from what is sacred. Religious beliefs are representations that express the nature of sacred things and the relations they sustain among themselves or with profane things. Finally, rites are rules of conduct that prescribe how man conducts himself with sacred things.[26]

Sacrifice (or victim, Korban in Judaism and Qurbani in Islam) is one of the oldest practices which is shared by almost all religious beliefs. The key question about the concept of sacrifice is that what are the necessary qualities which are required to be a sacrifice? They are different in cultures and religions but generally these qualities which a victim has to have are as follows: to be clean, healthy and a perfect member of its species, for instance if a lamp was separated for sacrifice it would be a good lamp. When a human is a sacrifice the required qualities are the same. So, if homo sacer cannot be sacrificed it should be imperfect, dirty or unhealthy. Additionally, every sacrifice who is sacrificed becomes sacred or holy because of being separated and adored for God so it is related with or closed to God. The logical outcome of this is that homo sacer cannot be sacred because he cannot be sacrificed and so, what is the very meaning of 'sacer'? It is a historical concept and currently hard to know what 'sacer' meant or why people of Rome called a person as 'homo sacer' who was not sacred. When thinking on process of being homo sacer it can be firstly said that sacer was ironic! It stands to reason then that because Homo sacer is not human and is not sacred, he can be killed without any legal responsibility or the probability of punishment for whoever killed him. His life has no worth or value; he is inhuman, not because of being sacred, a holy thing behind human but because of being a worthless thing, less than human. Briefly, 'sacer' can be meant in these steps of logic as an adjective, ironic and pejorative or humiliating.

Der Muselmann, as a kind of modern form of homo sacer, is an analogous concept too. Agamben built *Remnants of Auschwitz the Witness and the Archives (Homo Sacer III)* almost completely on der Muselmann (and on, as a counterpoint, *sonderkommando* in order to show how the horrible experiences in the camp became routine) and accepted the camps as *a milestone of ethics*. He briefly states the matter in his preface before the long collaboration of the book:

Above all, it made it necessary to clear away almost all the doctrines that, since Auschwitz, have been advanced in the name of ethics. As we shall see, almost none of the ethical

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[26]Emile Durkheim, *Elementary Forms of Religion*, Trans. Carol Cosman, 2001, 40

principles our age believed it could recognize as valid have stood the decisive test, that of an *Ethica more Auschwitz demonstrata.*[27]

According to him like 'we can never write a poem' after Auschwitz, we cannot assert any coherent ethical claim as a conclusion of an ethical theory that could pass the test of the Camp. But his sharp critique is not limited by ethics and he moves along to law. Agamben certainly denies any ethical reference and ethical dimension to law. Additionally, he totally disclaims any function of law in reaching or discovering truth. So he wrote, in a nihilist tone, that the sole function of law is to reach a res judicata, a formal non-debatable truth of law and to put it in place of justice or truth.

As jurists well know, law is not directed toward the establishment of justice. Nor is it directed to the verification of truth. Law is solely directed toward judgment, independent of truth and justice. This is shown beyond doubt by the *force of judgment* that even an unjust sentence carries with it. The ultimate aim of law is the production of a *res judicata,* in which the sentence becomes the substitute for the true and the just, being held as true despite its falsity and injustice. Law finds peace in this hybrid creature, of which it is   impossible to say if it is fact or rule; once law has produced its *res judicata*, it cannot go any further. [28]

"Hybrid creature", Agaben calls res judicata (judged matter) in order to draw attention to its monstrous, contradictory double character which is composed of fact and rule. The Fact – Rule problem is one of the most challenging problems of law. Legal practice generally accepts the forward progression from rule to event, so it means the application of the rule which is most related to the event. But in the long history of legal theory some schools and figures cast doubt upon this process. American Legal Realism, for instance, is a well known representative of that point of view. According to the Realist Movement rule, the application process is just opposite to that which is generally accepted. So judges and other functionaries that have to apply legal rules ex officio do not forward from rule to event and reach a decision; just the opposite**,** they reach their decision via a semi-conscious way. They are guided by a mixture which is composed of opinions, beliefs, prejudices, sexual incentives, etc. and reach a decision. After that process they try to find reasons and to demonstrate that how the decision, which at best they found by intuition, is a logical outcome of a legal rule. *Fact skeptics* and *rule skeptics* in the Realist movement focus on different parts of legal practice.

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[27]Giorgio Agamben, *Remnants of Auschwitz The Witness and the Archive,* Trans. D. Heller-Roazen, 1999, 13 Agamben's italic.
[28] Agamben, *Remnants of Auschwitz*, 18, Agamben's italic.

The former worries about the facts of the legal issue which are one of the major determining elements of a judge's decision, and the latter worries about whether or not a   judge's decision really was a logical outcome of the rule which is the most related with the legal issue, or if his political and personal choices affected the decision.

The Fact-Rule problem is not limited only by the application process of law but also forms the core theoretical problem of law. It can be put as follows: law is composed of rules (legal positivist outlook), a rule is an 'ought to be' but fact is a 'to be' and res judicata must intrinsically be a hybrid. So it has a Janus face: one looks at rule (ought to be) and the other looks at fact (to be), and it is needed to give an answer not only to the question that can it be possible to move forward from highly abstract, general principles to concrete, individual situations and to introduce a coherent solution which can be seen, at first sight, to be strictly the outcome of these principles, and but also how can it be reached from 'to be' to 'ought to be' namely, Hume's famous dilemma, from fact to rule? Additionally, when Agamben rejects any ethical theory after the camp experience, it becomes impossible to find any solution in the ethical content of law referring to natural law theories. But legal positivist approaches, against Agamben's criticism, are as hopeless as natural law. Because apart from the justice or truth when the final word was said in a case, and despite the fact that everybody accepts the possibility of wrong or deficient decisions, res judicata emerged with the justification of practical requirements. This overly formal nature of law, which legal positivists try to stand via neutrality and uniformity to reach objectivity, together with the disability of ethics in which natural law theorists try to escape from rules or decisions only formally valid but not just, carries Agamben to a nihilist edge.

Der Muselmann is a key and interesting concept, similar to the other concepts which Agamben used in his writings. But it has a unique character which is not only sharply separated from the others but also has a specific, multi- dimensional meaning. For the sake of clearness the dimension of its meaning can be traced from the surface to the deep. At first sight it is one of the extremely pejorative or humiliating terms which was used in the camps.

"The expression was in common use especially in Auschwitz, from where it spread to other camps as well… In Majdanek, the word was unknown. The living dead there were termed 'donkeys'; in Dachau they were 'cretins,' in Stutthof 'cripples,' in Mauthausen

'swimmers,' in Neuengamme 'camels', in Buchenwald 'tired sheiks,' and in the women's camp known as Ravensbrück, *Muselweiber* (female muslims) or 'trinkets'".[29]

Some of the other terms which were used instead of Muselmann, for example donkeys or camels, are rough; the others, for example cretins, cripples or trinkets refer to inhuman or less than human qualities. But it is a more interesting point that together with these pejorative terms Muselmann or Muselweiber, which are not generally a pejorative terms, were used in order to humiliate people at the point of death. It could have been to show popular prejudice in West European culture against Islam. Agamben is very far from ethnocentrism and thanks to his perfection at language he never uses any 'improper' word or phrase which gives rise to misunderstanding. But despite this careful approach what is the exact meaning of Muselmann, why did Nazi SS officers (Christians-Protestants) call prisoners (Jews) Muselmann (Muslims)? It is a well-known fact that the three big and most common religions in the World are called Semitic religions or Abrahamic religions because they share the same origin and ancestry. Apart from their historical mutual hostility or from 11 September (or a decade earlier Huntington's Clash of the Civilization thesis), it is generally accepted, by religious authority that they are more closely doctrinaire than generally thought. Despite this fact der Muselmann was able to be used as a pejorative adjective and Agamben gives an explanation for this strange usage:

The most likely explanation of the term can be found in the literal meaning of the Arabic word muslim: the one who submits unconditionally to the will of God. It is this meaning that lies at the origin of the legends concerning Islam's supposed fatalism, legends which are found in European culture starting with the Middle Ages (this deprecatory sense of term is present in European languages, particularly in Italian). But while the muslim's resignation consist in the conviction that the will of Allah is at work every moment and in even the smallest events, the *Muselmann* of Auschwitz is instead defined by a loss of all will and consciousness.[30]

He quoted a Muselmann's definition from Kogon: "relatively large group of men who had long since lost any real will to survive… were called 'Moslems' –men of unconditional

[29] From (Wolfgang Sofsky, *The Order of Terror: The Concentration Camp*, Trans. W. Templer, 1997, 329n5) Agamben, *Remnants of Auschwitz*, 44, Original italic.
[30] Agamben, *Remnants of Auschwitz*, 44, Agamben's italic.

fatalism".[31]Agamben, with extraordinary care, uses the same words and phrases: 'legends' 'supposed fatalism' but he accepts its pejorative meaning by using a less disturbing word 'deprecatory'. His brief explanation about the source of Muselmann is good but it seems not enough because he not only dedicated a whole part to der Muselmann in his book (*Remnants of Auschwitz*) and its important role in his whole theory but also did not take into account the psychological effects upon his readers. Many of his readers may have a memory in his mind, consciously or unconsciously, of one of the pejoratives or at least the deprecatory Muslim definitions that their common ground is that they are inhuman or less than human men who are deprived of character, a man without personality, for instance men of unconditional fatalism.

On the other hand, apart from any legend, Islam has a belief about fate or destiny (predetermination), different from the other Semitic religions. The concept of fate in Islam (qadar), in a nutshell, has different and conflicting definitions or conceptions according to different religious sects.[32] There are four major sects (theological schools) whose explanations and conceptions about qadar are important and prevailed in the course of history.[33] The first one is *Cebriye*. After the age of Rashidun caliphates (632-660), it was the official sect of Umayyad caliphates (661-750) and had a more political orientation than a religious one. It tried to get absolute obedience to the caliphates. In order to achieve this aim, its conception of qadar is very strict and it completely accepts predestination so denies free will. If the only sect in Islam were *Cebriye*, it would be right to assume that Muslims have no will and choice so they disavow their personality. The second one is *Mu'tazili (Qadariyah Qadariya)*. Although it was not official it was the favorite sect of Abbasid caliphates (750-1258). The qadar conception of followers of Mu'tazili was just opposite to Cebriye. They influenced ancient Greek philosophy and complied with Islam. They almost completely denied predestination (God, Allah, only created the World, gave human being reason and free will and at the end of the World, human beings will be responsible for their choices). So qadar is a determinant at the beginning and at the end. The third one is *Ehli Sunnet*. The followers of Ehli Sunnet divide the will into two parts: one of them is Allah's will which is called İrade-I Külliye (the Total Will) and the other is called İrade-i Cüziye (the Partial Will). Every human being is given İrade-i Cüziye (the Partial Will) by Allah in order to chose right (good) and deny wrong

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[31] From (Eugen Kogon, *The Theory and Practice of Hell: The German Concentration Camp and the System Behind them*, Trans. H. Norden, 1979, 284) Agamben, *Remnants of Auschwitz*, 45

[32] M. İhsan Oğuz, *Islam'da kader ve Kaza, (Qadar and Its Realisation in Islam)*, 3rd Edition, 1994, 25-33, 73-81 There are amount of discussion about fate, destiny and predetermination or special to Islam qadar and kısmet. But it is not crucial going inside to these discussions to put the matter clearly.

[33] Muhammed Ebu Zehra, *İslam'da Siyasi, İtikadi ve Fıkhi Mezhepler Tarihi, (History of Political, Religious and Legal Sects in Islam)*, Trans. H. Karakaya and K. Aytekin, 1983, 117-196

(bad). The last conception of qadar belongs to Shia Islam, Shi'at-ul Ali (Ali's Way). About qadar, it is similar to Mu'tezili and accepts free will. It gives more weight to inner, spiritual life than acts of worship. Ehli Sunnet's conception of qadar is a most common conception.

Agamben chose Muselmann because of their extreme position. He indeed knows SS officers did not mean that the living death Jew prisoners became Muslim. Despite this fact he wrote discussions about what the exact meaning of Muselmann is, and then wrote an interesting sentence: "In any case, it is certain that, with a kind of ferocious *irony*, the Jews know that they would not die in Auschwitz as Jews".[34] Tragically, some of the Jews in Auschwitz, because of the camps conditions, lost their basic ability to decide and choose about their lives, namely to die as humans. Agamben continues, in his own term, this kind of 'ferocious irony' and instead of 'would not die in Auschwitz *as Human*', writes 'would not die in Auschwitz *as Jews*'. So der Muselmann extreme position changed from between life and death to human and inhuman or Muselmann.

Conclusion

Agamben's political philosophy and his ideas about law are genuine. His excellence in language and his free associative style are impressive. Besides his works and philosophical depth, he shows his talent and supremacy over European culture. The general characteristics of Agamben's works can be stated as follows:

1. He studies European history, languages and culture. He refers to the other cultures only in the context of connection to European culture.

2. He mostly uses in his political works etymology and ancient Roman Law institutions and concepts to illuminate current concepts or institutions.

3. He is not an analytic philosopher - his logical succession is not strict.

4. He focuses generally on marginal, extreme situations and he uses them as a criterion in order to test political or legal assertions, theories or generally accepted ideas. It is similar to the history of science that gravity continually has been playing a testifying role in theories and 'the logic of scientific discovery', in the course of history, stands this unusual phenomenon that present theories cannot give any satisfactory explanation.

On the other hand in politics or especially law, can Agamben's impressive explanation be useful? Before any answer is given one should think of some real functions of law. Law is a social institution which is expected to solve urgent social problems. A judge in a courtroom in front of parties, claimant and litigant, has to reach a decision. A judge cannot settle for

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[34] Agamben, *Remnants of Auschwitz*, p.45, my italic.

criticizing a specific norm, a legal system or a concept of law. But this does not mean that Agamben is wrong or he unrightfully criticizes firm institutions of a society. Although he seems to have a pessimistic outlook, he insists that he is hopeful about a different future:

Until a completely new politics—that is a politics no longer founded on the *exceptio* of bare life—is at hand, every theory and every praxis will remain imprisoned and immobile, and the 'beautiful day' of life will be given citizenship only either through blood and death or in the perfect senselessness to which the society of the spectacle condemns it.[35]

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[35] Agamben, *Homo Sacer*, p.11, Agamben's italic.