

# The shadow and its shade: A response to Ulrike Kistner's paper 'Sovereignty in question'

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## 1 Introduction

Ulrike Kistner's paper presents us with a carefully constructed argument on the relation between Agamben and Schmitt. The crux of the argument is that Agamben's reliance on Schmitt constitutes a betrayal of Schmitt's thinking on sovereignty that has dire consequences for *the political* and politics.

According to Kistner, Schmitt's articulation of *the political* in terms of the *sovereign decision* that has to be taken in *the state of exception* constitutes a crucial *delimitation* of the sphere and purpose of sovereignty in political life. Schmitt's sovereign opens up a zone beyond ordinary politics and law that does at least three good things, or rather, one good thing with three dimensions:

- (1) Sovereignty, understood in terms of a state of exception, frames and conditions the realm of the regular and ordinary and thus allows for the very possibility of the regular rule of law. Without the sovereign exception, regular rule of law becomes impossible, as (2) and (3) explain further.
- (2) The articulation of sovereignty in terms of a state of exception constrains it. It binds it to the state of exception and thus removes it from ordinary politics under the regular rule of law. It constrains the exceptional *to* the exceptional and prevents it from becoming the regular exception.
- (3) The articulation of sovereignty in terms of a state of exception constrains the regular to the regular and prevents it from becoming the exception that is again, the regular exception.

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These three dimensions of Schmitt's concept of sovereignty are captured succinctly in the following key statement in Kistner's paper. Having stressed the need to read Schmitt's articulation of the state of exception in the *Politische Theologie* of 1922 against the background of *Die Diktatur* (1921), *Legalität und Legitimität* (1932), *Über die drei Arten des rechtswissenschaftlichen Denkens* (1934) and *Der Leviathan* (1937), she contends:

It turns out that the concept of sovereignty, in some specified legal-philosophical instances, and the decision on the state of exception concretely suspending the entire legal order in order to realise the law are *not*, for Schmitt, complicit with encroaching totalitarianism from the outset, but barriers against it.<sup>1</sup>

Kistner does not go into the Schmitt-Kelsen debate but the drift of her argument, especially regarding the third good thing or dimension pointed out above, goes to the heart of Schmitt's critique of Kelsen: When one removes the margin of sovereignty from the rule of law, however exceptional and marginal this sovereignty not only is but must be and must remain, *the regular rule of law itself becomes sovereign*.<sup>2</sup> This is of course exactly how liberal political and legal theory prefers the state of human affairs: The constitution and the law must be sovereign, above politics. But Schmitt's analytical blade cuts finer and deeper, argues Kistner: This liberal position may appear to render us safe from the obnoxious rule of men and the abuse of power, but it only leaves us with the confused state of affairs in which exceptions henceforth get decided *under the regular rule of law*.

Under the liberal legal and political theoretical celebration of the rule of law, there is no longer such a thing as the exceptional case, the case that takes us beyond law, the case that is *excepted or exempted from law*. In other words, liberal political and legal theory erases the distinction between the exception and the regular in a way that deprives us *completely and conceptually*, not just occasionally, exceptionally, and contingently so, of the notion and ideal of the regular rule of law. Under this total rule of law, exceptional cases are no longer cases that exceed the rule of law. They get reduced to *cases of law*, albeit unique, rare or difficult cases. Schmitt's intuition is that it is exactly this confusion of the exception and the rule under the total rule of law that creates the conditions for a totalitarian

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<sup>1</sup>Kistner 'Sovereignty in question. Agamben, Schmitt, and some consequences' (2009) SAPL 253.

<sup>2</sup>Schmitt *Der Begriff des Politischen* (1996) 66; *Verfassungslehre* (2003) 55.

mess, an indistinct realm of power and law all the more dangerous and treacherous for being able to masquerade under the banner of an innocent rule of law.

Kistner's argument deftly traces this line in Schmitt's thought, and hence her fine invocation of Blake's portrayal of Ezekiel's vision of the messianic banquet: The celebrated slaughtering and devouring of the sovereign (the Leviathan) takes place in the shadow of the sovereign above them.<sup>3</sup> She moves on to argue that it is exactly with regard to this crucial argument in Schmitt that Agamben goes fundamentally wrong. Agamben, argues Kistner, confronts us with an understanding of sovereignty that explodes or disperses it into the totalitarian erasure of the distinction between the regular and the rule, that is, the very development that Schmitt, according to her, sought to avoid or to resist. She writes:

Agamben relies on Schmitt's political-theological definition of sovereignty to install it at the heart of ultra-decisionistic modern biopolitics - the production of bare life - within certain geopolitical spatialisations. But he can arrive at this construction only through a reading in several aspects diametrically opposed to Schmitt's genealogy of sovereignty.<sup>4</sup>

My response to Kistner's argument in what follows turns on three steps:

- (1) It fully endorses the core argument regarding the need to *retain* sovereignty as a safeguard for the possibility of the exception to the rule that is, for this very reason, also the safeguard for the regularity of the rule.
- (2) It questions the suggestion in Kistner's paper that Schmitt consistently remained true to this argument.
- (3) It questions the contention that Agamben takes leave of this argument. It suggests that Agamben rearticulates the argument in a way that renders the distinction between the exception and the rule much more stable than Schmitt's argument does.

The first step actually needs no further elaboration, but I will furnish it with an example that highlights the pertinence of Agamben's reflections on the medical technology of our time. I do this in section 2 (The reduction of the exception to the unique). The second step consists in revisiting Schmitt's distinction between commissioned and sovereign dictatorships and the unqualified

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<sup>3</sup>Kistner 'Sovereignty in question' 239, 268 (first and last pages of paper).

<sup>4</sup>Kistner 'Sovereignty in question' 253.

endorsement of the latter that is evident in his concepts of the *absolute constitution* and *constituent power*. I do this in section 3 (The unique but regular state of exception in Schmitt's thinking of the political). I argue in section 3 that Schmitt's conceptions of the absolute constitution and of constituent power reduce constituted power and the regularity of the rule to relative and secondary instantiations of constituent power. As a result of this reduction, constituted power and the regularity of rules effectively become the *occasional* and *irregular* manifestations of constituent power. This is so because constituent power is for Schmitt the ultimate and fundamental *principle* of the political and of sovereignty, and thus, the true or most regular aspect of the political. The *true regularity* of the political consists precisely in its *irreducible and absolute potential to always* revoke and reconstitute whatever it constitutes.

*Section 4* (Towards a different understanding of exception and rule, potentiality and actuality) turns to Agamben. It distils from Agamben's writings a core argument regarding the relation between the exception and the rule that is as concerned with maintaining and stabilising this relation as Kistner is. Section 4 shows in fact that Agamben may well be a more reliable ally for Kistner than the one she finds in Schmitt. And so is Kelsen, contends a brief argument in section 5. Section 5 argues that Agamben, for all his fascination with Schmitt and Benjamin, is actually much closer to Kelsen. The argument is that both Kelsen's and Agamben's positions turn on set theoretical moves that render the distinction between the exception and the rule much more stable than Schmitt can ever hope to do. Section 6 ends my response to Kistner with a set of concluding observations.

## 2 The reduction of the exception to the unique

We shall turn to some serious set theory towards the end of this article, so let us begin with a simple exercise: Imagine a set like the members of football team. The members of the set do not wear gloves, for they are in any case not allowed to handle the ball in play. However, the goalkeeper wears gloves because a significant part of his participation in the game consists in having to catch the ball and preventing it from entering the posts. The goalkeeper surely has a *unique* position in the team, and a unique role in the game, but not an exceptional one. Among the rules of football there are specific ones that apply specifically to the goalkeeper and distinguish his

position in many ways from those of the other players, but this does not exempt him from the rules of the game. His position does not constitute an exception from the general rules of football. He can also not make a sovereign decision to break the rules when he deems fit. He cannot, for instance, when his team trails and seems incapable of scoring, decide to simply catch the ball, deftly run around the stunned opponents and dive with the ball into their goalposts. So goalkeepers have unique positions in the game of football, but they surely do not constitute sovereign exceptions to the regular rules and play of the game.

Certain theories of law aim to construe the law like a regular game of football. There are routine cases of law that require the routine application of legal rules and then there are hard, difficult, or unique cases that require goalkeepers. They require the invocation of more specific or unique rules. These more specific or unique rules usually derive from legal principles that have a wider scope and thus allow for the finding of a more apt or more finely tuned rule when unique circumstances require this. It is actually quite mysterious and apparently quite paradoxical that the greater generality of principles can raise the uniqueness and specificity of rules. Law students and teachers should ponder this mystery more frequently than they do, but I shall not do so here. At issue now is the fact that many (probably most) legal theorists and lawyers look at the more specific legal rules derived from more general legal principles as part and parcel of the regular status of the law. They do not constitute exceptions to the rule and thus do not require sovereign interventions to decide that an exception is at stake. According to these theorists, lawyers and judges always play football and if they do not 'it is just not cricket', and they remain adamant about this even under dire circumstances where many mortals might think the time for games are over.

A case in point is Neil MacCormick's insistence that even decisions like the one in the case of the *Conjoined Twins*<sup>5</sup> remain legal decisions that turn on universalisable rules. The facts of the case were the following (simplified here for the sake of brevity and clarity): Jodie and Mary were conjoined twins, joined at the abdomen. If they were to be left in their present condition, they would both die soon, given that Jody's heart sustained Mary's blood circulation and would not be able to continue to do so in the long run. If they were separated, Mary would certainly die, either during or immediately after the operation. The parents were very

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<sup>5</sup>Re A (Children) (*Conjoined Twins: Surgical Separation*) [2000] 4 All ER 961.

religious and insisted that there should be no medical intervention. They believed both children should be allowed to die should that be the will of God, but that active intervention that would kill one child so that the other might live was an option that they could not contemplate. The National Health authorities insisted the separation should be done so as to allow Jody a chance to survive and took the case to court to obtain permission to do so. The House of Lords ultimately decided in favour of the separation, but emphasised the uniqueness of the case repeatedly. The point of this emphasis on uniqueness was to prevent the judgment from becoming a general rule on the basis of which other cases could be decided, unless the facts of such other cases were exactly the same as those in the present case.

Neil MacCormick argued in response to the *Conjoined Twins* case that the judgment passed remained a legal judgment. As such, the judgment remained universalisable despite its extreme uniqueness. It could be applied in all other cases that were sufficiently the same (or *exactly* the same, as the court insisted). At issue, in other words, remained a legal judgment that decided the case with reference to a rule that was *in principle repeatable*, not a sovereign judgment that was *in principle unrepeatable*, however much one might expect a sovereign judge to make similar or exact same judgments in similar /exact same cases. In MacCormick's words:

The 'because' of justification is a universal nexus, in this sense: for a given act to be right because of a given feature, or set of features, of a situation, materially the same act must be right in all situations in which materially the same feature or features are present. This is subject to the exception that additional relevant features may be present that alter the right result, but the exception is a valid one only if it in turn has the same universal quality. We have to be dealing with some additional set of relations such that this in turn, if repeated, would be taken to justify the same exception in a similar future case.<sup>6</sup>

In view of the discussion above and the contention by MacCormick in this passage, it should be clear that two distinctly different legal theoretical positions demand our attention. On the one hand one can entertain the notion of a 'wise' or 'infinitely reasonable' sovereign whose decisions are not bound to rules, however much her decisions may remain consistent and take on a certain 'regularity' or even

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<sup>6</sup>MacCormick 'Particulars and universals' in Bankowski and Maclean (eds) *The universal and particular in legal reasoning* (2006) 17.

'predictability' over the course of time. On the other hand, one can entertain the notion of a super judge that always finds the universalisable rule, however unique the case may be and however unpredictable the finding of the universal rule often proves to be. What would be the difference between the two? The difference between the two turns on a distinction between the fathomable and the unfathomable or the calculable or the incalculable. However much sovereign decisions of exceptional cases may in fact turn out to be quite consistent and 'regular' over the course of time, one refers to them as sovereign and exceptional in response to an intuition that the reasons for these decisions are ultimately too complex and too opaque to articulate in terms of clear rules and principles. They exceed the terms of mortal normative reasoning. They require the godlike reasoning of sovereigns (indeed, traditionally held as the representatives of God on earth) that see and sense what ordinary mortals cannot grasp. In the eyes of ordinary mortals, these decisions must retain an element of arbitrariness or pure decisionism, however consistent they may turn out to be in the long run. Once the sovereign has decided, one might come to sense that the decision is right, but still cannot explain this sense exhaustively.

The opposite remains the case when legal decisions are made in terms of clear and universalisable rules and principles. The cases may be extremely complex and unique and require detailed and elaborate arguments that often lead to surprising results, but the insistence remains that the decision is fully explicable to each and every intelligent mortal. One can almost take it as a rule of thumb: The more surprising the outcome of a judicial decision will be, the more detailed and elaborate the reasons and explications will be and the more vociferous the claim that the decision is perfectly understandable. The lady's excessive protestation usually accompanies some or other surprise.

What is at stake in this difference? Once you have a clear rule - anyone with adequate training and intelligence can apply it. Adequate training and intelligence become the sole criteria for decision-making, however unique the case. There remains no scope for an exceptional case that requires a *qualitatively* different kind of decision-making that turns not on adequate training and intelligence, but on some other, godlike or transcendent competence. Here lies the root of the ubiquitous and regular bio-political management of the divide between life and death in contemporary hi-tech medicinal practices: If a judge can decide fundamental matters of life and death with reference to a universalisable rule, any competent hospital official can do so too, and most likely with

a stronger claim to have his/her fingers more closely on the pulse of the issues, or tissues, at stake.

Thus have ordinary medical officials come to decide regularly today matters of life or death; matters that used to be not just unique, but also *exceptional* in the sense that they could not be decided with reference to any rule or principle; matters that therefore had to be decided by officials endowed with a godlike authority and whose decisions could be accepted without the need to understand them, without the claim to any ability to understand them. When Nazi medical officials usurped this godlike authority less than a century ago, they were eventually prosecuted for having done so. Today medical officials assume this authority (they do not need to usurp it) as part of a regular state of affairs. There are some serious errors of analysis in Agamben's *Homo Sacer* and Kistner has good reasons for being uncomfortable with this book,<sup>7</sup> but *Homo Sacer* is surely worth its weight in paper and print for pointing out this dreadful irony.<sup>8</sup> Moreover, in doing so, in pointing out this irony, *Homo Sacer* makes the very point that Kistner claims to make with Schmitt against Agamben.

### 3 The unique but regular state of exception in Schmitt's thinking of the political

Kistner cites widely and persuasively from a range of Schmitt's works to portray him as a thinker that safeguards the exception against its regularisation and thus simultaneously safeguards the regular (rule of law) from a boundless exceptionalism. The allure of this line in Schmitt's thinking is the way it endeavours to ensure a neutrality of government on both sides of the exception/regular divide. This is self-evident as far as the regular (rule of law) is concerned. As the rule of law turns on a set of rules that applies to everyone in the same way, it ensures the formal neutrality of the law and the formal equality before the law that liberal democracies claim as a crucial element of legitimate government, but it is not self-evident that Schmitt's safeguarding of the exception ensures the neutrality of government. Why can it be claimed to do so? It does so because of the 'Lefortian' flavour that Schmitt gives to the safeguarded and

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<sup>7</sup>The most crucial error relates to his simplistic equation of human rights discourses with the logic of the camp. I shall not go into this here, but this is surely the weakest point in *Homo Sacer* and it surely demands further attention.

<sup>8</sup>Agamben *Homo Sacer* (1998) 165.



safeguarding exception. To be sure Schmitt's sovereign does not always have this Lefortian quality, but when it does not, the Schmittian sovereign is also no longer a safeguarded and safeguarding exception. When it loses its Lefortian quality, the Schmittian sovereign becomes the regular exception.

What is the Lefortian quality at issue here and when does Schmitt's sovereign evince it and when not? At issue is Lefort's notion of the empty signifier of power that conditions popular sovereignty. Democracy demands government *by everyone* but for this very reason also requires government *by no one* in particular. Government by everyone implies complete self-government and thus also that *no one governs another*.<sup>9</sup> Lefort associated such complete self-government with popular democracy, but Schmitt's astute observations regarding the triumph of popular sovereignty as the source of its demise indicate that this kind of complete self-government was perhaps more true or more plausibly true in pre-democratic times. At issue here is Schmitt's notorious cynicism regarding the popular parliamentary democracies of his time, especially in the Weimar republic.<sup>10</sup> Against the background of the nineteenth century split between the imperial state and civil society (during the various restorations of imperial rule), parliamentary politics still concerned an objective search for 'truth' or 'truly common interests' *vis-à-vis* the imperial government. United against impositions of the imperial state, parliamentary debates searched for and articulated truly common interests. When the democratic revolutions finally triumphed over imperial rule (in Germany in 1918) and erased the institutional boundaries between state and civil society, competition for the grand prize of direct access to and control over the state and state machinery divided parliament into factions. Henceforth parliamentary debate and

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<sup>9</sup>Lefort 'Permanence du Théologico-politique?' in *Essais sur le Politique XIXe-XXe siècles* (1986) 275-329; Cf. also the description of the paradox at the heart of democracy in Lefort *L'invention démocratique* (1994) 92: 'La légitimité du pouvoir se fonde sur le peuple; mais à l'image de la souveraineté populaire se joint celle d'un lieu vide, impossible à occuper, tel que ceux qui exercent l'autorité publique ne sauraient prétendre se l'approprier. La démocratie allie ces deux principes apparemment contradictoires: l'un, que le pouvoir émane du peuple; l'autre, qu'il n'est le pouvoir de personne. Or elle vit de cette contradiction.' It is this empty space, avers Lefort, that is filled and occupied by totalitarian politics: '[P]ar un renversement de la logique démocratique que nous évoquions, le pouvoir cesse de désigner un lieu vide, il se voit matérialisé dans un organe (ou, à la limite, un individu), supposé capable de concentrer en lui toutes les forces de la société.' (*L'invention démocratique* 99).

<sup>10</sup>Schmitt *Die Geistesgeschichtliche Lage des heutigen Parlamentarismus* (1996).

parliamentary politics would be reduced to the promotion of factional quests for the control of the state. It is against this background that Schmitt indeed clearly anticipated the possibility of one faction winning a parliamentary election, taking over the state and simply keeping it by suspending all future parliamentary elections.

It is against this background that Schmitt articulated the notion of the imperial president as ultimate guardian of the constitution (*Hüter der Verfassung*) who could use the exceptional powers granted to the imperial presidency by article 48 of the Weimar Constitution to prevent such a 'democratic' abduction of the state. The argument failed spectacularly, as Kistner observes correctly.<sup>11</sup> However, there is something interesting about the argument that transcends its failure, hence Kistner's understandable fascination with it. The interesting aspect of this argument is exactly the Lefortian flavour that Schmitt gives to his notion of the presidential guardian of the constitution. The sovereignty of the president consists in his absolute neutrality vis à vis the interests of the parliamentary factions. The president has only the 'universal' or general interests of the state at heart. He has no particular, factional or personal interests. The president is, as far as personal interests are concerned, a 'non-person', so to speak. It is more apt to speak of the president as a neutral embodiment of the imperial *presidency*.

Schmitt, following Benjamin Constant, refers to the imperial presidency as a neutral power (*pouvoir neutre*) and he also finds in Constant clear traces of an old and fundamental distinction in the European doctrine of the state, namely the distinction between *auctoritas* and *potestas*. In terms of this distinction the presidency only reigns (in view of his ultimate *auctoritas*) and does not govern (*il règne et ne gouverne pas* - this is so because he has no *potestas*). The situation with the Weimar presidency was different, argued Schmitt, for the Weimar president not only reigned but also governed.<sup>12</sup> But he clearly regarded the classical distinction between *auctoritas* and *potestas* as the ideal case in terms of which the presidency is a neutral power or even, as Montesquieu put it, an empty or zero power (*puissance de juger en quelque façon nulle*) that ensures the continuity and neutrality of the

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<sup>11</sup>Kistner 'Sovereignty In Question' 235 (text just before n 8). Arato 'constitutional learning' (2005) 106 *Theoria* 1 fn. 29: 'The Kelsen versus Schmitt debate on this point was decided in the court of history, when President Hindenburg offered the chancellorship to the Fuehrer of the NSDAP'.

<sup>12</sup>Schmitt *Der Hüter der Verfassung* (1996) 135-136.

state *vis-à-vis* the plurality of interests that it has to accommodate and only begins to take action once this fundamental continuity and neutrality is threatened.<sup>13</sup>

The sovereignty at issue in this articulation of the imperial presidency evinces significant similarities with the sovereignty contemplated in medieval political theology, a sovereignty that Kantorowicz described in terms of the 'king's two bodies'.<sup>14</sup> Alongside his own body, the King had a second body that consisted in his embodiment of or in the *Corpus Christi*, hence also the partial immortality of the king. The person or personal body of the king could die, but the king as embodiment of Christ on earth lived on. It is also with this political theology in mind that Bataille claimed that the dead or dying king was the ultimate manifestation of sovereignty, for in the moment of death or dying, the king's personal or private life gave way completely to the eternal life of the sovereign.<sup>15</sup> Sovereign monarchy thus remained an empty signifier that transcended or eluded all mortal significations of earthly monarchs. It never became fully signified.

This Lefortian plot is palpably evident in Schmitt's notion of the presidency as guardian of the constitution. It is also evident, as Kistner notes well, in his discussions of missionary dictatorships that act strictly in terms of their constitutional commissions. But Schmitt also loses the Lefortian plot when he invokes the notions of absolute constitutions and constituent power in his *Verfassungslehre*. When he does so, his missionary dictatorships turn into sovereign dictatorships that do nothing less than erase the boundaries between the exception and the regular that Kistner imputes to Agamben. However, I shall argue below that Agamben is well aware of this 'Lefortian' line in Schmitt and he engages with it instructively and almost programmatically. In fact, I shall also argue below that Agamben too does not pay enough attention to the way Schmitt loses the Lefortian plot.

Where or how, then, does Schmitt lose the plot? He does so when he invokes and endorses the notion of an absolute constitution that inheres in the existential status of a people. The relative constitution, the basic

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<sup>13</sup>Schmitt *Der Hüter der Verfassung* 136 n 2.

<sup>14</sup>Kantorowicz *The king's two bodies: A Study in medieval political theology* (1997).

<sup>15</sup>Bataille *La Souveraineté* in *Oeuvres Complètes VIII* 270: 'En la personne du souverain, le jeu est ce qu'il serait en la personne de Dieu, si nous n'avions concu sa Toute-Puissance dans les limites du monde subordonné. La mise à mort du roi est la plus grande affirmation de la souveraineté: le roi ne peut mourir, la mort n'est rien pour lui, elle est ce que sa présence nie, ce que sa présence anéantit jusque la mort, ce que sa mort elle-même anéantit.'

rules, principles and forms of government which liberal constitutional and political theory takes as the basis of constitutionalism, the *Verfassungslehre* tells us, is nothing but a temporary instantiation of the existential freedom of a people. This existential freedom remains absolutely free to change the terms or forms of its relative instantiations; hence the notion of a *constituent power* at the absolute mercy of which remain all instances of *constituted power*. Schmitt articulates this absolute freedom of constituent power to transform itself and withdraw from and destroy all forms of constituted power with reference to Spinoza, the ‘parasitic Jewish philosopher’ whom his book on Hobbes would single out as the main destroyer of the theological or mythological truth of the state by invoking the notion of an inviolable freedom of conscience to which the state too is subject.<sup>16</sup> This was 1938, the heady days when the exuberant anti-Semitism of a rampant National Socialist movement allowed for (or demanded, as Schmitt would later contend<sup>17</sup>) a remarkably toxic scholarly discourse. Let us not dwell too long here for it will only sap the will and inclination to think through what already goes fundamentally wrong in the *Verfassungslehre* of 1928 (when Spinoza was, as we shall soon see, still a crucial authority for Schmitt) and in *Die Diktatur* of 1922 (a crucial text for Kistner). In the *Verfassungslehre* Schmitt wrote:

Auf der verfassunggebenden Gewalt beruhen alle verfassungsmässig konstituierten Befugnisse und Zuständigkeiten. Sie selbst aber kann sich niemals verfassungsgesetzlich konstituieren. Das Volk, die Nation, bleibt der Urgrund alles politischen Geschehens, die Quelle aller Kraft, die sich in immer neuen Formen äussert, immer neue Formen und Organisationen aus sich herausstellt, selber jedoch niemals ihre politische Existenz einer endgültigen Formierung unterordnet.

In manche Äusserungen von Sieyès erscheint der ‘pouvoir constituant’ in seinem Verhältnis zu allen ‘pouvoirs constitués’ in einer metaphysischen Analogie zu der ‘natura naturans’ und ihrem Verhältnis zur ‘natura naturata’ nach der Lehre *Spinozas*: ein unerschöpflicher Urgrund aller Formen, selber in keiner Form zu Fassen, ewig neue Formen aus sich herausstellend, formlos alle Formen bildend.<sup>18</sup>

[All constitutional competences and arrangements depend on constituent power. Constituent power, however, cannot constitute itself constitutionally. The people, the nation, remain the primal foundation of all political developments. The people are the source

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<sup>16</sup>Schmitt *Leviathan* (2003) 86-87.

<sup>17</sup>Schmitt *Ex captivitate salus* (2002) 13-23, 55-56.

<sup>18</sup>Schmitt *Verfassungslehre* 79-80.

of all strength. The nation expresses itself in ever new forms and brings forth ever new forms and organisations, but never subjects its political existence to an ultimate formation.

In its relation to all constituted powers, constituent power appears in many statements of Sieyès in terms of the metaphysical relation between 'natura naturans' and 'natura naturata' in the philosophy of *Spinoza*: It is the inexhaustible primal source of all forms that can itself not be contained in any form; it brings forth ever new forms from within itself; formless does it construct all forms.]

Directly after these passages follows Schmitt's own reference to his discussion of revolutionary or sovereign dictatorships in *Die Diktatur*. In contrast to the constituted nature of missionary dictatorships, Schmitt already contended in 1922, sovereign dictatorships derive directly from a formless constituent power:

Aber während die kommissarische Diktatur von einem konstituierten Organ autorisiert wird und in der bestehenden Verfassung einen Titel hat, ist die souveräne [Diktatur] nur *quoad exercitum* und unmittelbar aus dem formlosen *pouvoir constituant* abgeleitet.... Sie appelliert an das immer vorhandene Volk, das jederzeit in Aktion treten und dadurch auch rechtlich unmittelbare Bedeutung haben kann. Ein 'Minimum von Verfassung' ist immer noch da, solange der *pouvoir constituant* anerkannt ist.<sup>19</sup>

[But while a missionary dictatorship is authorised by a constituted organ and derives its title from an existing constitution, the sovereign [dictatorship] exists only *quoad exercitum* and derives directly from a formless constituent power .... It appeals directly to the ever present people, the people who can always move into action and can therefore also have direct legal significance. A minimal constitution is always still there as long as a constituent power is recognised.]

One should stagger for a moment the phrases in these passages that point to the perennial presence, continuity and permanence of the sovereign constituent power that Schmitt describes here (*Urgrund, immer neu, unerschöpflicher Urgrund, immer vorhanden, jederzeit, immer noch da*) and then ask again whether there is really an exception at stake in this sovereignty; or, should one insist that some kind of exceptionality remains plausible here, whether one should not at least concede that this perennially present, permanent and continuous exceptionality also evinces the regularity of an ordinary state of affairs. When Schmitt writes some lines further on

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<sup>19</sup>Schmitt *Die Diktatur* (2006) 142.

that this dictatorial power constitutes a transitional sovereign (*[d]aher ist diese diktatorische Macht souverän, aber nur als Übergang*<sup>20</sup>) one has good reason to wonder what this *transitory* status might mean against the background of perennial presence, continuity and permanence that he has just attributed to constituent power. Is there not clearly another reduction of the exception to the unique and infrequent manifestations of a *regular* case at issue in this *transitional* sovereignty?

It is surely with regard to this discourse of permanence and continuity that Derrida would write that Schmitt's sovereign, for all his sonorous invocations of the exception, remains stuck in the discourse of a non-exceptional subjectivity.<sup>21</sup> With this Derrida surely did not primarily have in mind the *subjective agency* or *human subjectivity* of Schmitt's sovereign (for no logic militates against an exceptional agency), but the *permanent* and *constant presence* of the subject in the full sense of the ever-underlying *subiectum* with reference to which Heidegger would mark the essence of the metaphysics of presence.<sup>22</sup>

Schmitt intended to describe the commissioned dictatorship of the imperial presidency as the goalkeeper of the constitution (*Hüter der Verfassung*). As such, the presidency was clearly a member of the team selected by the constitution, albeit a unique member. The non-commissioned but commissioning dictatorship of constituent power, on

<sup>20</sup>Schmitt *Die Diktatur* 143.

<sup>21</sup>Derrida *Politiques de l'Amitié* (1994) 86-87: 'La décision fait événement, certes, mais elle neutralise aussi cette survenue qui doit surprendre et la liberté et la volonté de tout sujet, surprendre en un mot la subjectivité même du sujet, l'affecter là où le sujet est exposé, sensible, réceptive, vulnérable et fondamentalement passif, avant et au-delà de toute décision, avant même toute subjectivation, voire toute objectivation. Sans doute la subjectivité d'un sujet, déjà, ne décide-t-elle jamais de rien; son identité à soi et sa permanence calculable font de toute décision un accident qui laisse le sujet indifférent. *Une théorie du sujet est incapable de rendre compte de la moindre décision. Mais cela doit se dire a fortiori de l'événement, et de l'événement au regard de la décision. Car si rien n'arrive jamais à un sujet, rien qui mérite le nom d'événement, le schème de la décision tend régulièrement, du moins dans son acception commune et hégémonique (celle qui semble dominer encore le décisionnisme schmittien, sa théorie de l'exception et de la souveraineté), à impliquer l'instance du sujet, d'un sujet classique, libre et volontaire, donc d'un sujet auquel rien n'arrive, pas même l'événement singulier don't il croit, par exemple en situation d'exception, prendre et garder l'initiative.'*

<sup>22</sup>Heidegger *Nietzsche II* (1961) 429-436; *Wegmarken* (1978) 134, 342; A recent essay by Hans Lindahl goes to the heart of the matter at issue here. Lindahl 'Collective self-legislation as an *actus impurus*: A response to Heidegger's critique of European nihilism' (2008) 41 *Continental Philosophy Review* 323-343.

the other hand, he held forth as an *exceptional player*, a member of the team that could constantly choose to play and have others play by different rules. But since the very notion of team membership relates to a single set of rules, the choice to constantly change the rules must destroy the notion of membership and wreck the game. Not only is the exceptional player a game killer. He is a boring game killer. I have argued elsewhere in favour of a *literary* understanding of a constant state of exception and will return to this argument below. Suffice it nevertheless to end this section with this suggestion: *Literally* conceived as the *constant* choice to play differently Schmitt's notion of exceptionality becomes quotidian. Constituent power ends up appearing rather less unique and less interesting than the common goalkeeper called the imperial presidency with the section 48 gloves.<sup>23</sup>

#### 4 Towards a different understanding of exception and rule, potentiality and actuality

If the argument above regarding the constant underlying presence of the state of exception contemplated in Schmitt's understanding of sovereign dictatorship and constituent power holds true, there is little ground for reading Agamben's argument regarding the regular state of exception in *Homer Sacer* as a misappropriation of Schmitt's argument. Moreover, a closer look at what Agamben is getting at in *Homo Sacer* and elsewhere shows that we have good grounds to argue that he remains faithful to Schmitt to the extent of failing to see that there are two sides to Schmitt; the side to which he remains faithful for good reasons, and another side to which he has good reasons not to be faithful. Let us expound the position schematically:

- (1) As shown in the Introduction above, Kistner highlights an argument in Schmitt in terms of which the exception guards the regular and renders the regular possible. Let us refer to this position as Schmitt I.
- (2) In section 3 above, I highlight another argument in Schmitt that erases the boundary between the exception and the regular and leaves the latter completely at the mercy of the former. Let us call this position Schmitt II.

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<sup>23</sup>In the world in which we live, the game killers appear and re-appear with a monotony that could have been deemed boring had their killings not been so cruel and catastrophic. The game-players and game-preservers are the ones who turn up all too rarely. That explains, I guess, why merely the vague promise of one ends up with a Nobel prize even before the playing starts.

- (3) Agamben relies on Schmitt I to describe and critically lament a biopolitical development in contemporary societies which he relates paradigmatically to the murderous regularisation of the exception in the concentration and extermination camps of the National Socialist movement. He does so in *Homo Sacer*, *Remnants of Auschwitz* and *State of exception*. However, nowhere in these works does he articulate an express critical regard for the position of Schmitt II. Nowhere in these works does he engage with the fundamental regularity of the state of exception that is evident in Schmitt's concepts of constituent power and sovereign dictatorship. Nowhere in these works does he show an awareness of how Schmitt I ultimately gives way to the endorsement of a fundamental regularisation of the exception in Schmitt II. Nowhere does he engage expressly with the murderous potential and potentiality of the notions of constituent power and sovereign dictatorship.
- (4) To the extent that Agamben can be said to withdraw critically from Schmitt, he does so by ultimately withdrawing altogether from the Aristotelian conception of the distinction between potentiality and actuality and the political-legal discourse of the sovereign ban and abandonment attached to it. He does so by turning to the messianic conception of potentiality in St Paul. In doing so, he surely also withdraws from Schmitt I, as Kistner observes correctly. But he does not do so to render the distinction between the state of exception and the regularity of the rule less secure, as she contends. He does so, in fact, to render it significantly more secure than the Aristotelian tradition of political thought could ever hope to do.

I assume now that points 1 and 2 have been expounded sufficiently in sections 1 and 3 above. This section now needs to explain points 3 and 4. I shall do so under two sub-headings: *Agamben's lament* and *Agamben's messiah*.

#### ***4.1 Agamben's lament***

Kistner correctly and astutely recognises the critical move in Agamben, namely, his endeavour to point the way towards a different understanding of the relation between potentiality and actuality.<sup>24</sup> He makes the point as follows:

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<sup>24</sup>Kistner 'Sovereignty in question. Agamben, Schmitt, and some consequences' (2009) 24 SAPR/PL 248 (text at n 17).



*Only* an entirely new conjunction of possibility and reality, contingency and necessity, and the other *pathē tou ontos*, will it make it possible to cut the knot that binds sovereignty to constituting power. And only if it is possible to think the relation between potentiality and actuality differently - and even to think beyond this relation - will it be possible to think a constituting power wholly released from the sovereign ban. Until a new and coherent ontology of potentiality (beyond the steps that have made in this direction by Spinoza, Schelling, Nietzsche, and Heidegger) has replaced the ontology founded on the primacy of actuality and its relation to potentiality, a political theory freed from the aporias of sovereignty remains unthinkable.<sup>25</sup>

*Only* if it is possible to think the Being of abandonment beyond every idea of law (even that of the empty form of law's being in force without significance) will we have moved out of the paradox of sovereignty towards a politics freed from every ban.<sup>26</sup>

These passages clearly express an aspiration towards a new understanding of Being and potentiality and actuality that would make a new politics possible. I return to this aspiration below (*Agamben's messiah*). But these passages surely also express desperation and lamentation with their: '*Only*' and '*Only if ....*' The clinical language with which Agamben describes the bio-political regularisation of the exception in the camp and in the modern societies for which the camp has become the paradigm does not wear this lament on its sleeve, but failure to discern it cannot but lead to misunderstandings of Agamben's work. The camp and the bio-political regulation (regularisation) of the exception is ultimately the result of the politics of the ban and abandonment, a politics that has its origins in the fateful relation between potentiality and actuality in Western metaphysics; hence Agamben's lament: *If only* we were not banned and abandoned by this metaphysics in the way we are ....

The politics of the ban and abandonment is a politics that requires a splitting of and split between constituent and constituted power. Constituted power bans constituent power. From the point of view of the law and the constitution, constituent power is an outlaw. It is banned. And *vice versa*: Constituent power abandons constituted power. It withdraws from it, leaving it lifeless and deadening if not dead. Devoid of miracles and the exhilaration of creation is the mundane world of constitutionalism. As we saw clearly in Schmitt, this split can be traced

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<sup>25</sup> Agamben *Homo Sacer. Sovereign power and bare life* (1998) 44.

<sup>26</sup> Agamben *Homo Sacer* 59.

to Spinoza's distinction between *natura naturans* and *natura naturata*, however much Spinoza endeavoured to articulate this distinction as a distinction only (an internal differentiation) and not as a split. At issue here is an old distinction that can be traced all the way to Aristotle's distinction between potentiality and actuality, and it is in Aristotle that Agamben finds the heart of the aporia of sovereignty. In order for the distinction between potentiality and actuality to make sense, or to function properly, there must be a real and irreducible *difference between* potentiality and actuality. For potentiality to be something *different from* actuality, it cannot just be a passing (dialectical) phase through which actuality passes so as to become fully actual (this is why Hegel does not fit into the history that Agamben has in mind here and why he does not name him along with Spinoza, Schelling, Nietzsche, and Heidegger in the passage above.) For potentiality to be *distinctly different* from actuality it must retain an irreducible element of sheer potentiality or sheer non-actuality. That is why potentiality is most fundamentally the *potentiality not to be, the potentiality not to become actual*. It must remain that which never exists *per transitum de potentia ad actum*, as Agamben puts it with reference to Schelling.<sup>27</sup>

It should be clear that there is an incircumventible aporia here. There is no way out once one has committed oneself to the language of potentiality and actuality. This is so for two reasons:

- (1) The attempt to save potentiality from actuality by hypostatizing potentiality that Agamben attributes to Spinoza, Schelling and Heidegger, reduces actuality to potentiality and thus renders actuality vacuous. Again do we see the distinction disintegrate or disappear. For the distinction between potentiality and actuality to function properly, there must also be something irreducible to actuality that cannot be assimilated by potentiality. Both potentiality and actuality must respectively retain elements of potentiality and actuality that remain irreducible to one another.
- (2) The way out of 1 would be to separate potentiality and actuality completely, more or less as Plato did,<sup>28</sup> but this would mean giving up the language of potentiality and actuality. Completely separated from one another, both actuality and potentiality lose

<sup>27</sup>Agamben *Homo Sacer* 48.

<sup>28</sup>According to earlier (standard) dualistic interpretations of Plato. This dualistic understanding of Plato has been put in question by Gadamer. Gadamer 'Zur Vorgeschichte der Metaphysik' in Gadamer (ed) *Um die Begriffswelt der Vorsokratiker* (1968) 372-6, 386-389 and further generally Gadamer *Die Idee des Guten zwischen Plato and Aristoteles* (1978).

their meaning simultaneously. When its terms end up separated into two independent realms, the distinction between actuality and potentiality must make way for a more Platonic one between idea and opinion (*eidōs/doxa*).

Now, according to Agamben, it is against this Platonic splitting and separation of existence that Aristotelian philosophy and especially the thinking marked by the names of Spinoza, Schelling and Heidegger commit much of Western thought. And it does so, maintains Agamben, with disastrous consequences for Western politics. This is so because the 'one world' postulation of a potentiality/actuality distinction is an unstable compound of irreconcilable quests that tend to annihilate one another. On the one hand there is the quest for reliable and stable constitutions of power or constituted powers that become lifeless and frustrating for lack of political freedom and creativity. On the other hand there is a quest for free political creativity that turns into invariably murderous concerns with constituent or unconstituted power. These concerns are invariably murderous because of their need to crack the nut conclusively, so to speak. For constituent power to become fully constituent and thus fully *unconstituted*, it must become a total or totalitarian quest for *unconstituted life*, that is, *bare life*. *Bare life*, argues Agamben, is not only life stripped of political and cultural trappings; it is not only *zōē* stripped of *bios*. It is also life stripped to the bare minimum of life on the verge or threshold of death. The *muselman*, argues Agamben, is the ultimate quest that drives a totalitarian politics of life. The totalitarian imagination of life comes into its own with the systematic production of the very threshold between life and death that went around in the camps in the figures of those Jews who literally were dead men walking.<sup>29</sup>

The *muselman* is thus, for Agamben, the extreme and full potential of the politics of life that commences with the quest for constituent power that we find in the position described as Schmitt II above. And *Remnants of Auschwitz* must surely be understood as an argument against this politics. *Remnants of Auschwitz* underlines the contention in *Homo Sacer* that Western political thought needs to articulate a different understanding of potentiality that will liberate it from the aporias of sovereignty. This new articulation of potentiality, argues Agamben, would have to surpass even the significant efforts of Spinoza, Schelling, Nietzsche and Heidegger to rearticulate the Aristotelian concept of potentiality. The link between Spinoza and Schmitt II should be

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<sup>29</sup>Agamben *Remnants of Auschwitz: The witness and the archive* (1999) 41-86.

abundantly clear from the discussion in section II above. Lack of space and adequate scholarly competence prevent me from going into Schelling and Nietzsche here, but a note on the relation between Heidegger and the philosophy of National Socialism is warranted and possible here. Agamben articulates in a nutshell what remains the most disconcerting link but also the most significant difference between Heidegger's thought and the biological racism of the National Socialist movement. Both were concerned with the retrieval of the *facticity of existence* from the lifeless mediocrity of bourgeois life. This is surely what is at issue in Heidegger's contrast between authentic *Dasein* whose existence remained a constant question and a constant concern with its own death, on the one hand, and the unquestioning life of *das Man*, on the other. In this respect he was surely a child of the rife Weimar-era revolutionary conservatism from which the National Socialist movement drew much of its inspiration and energy, especially among the Nazi-elites. What (mostly) distinguished Heidegger's position fundamentally, not only from the Nazis but also from the conservative cultural revolutionaries of his time, was his insistence that *facticity* could not be reduced to *facts*. Facticity was for Heidegger not a *presence* that could be reduced to a present state of affairs, be this state of affairs racial, biological, cultural or otherwise; hence also the profound difference between his thought and the factual biological racism of the National Socialists.<sup>30</sup>

To return to Agamben, Schmitt and Kistner: *Homo Sacer* and *Remnants of Auschwitz* constitute Kistnerian arguments against Schmitt II, the Schmitt that neither Kistner nor Agamben recognises properly. The irony becomes tangible when Agamben himself relies expressly on Schmitt I to argue against a Schmitt II in *State of exception*, a Schmitt II that he simply does not recognise behind the figure of Walter Benjamin.<sup>31</sup> I have discussed Agamben's position in *State of exception* elsewhere and will only restate the essential points here:<sup>32</sup>

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<sup>30</sup>Agamben *Homo Sacer* 150-153.

<sup>31</sup>He is also not, under the other hand, completely unaware of this Schmitt II behind Benjamin. Agamben *State of exception* (2005) 58: 'But what Schmitt could in no way accept was that the state of exception be wholly confused with the rule. In *Dictatorship* he had already stated that arriving at a correct concept of dictatorship is impossible as long as every legal order is seen "only as a latent and intermittent dictatorship"... To be sure, *Political Theology* unequivocally acknowledged the primacy of the exception, insofar as it makes the constitution of the normal sphere possible; but if, in this sense, the rule "lives only by the exception", what then happens when exception and rule become undecidable?'

<sup>32</sup>Van der Walt *Law and sacrifice* (2005) 135-136, 198-204.

- (1) According to *State of Exception* Schmitt's concept of commissary dictatorships in the *Die Diktatur* and *Der Hüter der Verfassung* can clearly be read as a negation of the notion of divine violence that Benjamin articulated in his *Kritik der Gewalt*. These texts clearly reject the idea of a divine or pure revolutionary violence that exceeds or transcends the circle of law-founding and law-maintaining violence.
- (2) To negate and denounce Benjamin's concept of pure revolutionary violence, Schmitt articulated a concept of the *state of exception* in the *Politische Theologie* in terms of which the state is never fully severed from the rule or rules of law. The *state of exception* never destroys the rule. It simply suspends the *application* or *force* of the rule so as to safeguard the ongoing validity of the rule during times of turmoil. The state of the exception is thus nothing more than the moment of utmost tension between the validity of the rule and its application.<sup>33</sup>
- (3) The debate between Schmitt and Benjamin reflects the *gigantomachia peri tēs ousias*; the struggle for Being between the giants of metaphysics, the struggle between those metaphysicians with a direct quest for pure Being and those who approach Being through the *logos* or the law (*nomos*).<sup>34</sup>
- (4) The position of those metaphysicians who insist on always approaching Being through the *logos* reflect the Greco-Roman regard for the double phased movement of all creation and the double phased conception of the relation between life and law. This conception also marked the double phased articulation of the state of exception under Roman law: A *tumultus* (public danger) first had to be declared by the *auctoritas* of a senator in the form of a *senatus consultum ultimum*. Then only could the *potestas* of magistrates begin to use the extraordinary powers of the *iustitium* to restore law and order.<sup>35</sup>
- (5) Modern totalitarian regimes consist in the collapsing of the two phases of the state of exception into one and in the complete erasure of the distinction between *auctoritas* and *potestas*. The result, argues Agamben, is a killing machine that runs on a permanent state of exception.<sup>36</sup>

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<sup>33</sup>Agamben *State of exception* 56.

<sup>34</sup>Agamben *State of exception* 59.

<sup>35</sup>Agamben *State of exception* 41-51.

<sup>36</sup>Agamben *State of exception* 86.

- (6) Agamben does not state this expressly, but his argument surely alludes to a link between the Benjamin's divine or pure violence and the collapse of the double phased articulation of the relation between bare life and law in Roman law into an immediate, permanent, totalitarian and murderous state of exception. Schmitt's position, on the other hand, is surely presented as closely related or faithful to the Roman law articulation of the relation between life and law. In terms of the positions charted at the beginning of this section, however, Agamben does not realise or does not seem to realise that he is not only pitting Schmitt against Benjamin here, but also Schmitt against himself. He is pitting Schmitt I against Schmitt II in more or less the same way and for the same reasons that Kistner pits Schmitt against Agamben.

Ultimately, however, Agamben turns completely away from the language of the Greek metaphysicians. He turns to St Paul, the one who writes *in* Greek, but actually writes or speaks Yiddish. 'But that isn't Greek, it is Yiddish' exclaimed Emil Staiger with regard to the Pauline letters during a conversation with Jacob Taubes.<sup>37</sup> Here, in this Yiddish Greek or Greek Yiddish of St Paul, Agamben locates a different concept of potentiality that is significantly different from the potentiality caught up in the Aristotelian constellation of *dynamis* and *energeia*, namely the potentiality of the messianic community, the potentiality of the community of those who are called by Christ to live on in *the time that remains*, the time between the resurrection of Christ and the end of time, the apocalypse. These communities called by Christ (*ekklesia*) live on, on earth, as if no longer on earth (*on, but not of, this earth*), married as if not married (οἱ ἔχοντες γυναῖκας ὡς μὴ ἔχοντες εἶναι), crying as if not crying (οἱ κλαίοντες ὡς μὴ κλαίοντες), rejoicing as if not rejoicing (χαίροντες ὡς μὴ χαίροντες), buying as if not to keep (οἱ ἀγοράζοντες ὡς μὴ κατέχοντες), using as if not consuming (οἱ χρῶμενοι ὡς μὴ καταχρῶμενοι).<sup>38</sup>

#### 4.2 Agamben's literary messiah

I cannot do justice here to the breathtaking scope and depth of *The time that remains* and to all the turns of the central thread of the *as if not* - ὡς μὴ? - that Agamben weaves through the text. I shall only trace briefly here one of its more conspicuous aspects, namely the

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<sup>37</sup>Agamben *The time that remains* (2005) 4.

<sup>38</sup>Agamben *The time that remains* 19-26; 1 Corinthians 7, 29-32.

*literary* and fictional quality of the ὡς μὴ, the ‘as if not’. Those called by Christ live a literary or fictional (but surely far from fictitious) life ‘as if’ life, but negatively so. They live an ‘*as if not*’ life. They live under the law (circumcised) *as if not* under the law; not under the law (not circumcised) *as if not* not under the law. A new relation between the law and the outlaw emerges here that no longer turns on the relation between the regular rule of the law and a state of exception. At issue here is not longer *the exception* but the *example*. The Christian community no longer lives under the partitioning law of the *ban* or *abandonment* that separates life into law and the exception to law. Having been liberated from the law does not constitute an exception to and exemption from the law, hence also the message to the Romans to obey the earthly authority that God invested in the Emperor.<sup>39</sup> No, the Christian community does not lead an exceptional life but an *exemplary life*, the life of the *example*. What is the difference between the exception and the example? Agamben answers this question with reference to set theory: Set theoretically, the exception is the *excluded member* of the set. The example, in contrast, is the *included non-member*; hence the peculiar status of Christian existence: on but not of this earth, by the law but not under the law, married, but only as if not married, etcetera. This is sheer trickery of course and Agamben knows it well, but in this linguistic trickery lies the promise of the messianic community, that is, *the coming community*:

Neither particular nor universal, the example is a singular object that presents itself as such, that *shows* its singularity. Hence the pregnancy of the Greek term, for example: *para-deigma*, that which is shown alongside (like the German *Bei-spiel*, that which plays alongside). Hence the proper place of the example is always beside itself, in the empty space in which its undefinable and unforgettable life unfolds. This life is purely linguistic life. Only life in the word is undefinable and unforgettable. Exemplary being is purely linguistic being. Exemplary is what is not defined by any property, except by being called. Not being-red, but being-*called*-red; not being-Jakob, but being-*called*-Jakob defines the example. Hence its ambiguity, just when one has decided to take it seriously. Being-called - the property that establishes all possible belongings (being-called-Italian, -dog, -Communist) is also what can bring them all back radically into question. It is the Most Common that cuts off any real community. Hence the impotent omnivalence of whatever being. It is neither

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<sup>39</sup>St Paul *Romans* 13.

apathy nor promiscuity nor resignation. These pure singularities communicate only in the empty space of the example, without being tied by any common property, by any identity. They are expropriated of all identity, so as to appropriate belonging itself, the sign ?. Tricksters or fakes, assistants or 'toons, they are the exemplars of the coming community.<sup>40</sup>

At issue in the exemplary life of the Christian is then not a matter of being-Christian, but being-called-Christian; hence the emphasis on being-called of the Christian community, the *klesis* of *ekklesia* in *The time that remains*. Crucial about this community is its sheer linguisticity, its fictional and literary existence through which it constitutes and de-constitutes itself without states of exceptions coming into play. It exists neither under the law, nor as an outlaw. It simply exists *alongside the law* as the remembrance of unforgettable and singular existence, the unforgettable and singular existence of everything that the law *does not set aside and keep alongside*,<sup>41</sup> but simply fails to recognise and dismisses. That it is up to literature to remember the unforgettable life that the law forgets without even having come to know it, is central to Agamben's literary messianism. Much more is at stake here than the mere remembrance of the forgotten. At stake is the literary register of that which must remain unforgettable even when it is forgotten.<sup>42</sup> The aim of literature is the complete recapitulation and the redeeming memory of the unforgettable.<sup>43</sup>

I recently called for a different relation between law and literature than the relation henceforth advocated by the law and literature movement. I did so with reference to the *literary Marxist* concern with the singular that Nancy articulates in *La Communauté Disoeuvrée*.<sup>44</sup> The resonances between Nancy's literary communism and Agamben's coming community are evident. They do not necessarily say the same thing. They are perhaps no more than examples (included non-members) of one another. But they both allow us and require us not to confuse law and literature. They require us to remember and emphasise the difference between law and literature. For the law will always be and must perhaps always be the forgetfulness of the unforgettable. Literature, on the other hand, is and must remain the memory of the unforgettable, the

<sup>40</sup>Agamben *The coming community* (2003) 6.7-10.1.

<sup>41</sup>Van der Walt *Law and sacrifice* 30, 146-148.

<sup>42</sup>Agamben *The time that remains* 39-40.

<sup>43</sup>Agamben *The time that remains* 75, 77.

<sup>44</sup>Van der Walt 'Agaat's law: Reflections on Law and Literature with reference to Marlene van Niekerk's novel *Agaat*' (forthcoming in *The South African Law Journal*).



*unforgettable life* that Agamben, in the properly Greek language of Aristotle, would earlier have called bare life, *zoe*.

Literature can do what the law cannot do without descending into murderous totalitarian exceptions. Literature can remember and keep in play, alongside the regular rule of law, bare life or unforgettable life.<sup>45</sup>

## 5 Kelsen and Agamben: *As if* and *as if not*

The journey through Agamben has taken us far enough to notice how far he moves away from Schmitt and how close he ends up to Kelsen. Kelsen, like Schmitt, recognised and acknowledged the exposure of law to the exception, the exposure of law to its outside. He was acutely aware of the impossibility of a purely legal foundation of law, acutely aware that the set of the law and its set or series of constitutions or *Grundnormen* always lack the crucial extra member that would complete the set. But unlike Schmitt he was not at all keen on this exposure. He was not keen on the existential inclusion of the exception into the law. So he devised an *exemplary* theory of the law. He constructed a pure theory of law that served as an example for how one can think about law as law. This example simply required that lawyers and jurists imagine and *presuppose* a fully validated first constitution in no need of further validation, be this validation existential (Schmitt) or normative (in need of an infinite series of normative validations). The Grundnorm of course never existed as posited or positive law (*gesetzt*). The example simply required that the Grundnorm be presupposed (*vorausgesetzt*) *as if* (*als ob*) it existed.<sup>46</sup> Like Agamben, Kelsen was quite a trickster. And although this may begin to sound like a Coen Brothers film here,<sup>47</sup> there is no reason why these tricks cannot work for us. Many generations of lawyers and jurists have worked with the law *as if* it is something different than sheer power politics and they have most

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<sup>45</sup>Hence Posner's resistance to literature that would be reduced to moral lessons for lawyers. The concern with literature, argues Postner, is not a concern with moral instruction, but with '[living life], for the moment anyway, more intensely'. Posner *Law and literature* (1998) 330.

<sup>46</sup>Kelsen *Reine Rechtslehre* (1934) 66-67.

<sup>47</sup>Consider *The big Lebowski* (Joel and Ethan Coen 1998). There was no abduction to begin with, but neither was there ever any ransom money offered. It was all about nothing. This scheme basically runs through most of the Coen brothers' films, right up to the recent *Burn after Reading* (2008).

often done so with reasonably fair consequences. So, back to back, as two irreconcilable, mutually exclusive but inseparable sides of a coin, Kelsen and Agamben provide us with an *as if* theory of law and an *as if not* theory of redeeming literature through the constellation of which the latter redeems us from the injustices of the former. And thus do they collaborate to avoid the regularisation of exceptions that threatens so ominously in the work of Schmitt. I think Kelsen is Kistner's real ally, and so is Agamben for that reason.

## 6 Concluding remarks

- (1) Kistner's argument regarding the sovereign recognition of states of exception as crucial safeguards for the regular rule of law raises an important point that demands serious attention in an age where sovereignty clearly threatens to permeate every walk of life surreptitiously and can no longer be recognised as exceptions that depart from the regularity of the rules.
- (2) Kistner's reliance on Schmitt and Agamben surely provides a persuasive and interesting vocabulary for her argument. But there is more to both Schmitt and Agamben than Kistner brings to our attention. On both counts, matters are considerably more complex.
- (3) Schmitt is not only concerned about commissary dictatorships, but also about revolutionary or sovereign dictatorships and his fundamental concern with constituent power elevates the idea of sovereign dictatorships to a mainstay of his political thought. In this regard, he is as 'guilty' of the erasure of the boundary between the exception and the regular that Kistner imputes to Agamben.
- (4) Agamben traces the political discourse of the exception to Aristotle's distinction between *dynamis* and *energeia* and he is acutely aware that this Greek discourse of potentiality and actuality that informs the political conception of the exception is an unstable one that constantly threatens to turn the exception into the regular and vice versa. Hence his reliance on St Paul's Greek-Yiddish discourse to stabilise the discourse of potentiality and actuality by rephrasing potentiality in terms of a messianic consciousness that lives on in *the time that remains* until the apocalypse or *eschaton* when the faithful will finally be redeemed fully and God will reckon with the unfaithful (only here then, Benjamin's divine violence). In *the time that remains*, however, those called by the Messiah live on *as if not* (ὡς μὴ) living on. They

are in but not from this world. Thus does Agamben construct a radical and indefinite postponement of the exception (the *eschaton*: the moment of full and final redemption and reckoning at the end of time) that stabilises regular law and politics on earth. In the meantime, however, that is, *in the time that remains*, redemption must remain a *literary memory*. Redemption, at least for now, turns on the memorial work of literature, the task to remember what must remain unforgettable.

- (5) Speaking in terms of set theory, the sovereign *exception* concerns the member of the set that remains excluded. The messianic  $\omega\varsigma \mu\eta$ , quite to the contrary, concerns the *example* of the non-member of the set that remains included. The sovereign exception has the *constant potential to constantly disrupt* the set violently and disastrously. The example or exemplary life of the messianic  $\omega\varsigma \mu\eta$  remains hospitable to the stranger, the non-member, without risking the integrity of the set. This is impossible, of course, as Derrida teaches us well. So the example is really a matter of trickery. It is fiction. It constitutes nothing but a literary community or literary communism; a *literary Marxism*, as Nancy puts it.
- (6) However, literary communities and literary redemptions (and mercy) are not fictitious. Those who would want to argue that they are - as literal Marxists might want to do - must then also argue that the law is fictitious. For the law too, Kelsen, teaches us, turns on a trick or fiction. We only have law *as if* we have law. We only have law when a sufficient number of us presuppose or accept that we have law. We only have law, as Hart phrased the same point, when a sufficient number of us have an internal perspective on law.<sup>48</sup> This imaginative acceptance of the existence of law does not render the law fictitious. The law is only too real, as the Baileys and Grootbooms of the world know well.<sup>49</sup> At issue here is an insight that we already have from Homer and Sophocles: Humanity lives on by the grace and disgrace of trickery and not by force.<sup>50</sup>

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<sup>48</sup>Hart *The concept of law* (1961) 89.

<sup>49</sup>Van der Walt 'Agaat's law'.

<sup>50</sup>Consider the cunning of Odysseus, the essence of Enlightenment according to Horkheimer and Adorno (*Dialektik der Aufklärung* (1969) 50-87) and the elegy/eulogy of the chorus on this cunning in Sophocles' *Antigone* (quoted here from the translation by Seamus Heaney in *The burial at Thebes* (2004) 17): 'The wind is no more swift or mysterious/Than his mind and words; he has mastered thinking, /roofed his house against hail and rain/And worked out laws for living together.'

- (7) If Kistner's concern is really with the stabilisation of the distinction between the exception and the regular that safeguards the regular, she should take into consideration Agamben's messianic postponement of redemption to the end of time and his messianic maintenance of the regular *in the time that remains*. She may find that Agamben is a much closer ally than Schmitt.
- (8) The goalkeeper that breaks the rules as he pleases will soon kill our interest in the game. There will be no game. But depending on his skills and artistry, he may well continue to interest us as theatre and fiction.

### 6.1 *Epilogue: The shadow and its shade*

Irene Grootboom's shadow hangs indelibly over the *groot boom* of the Constitutional Court, the big tree that was to gather the South African community of law in its shade. She was not allowed into this paltry shade.<sup>51</sup>

Indelibly hangs her shadow. It will not be erased in the time that remains. It will remain unforgettable even when forgotten.

That is why and how she turned the tables. If anything will ever shade and shelter something like a community in South Africa, something that *can be called community*, it will be her unforgettable shadow and the literary memory of this shadow.<sup>52</sup> She will be the *groot boom*/big tree of the constitution.

Thus do the poor inherit the earth *for us* and do we become exemplary members of a set called Wallacedene.<sup>53</sup>

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<sup>51</sup>*Government of the Republic of South Africa/The Premier of the Province of the Western Cape/Cape Metropolitan Council/Oostenberg Municipality v Irene Grootboom* (2000) 11 BCLR 1169 (CC).

<sup>52</sup>'Agaat's law' (footnotes towards end).

<sup>53</sup>Who we? We bourgeois legal theorists who profess solidarity with the poor without ever effectively resisting laws that destroy solidarity; we bourgeois 'critical' legal theorists who *call* ourselves Marxists or literary Marxists but, for good or bad reasons, no longer have the real revolutionary stomachs for bloody states of exception - all of us who have effectively become good Christians, sincerely concerned with redemption and reckoning, but ultimately always leaving these matters to God (also in times when socio-path investment bankers in the rich countries of the world steal more public money in weeks than the poor receive in years). God help us all.