Asylum and the Common: Mediations between Foucault, Agamben and Esposito

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Through the use of predominantly biopolitical theoretical concepts from Foucault, Agamben and Esposito, this article aims to uncover the dynamics that enable violent exclusion from the community of asylum seekers in the UK. Foucault's notion of state racism, and the dynamic of hierarchisation that results from this, are shown to play a significant role in enabling destitution amongst asylum seekers. Agamben's concepts of *homo sacer* and bare life are used to show similarities with the legal situation and *de facto* destitution of asylum seekers in the UK, who occupy a zone of indistinction between inclusion and exclusion. By examining Esposito's paradigm of immunisation it is shown how asylum seekers represent a threat to the preservation of individual identity. Furthermore, institutions granting rights protection could be seen, following Esposito, as attempts to immunise oneself from the 'threat' of the common. In the end, it seems that asylum seekers are subject to illegalisms by the very institutions that at once grant them rights and produce them as an unwanted category, occupying an ever expanding space of remnants in our presupposed common universality.

Lives that are as though they hadn't been, that survive only from the clash with a power that wished only to annihilate

them or at least to obliterate them, lives that come back to us only through the effect of multiple accidents.[1]

— Michel Foucault

The refugee is perhaps the only thinkable figure for the people of our time and the only category in which one may see today ... the forms and limits of a coming political community.[2]

— Giorgio Agamben

The common is not characterized by what is proper but by what is improper, or even more drastically, by the other; by a voiding [svuotamento], be it partial or whole, of property into its negative.[3]

— Roberto Esposito

1. Introduction

The Problem

The issue of migration or asylum has played a contentious role in British politics in recent years. Similar discussions have dominated political debate across the EU. In the UK, recent examples include the Home Office initiative of a mobile van urging 'illegal immigrants' to return home,[4] or the media outcry over the fear of an influx of new migrants in the run up to Romania and Bulgaria

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[1] Michel Foucault, *The Essential Foucault: Selections from Essential Works of Foucault, 1954-1984* (Paul Rabinow & Nikolas Rose eds, The New Press 2003) 163.

[2] Giorgio Agamben, *Means without End: Notes on Politics* (Vincenzo Binetti and Cesare Casarino trs, University of Minnesota Press 2000) 16.

[3] Roberto Esposito, *Communitas: The Origin and Destiny of Community* (Timothy Campbell tr, Stanford University Press 2009) 7.

[4] Patrick Wintour, '"Go home" vans to be scrapped after experiment deemed a failure' (*Guardian*, 22 October 2013) <www.theguardian.com/uk-news/2013/oct/22/go-home-vans-scrapped-failure> accessed 18 February 2014.

joining the EU.[5] This article aims to explore the dynamics and power relations at play concerning asylum seekers in the UK and to situate or better understand their 'place' in the community. According to UNHCR figures there are 149,765 refugees, 18,196 pending asylum cases and 205 stateless persons in the UK.[6] Many unsuccessful asylum seekers suffer destitution and as a result face social exclusion—an aspect of the experience of asylum seekers rarely portrayed in the media. I begin by articulating the framework within which the question of exclusion will be situated; that is, by illustrating the close relationship between the nation state, citizenship and access to human rights protection. Following this, I will attempt to link theoretical concepts with the legal and social dynamics of asylum seekers in the UK. Three theorists, namely Foucault, Agamben and Esposito will be considered. Naturally, the full breadth of their thoughts will fall beyond the remits of this investigation. It will be necessary, therefore, to approach these theories like 'a box of tools.'[7] Indeed, as Deleuze explains by quoting Proust: 'treat my book as a pair of glasses directed to the outside; if they don't suit you, find another pair; I leave it to you to find your own instrument, which is necessarily an investment for combat.'[8]

Citizen, Nation

The nation, territorially bound, recognises its citizens through the law. Indeed, 'it is law which, finally, mediates between the citizenry making up the determinant nation, the nation of blood and soil, and what lies beyond.'[9] In other words, all citizens share common legal rights and duties as members of the nation, that is, to the extent that

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[5] Jonathan Petre and Simon Walters, 'Exposed: What they DIDN'T tell you about new wave of migrants heading for booming Britain' (*Mail Online*, 29 December 2013) <www.dailymail.co.uk/news/article-2530503/Exposed-What-DIDNT-tell-new-wave-migrants-heading-booming-Britain.html> accessed 18 February 2014.

[6] UNHCR, 'The Facts: Asylum in the UK' (*UNHCR*) <www.unhcr.org.uk/about-us/the-uk-and-asylum.html> accessed 18 February 2014.

[7] Gilles Deleuze, 'Intellectuals and Power' in Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Donald F Bouchard ed, Cornell University Press 1977) 208.

[8] ibid.

[9] Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press 2001) 135.

they belong to the common will and to the state.[10] However, what becomes apparent is that rights, granted to citizens of a particular nation, necessarily exclude members from the community of its citizens or subjects all those who do not belong to the particular nation.[11] Asylum seekers are not full citizens and therefore do not have access to the same rights as citizens of the particular state in which they are seeking protection.

The modern subject's humanity is recognised through the procurement of political rights of citizenship which, in turn, ensure admission to a so-called 'universal human nature' by excluding from that particular status those without rights.[12] As such, it seems that the only form of effective realisation of 'the human' is through membership of the 'community of citizens.'[13] Asylum seekers in the UK, the 'subjects' of this investigation, fall within that particular category. As per the framework of the nation state, the law and citizenship, the asylum seeker in a sense transcends the 'rules' by categorically embodying a status of 'other-than human' despite being *nothing other* than human.

What seems apparent within this framework is a rather rigid, territorialising dichotomy, between the so-called citizen insider and asylum seeker outsider. By exclusively delineating a space based on geographical or territorial frontiers or borders one could argue that other mechanisms of exclusion are undermined. This is true, and indeed much has been written on the subject of exclusion of certain groups despite possession of formal citizenship. [14] Since this investigation focuses on the question of destitution amongst asylum seekers, the attachments to the nation and the validity of recognition as a human being through the notion of citizenship will take precedence over so-called excluded citizens. This is not to say that

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[10] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000) 106.

[11] ibid 104.

[12] ibid 106.

[13] Étienne Balibar, 'Violence and Civility: On the Limits of Political Anthropology' (2009) 20(2-3) Differences 9, 26.

[14] Kitty Calavita, 'Law, Citizenship, and the Construction of (Some) Immigrant "Others"' (April 2005) 30(2) Law and Social Inquiry 401, 407; See also Étienne Balibar, *We, the People of Europe?: Reflections on Transnational Citizenship* (Princeton University Press 2004) 68.

one case is more urgent than the other, or indeed that the two should be juxtaposed in this way. Nevertheless, for the purposes of this investigation it will be useful to think of the two as 'incommensurable' in a Feyerabendian sense. Simply put, one form of exclusion occurs despite citizenship and the rights associated with it and the other because of no such citizenship or rights. In order to demonstrate the shortcomings of a particular 'paradigm,' the philosopher of science Paul Feyerabend proposes entering that particular paradigm and refuting it according to its 'own respective kinds of experience.'[15] In other words, for asylum seekers in the UK, the most basic recognition as a human being is denied based on the predicates of universal rights. By arguing within the 'framework' of the nation state, I hope to make sense of the dynamics at play as well to expose to a certain extent, the banal significance of such grandiose claims.

2. Biopolitics

Foucault's Epistemé

In a series of lectures at the Collége de France (1975-76), Foucault outlined his thoughts on power, war and the question of sovereignty. Power, Foucault explains, can be understood as the implementation and deployment of a relationship of force.[16] The classical theory of sovereignty, the right of life and death—that is the right to take life and let live—was complemented by a different right: the power to 'make' live and 'let' die.[17] This gradual transformation, explains Foucault, begins with the emergence of disciplinary techniques of power during the seventeenth and eighteenth centuries. During this time, the technology of surveillance centred around disciplining individual bodies, to increase their individual productive force in the most economic way possible—what Foucault termed

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[15] Paul Feyerabend, 'Consolations for the Specialist', in Imre Lakatos and Alan Musgrave (eds), *Criticism and the Growth of Knowledge* (Cambridge University Press 1970) 227.

[16] Michel Foucault, *Society Must Be Defended: Lectures at the Collège De France, 1975-76* (Mauro Bertani and François Ewald eds, Penguin 2004) 15.

[17] ibid 241.

'governmentality.'[18] In the second half of the eighteenth century a new technique of power emerged that would operate alongside—but on a different scale to—disciplinary surveillance.[19] This new power, rather than being applied to individual bodies or man-as-body, began to be applied to man-as-species—the global mass of the population.[20]

This 'biopolitics of the human race' functions by accumulating knowledge concerning the birth rate, mortality rate, life expectancy and so on as well as political and economic trends—all of which are factors which need to be controlled.[21] Indeed, biopolitics is concerned with the population—both as a political and economic problem—a problem that is at once 'scientific and political, as a biological problem and as power's problem.'[22] Amassing this volume of knowledge over a period of time amounts to the emergence of constants and averages. In turn, regulatory mechanisms are put in place in order to establish equilibriums, to maintain an average, a norm, and to compensate for variations within the general population.[23] This process of taking control of life and the biological process of man-as-species is described as a process of regularisation; it is in this way that the power of the sovereign consists of 'making live and letting die.'[24]

The central function of this regularising biopolitical power is to improve life, prolong its duration, compensate for failings and so on. Foucault asks, therefore, how can a power such as this kill?[25] It is at this point that Foucault introduces the concept of racism, which is inscribed as the basic mechanism of power. What is meant by racism in this particular context is that which introduces a 'break' within the domain of life—that is, a break between what must live and what must die.[26] This allows power to treat the 'species,' to

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[18] ibid 242.

[19] ibid.

[20] ibid.

[21] ibid 243.

[22] ibid 245.

[23] ibid 246.

[24] ibid 247.

[25] ibid 254.

[26] ibid.

subdivide the 'species'—its function is to fragment and 'create caesuras within the biological continuum addressed by biopower.'[27]

A secondary function of this discourse of race is to distinguish an inferior race, one that must die for the species to grow stronger, purer.[28] This biological mechanism is one that treats adversaries not as political threats but rather as biological threats, external or internal, to the population.[29] It is this racism that is inscribed into the functioning of the state—both a biopolitical and normalising society—that allows others to be killed and thus enables the old sovereign right to kill to be exercised once more.[30] Foucault makes clear that the sovereign's right to kill is not limited to murder but also includes any indirect means such as: exposing someone to death, increasing the risk of death for some people, expulsion, rejection, political death, and so on.[31]

How can we relate these ideas to the question of destitute asylum seekers? How can Foucault's notion of sovereignty, the power 'to make live and let die'—in other words, the desire to ensure the preservation of life—be reconciled with the asylum seeker who is left simply to survive?

Myth of an Original Community and the Notion of State Racism

Our contemporary society adheres to a notion, not immediately controversial but which nevertheless on closer inspection appears to be a curious fascination, that is: the so-called universal desire to survive; in other words, the unequivocal necessity to preserve life. This notion arguably dates back to Rousseau's social contract, a document that itself could be described as a device or means for survival, and what Hanafin calls a 'temporary immunity from death.'[32] This foundational text was one in which people contractually agreed with themselves to relinquish their person,

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[27] ibid 255.

[28] ibid.

[29] ibid.

[30] ibid.

[31] ibid 255.

[32] Patrick Hanafin, 'Rights of Passage', in Rosi Braidotti and Patrick Hanafin (eds), *Deleuze and Law: Forensic Futures* (Palgrave Macmillan 2009) 48.

powers and possessions to a 'common power,' and in return would receive a place in the body politic and become indivisible parts of the sovereign.[33] As such, this could be argued to mean a symbolic extension to the idea of (im)mortality. In this way, the power to decide or choose how one dies is taken from the individual, since it is in fact the legislator who crafts citizens into what they ought to become.[34] Hanafin argues that these decisions are based on an abstract notion of life and are exercised through the mechanism of various legal controls and obstacles.[35]

The sovereign's preoccupation with the preservation of life as discussed in Foucault's framework of biopower can be illustrated most clearly with the case of euthanasia. In a case examined by Hanafin, namely *Washington v Glucksberg* concerning physician assisted suicide, it becomes apparent that what guides the decision to prevent such an act of assisted dying to take place is 'the illusion that there is a uniform view on this contested ethical issue.'[36] That is to say, there exists 'a totalising transcendent being in common of community.' [37] In this case, Chief Justice Rehnquist perceives physician-assisted suicide as a threat to communal identity, one that is based on the idea of community to be 'built on a unified body of national history, legal traditions, and practices.'[38] This appeal to a homogenous being in common of community is not new. A melancholic desire of regaining or returning to a lost age of tightly woven, harmonious bonds is one that has long characterised the construction of history.[39] It is in this way that the law can be seen to function as an institutional mechanism of biopolitical management.[40] The power or desire to 'foster life' to defend the polity against internal threats and against itself is seen to be a primary function of the sovereign state. In this case, what can we make of the asylum seeker whose life is not necessarily 'fostered'?

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[33] Douzinas (n 10) 222.

[34] ibid 224.

[35] Hanafin (n 32) 48.

[36] ibid 50.

[37] ibid.

[38] ibid 51.

[39] Jean-Luc Nancy, *The Inoperative Community* (University of Minnesota Press 1991) 9.

[40] Hanafin (n 32) 52.

In the spring of 2013 Khalid Shahzad, an asylum seeker from Pakistan who was awaiting deportation from the UK, was deemed 'unfit to be detained' because of serious underlying health conditions. The relevant authorities chose to release him from Colnbrook immigration removal centre in the UK. Hours later, he was found dead on a train from Euston to Manchester.[41] The Home Office is currently investigating the matter. What is particularly interesting, however, is the fact that the asylum seeker, extremely ill with 'not long to live' was literally expelled from the confines of the state—to die elsewhere. Is this not an example of an unwittingly revealed symbolic gesture? Rather than caring for Mr. Shahzad and 'preserving' his life the authorities decide to 'let him die' away from the state's gaze. In fact, this gesture seems to exemplify Foucault's notion of state racism. That is, a mechanism that divides the population into one *norm defining race* and the other into a *norm-defying race*. In this case, the asylum seeker is deemed to represent a direct threat to the well-being of the population prompting the sovereign's role not to make live, but to let die.

Law as Tactic—Destitution as Norm

The law can be described as an institutional mechanism of biopolitical management.[42] If this is the case, the law can also be regarded as a mechanism of administering what Foucault called 'illegalisms.' On elaborating upon what this might mean, Deleuze says 'law administers illegalisms: some it allows, makes possible or invents as the privilege of the dominating classes, or even uses in the service of the dominating class; others again it forbids, isolates and takes as both its object and its means of domination.'[43] Indeed, this can be seen more clearly in the use of immigration controls, whose role is not necessarily to put an end to so-called 'informal employment,' but rather to '*reproduce an illegality* that in return

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[41] Eric Allison, 'Asylum seeker death investigated by Home Office amid healthcare concerns' (*Guardian*, 14 April 2013) <www.theguardian.com/uk/2013/apr/14/asylum-seeker-death-investigated> accessed 25 August 2013.

[42] Hanafin (n 32) 52.

[43] Gilles Deleuze, cited ibid.

justifies the necessity of repressive measures.'[44] By preventing asylum seekers from gaining legal status, 'illegality' is continuously produced. This produced 'illegality' then becomes ingrained at the core of the state's security apparatus, which in turn promotes social and economic programs of discrimination and hierarchisation of populations—thus heightening the sense of insecurity in targeted populations like asylum seekers.[45]

For instance, the objectives of asylum policies in the UK have grown increasingly more restrictive and exclusive in recent years. The government's justification for this is, as British Prime Minister David Cameron has argued, that immigration is out of control and a burden on public services.[46] The main focus of these policies include reducing the number of asylum claims, speeding up the process of asylum applications and increasing the number of removals of unsuccessful claimants.[47] A recent Oxfam report argues that the core factors of asylum policy instil poverty 'as a norm amongst people seeking asylum in the UK, consequently making them more vulnerable to destitution.'[48] According to the Asylum Act 2000, a person is destitute 'if they don't have adequate accommodation or any means to obtain it ... ; or they have adequate accommodation or the means of obtaining it, but cannot meet other essential living needs.'[49] However, many rights groups and charities consider

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[44] Balibar, *We* (n 14) 62 (emphasis in original).

[45] ibid 63.

[46] Steven Swinford, 'David Cameron: "Immigration is constant drain on public services"' (*The Telegraph*, 23 July 2013) <www.telegraph.co.uk/news/politics/10197738/David-Cameron-Immigration-is-constant-drain-on-public-services.html> accessed 18 February 2014.

[47] Heaven Crawley, Joanne Hemmings and Neil Price, 'Coping With Destitution: Survival and Livelihood Strategies of Refused Asylum Seekers Living in the UK' (Oxfam GB Research Report, February 2011) <http://policy-practice.oxfam.org.uk/publications/coping-with-destitution-survival-and-livelihood-strategies-of-refused-asylum-se-121667> accessed 24 June 2013, 6.

[48] Refugee Survival Trust, '"What's Going On?": A Study into Destitution and Poverty Faced by Asylum Seekers and Refugees in Scotland' (Refugee Survival Trust Research Report, April 2005) <http://policy-practice.oxfam.org.uk/publications/whats-going-on-a-study-into-destitution-and-poverty-faced-by-asylum-seekers-and-112477> accessed 12 June 2013, 9.

[49] Gareth Morrell, Sophie Wainwright, 'Destitution amongst Refugees and Asylum Seekers in the UK' (ICAR Briefing Paper, May 2006) <www.irr.org.uk/pdf/ICAR_destitution.pdf> accessed 12 June 2013, 1.

destitution to include, as well as material deprivation, social exclusion and the denial of rights associated with being a citizen.[50] As such, one could make the claim that most asylum seekers are destitute. Destitution occurs mainly because of legal decisions, policy initiatives and procedural delays. Section 55 of the Immigration and Asylum Act 2002, for example, removes access to the National Asylum Support System (NASS) for those who do not register their claim for asylum 'as soon as reasonably practicable' after arriving in the UK.[51] The result was that in 2003 the most basic support was denied to 9,000 asylum seekers, many of whom had applied for asylum within a few days or hours of arrival in the UK.[52] It could be argued that a legal tactic such as this one is a deliberate attempt to organise policy in the most economic way possible, thus taking advantage of those with little knowledge of the precision of the law and increasing the likelihood of exclusion—thereby further reproducing illegality.

Once an applicant's claim has been refused and there is no outstanding appeal they are told they must not work, and that they are expected to leave the country within 21 days. In fact, the Home Office openly declares, 'for those not prioritised for removal, they should be denied the benefits and privileges of life in the UK and *experience an increasingly uncomfortable environment so that they elect to leave*.'[53]

For many asylum seekers, the situation of forced destitution and social exclusion not only means poverty and unemployment, but also instils perpetual fear of deportation and emotional anguish. As one asylum seeker put it when asked what they would change if they made the rules:

> First of all, they must bear in mind you are also human beings. They must know you are human beings rather than treating us like you are nothing ... have mercy on the asylum

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[50] Refugee Survival Trust (n 48) 15.

[51] Crawley, Hemmings and Price (n 47) 5.

[52] ibid.

[53] Home Office, cited in Morag Gillespie, 'Trapped: Destitution and Asylum' (Scottish Poverty Information Unit Research Report, September 2012) <www.rst.org.uk/wp-content/uploads/2012/11/Trapped-destitution-and-asylum-final.pdf> accessed 23 June 2013, 5 (emphasis added).

> people and free the asylum seekers. They are people, they need to live life, a normal life.[54]

A common assumption is that if asylum seekers' claims are refused then they are illegal and are not genuine refugees. This notion of illegality, as well as falling into the created illegalisms discussed earlier, is also intricately related to the construction of the figure of the asylum seeker or refugee. Indeed, it could be argued that refugee law functions as a mechanism to create a so-called official 'refugee' identity. By constructing the 'refugee' in narrow and inflexible terms those that fall outside of a particular construct can be deemed illegal, thereby legally 'justifying a limited range of assistance to refugees without that identity.'[55]

The internationally binding definition of the refugee inscribed in article 1A(2) of the Geneva Convention protects refugees fleeing state persecution on the basis of 'race, religion, nationality, membership of a social group or political opinion'. One could argue that these categories privilege grounds for persecution from a strictly Western European perspective.[56] This is rather striking since the majority of those fleeing persecution are from so-called 'developing countries'.[57] Many of the reasons for which they have been displaced may include environmental devastation, socio-economic difficulty or even persecution in the 'private sphere' of the home—where incidences of violence against women are likely to occur—rather than the traditionally male dominated political 'public' sphere;[58] all of which fall beyond the bounds of recognition of the Geneva Convention and thus exclude an ever-growing mass of peoples from our presupposed universality.

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[54] ibid 43.

[55] Patricia Tuitt, *False Images: Law's Construction of the Refugee* (Pluto Press 1996) 14.

[56] ibid.

[57] Liisa H Malkki, 'Refugees and Exile: From "Refugee Studies" to the National Order of Things' (October 1995) 24 Annual Review of Anthropology 495, 503.

[58] Maroussia Hajdukowski-Ahmed, Nazilla Khanlou and Helene Moussa (eds), *Not Born a Refugee Woman: Contesting Identities, Rethinking Practices* (Berghahn Books 2008).

3. *Homo Sacer* and Bare Life

Homo Sacer

Agamben argues that 'the ultimate subject that needs to be at once turned into the exception and included in the city is always naked life.'[59] Naked life—which, according to Agamben, is the hidden foundation of sovereignty, which operates both by appealing to emergency and creating it—has become the rule rather than the exception.[60] Agamben illustrates this concept using Jean-Luc Nancy's concept of 'the ban'. Indeed, Agamben explains that a connection still exists between the 'banned' and the political community precisely because they are outlawed.[61] As such, sovereign power relies on the ability to decide on whether certain forms of life are worth living. This results in the 'production' of an expendable form of life which Agamben terms 'bare life'; a life banned from the legal and political institutions to which citizens have access, rendering life subject to exceptional sovereign power.[62]

This is significant, since the nation-state defines itself in terms of the connection between birth and territory—the foundation of sovereignty as outlined by the first three articles of the 1789 Declaration.[63] Human rights represent the inclusion of naked life into the political-juridical order of the nation state. In contrast to the classical world's distinction of naked life (*zoē*) from political life (*bíos*)—it now marks its foundation.[64] Agamben shows that what industrialised countries face today is a permanently resident mass of noncitizens that do not want to be either naturalised or repatriated.[65]

Indeed, this dilemma at the heart of human rights, or the 'rights of man', is one that Hannah Arendt foresaw. In 'Decline of the Nation State and the End of the Rights of Man'—the last chapter of *The Origins of Totalitarianism*—Arendt developed a thesis broadly concerned with the mass statelessness of people following the First

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[59] Agamben, *Means* (n 2) 6.

[60] ibid.

[61] Giorgio Agamben, *Homo Sacer* (Stanford University Press 1998) 28.

[62] ibid 139.

[63] Giorgio Agamben, 'We Refugees' (1995) 49(2) Symposium 114, 116.

[64] Agamben, *Means* (n 2) 20.

[65] Agamben, *Homo Sacer* (n 61) 23.

World War. Arendt shows how, with the creation of the nation state, belonging to a community was directly identified with possession of national citizenship.[66] In other words, the human being is only recognised to the extent that she belongs to the community of citizenship such that 'only the loss of a polity itself expels him from humanity.'[67] One could argue, therefore, that humans simply are their rights. Though those same institutions that allow human beings to become 'human' also destroy these rights, and threaten the 'human.'[68] The framework of the nation-state, whilst embodying the status as a positive guarantor of the recognition of the human simultaneously produces its opposite, thus undermining the universal values it purports to have supported.[69] Arendt explained that the conception of human rights as such weaken, the moment that 'those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human.'[70] As such, the paradox is that if a human being loses his or her political status, and is therefore 'man who is nothing but a man,' he or she loses 'the very qualities which make it possible for other people to treat him as a fellow-man.'[71]

Thus, Agamben makes the claim that the category of the refugee or asylum seeker no longer seems representable within the nation-state schema. This is the case since, for Agamben, human rights are not 'protections' against sovereign power but are in themselves mechanisms of power that are bound up from their inception with the regulation and making of subjects.[72] It is at this juncture that reference to Foucault's notion of biopolitics—the inscription of 'natural life', bare life, into the political sphere—is made. For Agamben, biopower has been functioning since the inception of

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[66] Étienne Balibar, '(De) Constructing the Human as Human Institution: A Reflection on the Coherence of Hannah Arendt's Practical Philosophy' (2007) 74(3) Social Research: An International Quarterly 727, 731.

[67] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1951) 297.

[68] Balibar, '(De) Constructing' (n 66) 733.

[69] Étienne Balibar, 'Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence' (2001) 8(1) Constellations 15, 19.

[70] Arendt (n 67) 299-300.

[71] ibid.

[72] Agamben, *Homo Sacer* (n 61) 127.

western politics. As Schutz eloquently puts it: 'before impetuously coming to light in our century, the river of biopolitics that gave *homo sacer* his life runs its course in a hidden but continuous fashion.' [73] Furthermore, Agamben makes the distinction that sovereignty does not decline as a result but is instead extended—through the notion of the state of exception. Agamben calls this the paradox of sovereignty, 'in the fact that the sovereign is, at the same time, outside and inside the juridical order. ... The sovereign, having the legal power to suspend the validity of the law places himself outside the law.'[74]

The life of *homo sacer* is akin to the life of the 'remnant.' A life that happens not to 'be' but nonetheless to be 'around,' that is a merely factual existence. [75] The excluded figure of *homo sacer* indeed remains 'included' in the legal order, as lawless and no longer enjoying protection. Recall Agamben's formulation of the 'ban' mentioned earlier, whereby abandonment referred to the position of *homo sacer*, who finds himself inside and outside the law—in a zone of indistinction—at the mercy of the sovereign exception. In other words, the banned is not simply outside the law and 'indifferent' to it—but is rather abandoned by it.[76] It can be argued therefore that the banned reside on a threshold in which 'life and law, outside and inside, become indistinguishable. It is literally not possible to say whether one who has been banned is outside or inside the juridical order.'[77]

Agamben illustrates this concept of 'the ban' with that of a figure that inhabits a zone of indistinction—the *lupo mannaro* (werewolf)—whose life epitomises a 'threshold' or indistinction between the animal and the human, *physis* and *nomos*, exclusion and inclusion. As Agamben explains, 'the life of the bandit is the life of the *loup garou*, the werewolf, who is precisely neither man nor beast, who dwells paradoxically within both while belonging to

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[73] ibid 121.

[74] ibid 15.

[75] Anton Schutz, 'The Fading Memory of *Homo Non Sacer*' in Justin Clemens, Nicholas Heron and Alex Murray (eds), *The Work of Giorgio Agamben: Law, Literature, Life* (Edinburgh University Press 2011) 124.

[76] Agamben, *Homo Sacer* (n 61) 28-9.

[77] ibid.

neither.'[78] It is this life that is neither natural nor social life, but rather bare life, that is the presupposition of sovereignty. Thus, the result of this model of inclusion and exclusion is for certain lives, lives that do not merit protection, to be abandoned or left simply to 'be around.'[79]

Reserve Army of Labour

This notion of an abandoned being that is, nonetheless, included in the city, can be extended to the life of the asylum seeker. Indeed, the asylum seeker whose claim has been refused closely resembles the life of *homo sacer*. The asylum seeker who is around the political community but is nonetheless excluded, whose presence has no precise function and yet is necessary just like 'bare life' is the foundation of sovereignty. Indeed, as explained earlier, this exclusion of *homo sacer* works simultaneously as a capture of his bare life that is exposed to violence and death, in the juridical order.[80]

A similar analogy can be made here with the concept of a 'reserve army of labour' in our modern economies. It could be argued that, whilst the unemployed serve no specific function *per se*, it is the *non-function* itself which *serves* a specific function in their very necessity for the economy's well-being. Indeed, our contemporary neoliberal economies favour theories of growth that encompass conditions of disequilibrium marked by conditions of continual crisis.[81] This is the case particularly with evolutionary theories of growth advocated by the economist Joseph Schumpeter whose theory on 'creative destruction' necessarily demands both violent and productive moments of crisis. More precisely, this means both boom and bust—where both life and capital are exposed—for increased growth and innovation. [82] The unemployment that results from 'creative

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[78] ibid 104.

[79] Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge 2010) 159.

[80] Lorenzo Chiesa, 'Giorgio Agamben's Franciscan Ontology' (2009) 5(1) Cosmos and History: The Journal of Natural and Social Philosophy 105, 106.

[81] Melinda Cooper, *Life as Surplus: Biotechnology and Capitalism in the Neoliberal Era* (University of Washington Press 2008) 43-4.

[82] ibid 45.

destruction' is what Milton Friedman called the 'natural rate of unemployment,' which in fact signalled a dynamic and flexible economy as opposed to a rigid, inflexible one.[83] Yet, what is important is that the *non-function* of the unemployed—in that they are not productive forces in the economy—nonetheless serves a precise function, since they are *structurally inseparable* from the dynamic of 'accumulation and expansion which constitutes the very nature of capitalism as such.'[84] *In nuce*, the production of bare life in the figure of the asylum seeker is to sovereignty what 'the reserve army of labour' is to our modern economies. Both are inextricably linked and function together in tandem.

4. The Paradigm of Immunisation

Immunity

In a detailed examination on the origins of community, Esposito links the 'expropriative' to what is regarded as a pre-supposed excess of communal gift giving.[85] Indeed, for Esposito, the community is inhabited by the communal. That is to say it is inhabited by that 'which is not my own,' that begins where 'my own' ends. In other words the community is what belongs to all or most and is therefore '"public" in juxtaposition to "private", or "general" (but also "collective") in contrast to particular.'[86] Esposito argues that at the origin of community lies an absent gift that members of the common cannot keep for themselves. Therefore, Esposito explains that this 'obligation' of gift giving operates as a *defect* since it involves a somewhat uncomfortable element of 'donating' or reciprocating a part of individual identity.[87] In other words, the community is not only identifiable with the '*res publica*'—the 'common thing'—but

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[83] Milton Friedman, 'Nobel Lecture: Inflation and Unemployment' (June 1977) 85(3) Journal of Political Economy 451, 459.

[84] Fredric Jameson, *Representing Capital: A Commentary of Volume One* (Verso 2011) 149.

[85] Esposito, *Communitas* (n 3) 6-10.

[86] Timothy Campbell, '*Bíos*, Immunity, Life: The Thought of Roberto Esposito' in Roberto Esposito, *Bíos: Biopolitics and Philosophy* (Timothy Campbell tr, University of Minnesota Press 2008) ix-x.

[87] ibid x.

rather 'is the hole into which the common thing continually risks falling.'[88] As such, Esposito argues that in order to be free from communal obligations or 'debt' it is necessary to 'immunize' against it.[89] Indeed, it seems that a close relationship between immunity and individual identity exists, since immunity offers an escape from the potentially expropriative effects of community and thus protects the individual who 'carries it' from the risk of 'contact' or 'contagion' with those who are not immune—thus safeguarding against the loss of individual identity.[90] Esposito explains that immunisation of the political body, akin to vaccinating the body, functions by introducing a small amount of what it wants to protect itself from.[91] In other words, 'immune is he ... who is exonerated or who has received a *dispensatio* from reciprocal gift giving.'[92] It is in this way that *immunitas* can be said to reinstitute 'its own borders that were jeopardized by the common.'[93]

Seen from this perspective—that is, the substitution of individualistic models for communitarian forms of organisation—immunity could be said to presuppose community. But, crucially, it also negates it so that 'to survive, the community, every community, is forced to introject the negativity of its own opposite, even if the opposite remains precisely a lacking and contrastive mode of being of the community itself.'[94] As an example, Esposito argues that the modern subject, or citizen, who enjoys civil and political rights, is an example of an attempt to attain immunity from the possibility of community.[95] Indeed, this attempt to immunise the individual from what is common ends up putting at risk the community, as immunity 'turns upon itself.'[96] For instance, if we recall the notion of rights granted by political institutions mentioned in part two, it was shown that those same institutions which enable human beings to become

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[88] Esposito, *Communitas* (n 3) 8.

[89] Campbell, '*Bíos*' (n 86) xi.

[90] ibid.

[91] Roberto Esposito, *Bíos: Biopolitics and Philosophy* (University of Minnesota Press 2008) 46.

[92] Campbell, '*Bíos*' (n 86) x-xi.

[93] Esposito, *Bíos* (n 91) 50.

[94] Roberto Esposito, quoted in Campbell, '*Bíos*' (n 86) xi.

[95] ibid.

[96] Campbell, '*Bíos*' (n 86) xi.

'human' also destroy these rights and threaten the 'human.'[97] Therefore, by applying Esposito's notion of community, it could be argued that these rights and institutions are instruments of immunisation that protect against 'the burden' of community. Similarly, as we have seen, in order to survive, the community must introject 'the negative modality of its opposite.'[98] In this case, does the asylum seeker represent this 'negative modality,' the opposite of a citizen with full rights and recognition as a human being?

Justice in the Impersonal

Esposito argues that at the centre of the 'juridical procedure' stands the structurally exclusive mechanism of right, which is inclusive through exclusion. In this particular instance, Esposito seems to agree with Agamben's sovereign ban denoting a mechanism of inclusion/exclusion. Indeed, the human being as such is precisely what the law excludes from within its borders, in other words what Arendt calls the 'abstract nakedness of being human.'[99] It seems that the law allows entrance only to those who fall into some category— citizens, subjects, even slaves—insofar as they are part of a political community.[100] As a result, Esposito argues for a notion of the 'impersonal' through the lens of Simone Weil's notion of justice. Indeed, Esposito distinguishes between subject and person primarily because of an attempt to think a so-called affirmative biopolitics.[101] Esposito does this through the notion or philosophy of the impersonal. Hence his use of 'person' rather than the subject—since in classical models of the subject, one is or is not a subject, there is no 'im-subject.'[102]

Esposito shows the concept of the person to be a 'true and proper performative dispositif' that has been in operation for a long period

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[97] Balibar, '(De) Constructing' (n 66) 733.

[98] Roberto Esposito, quoted in Campbell, '*Bíos*' (n 86) xi.

[99] Arendt (n 67) 299.

[100] Roberto Esposito, *The Third Person* (Polity 2012) 69.

[101] Timothy Campbell, *Improper Life: Technology and Biopolitics from Heidegger to Agamben* (University of Minnesota Press 2011) 66.

[102] ibid.

of time.[103] Campbell explains that what Esposito means by dispositif represents not only a process of subjectification but also a vehicle through which a regime of personhood is instituted.[104] A dilemma arises however, in that only those beings awarded the status of person enjoy the fundamental rights of being human.[105]

Esposito reconstructs the genealogy of the person by tracing the distinction established between Christian and Roman power. Esposito shows that it is at both their intersections that the most important effect of the dispositif of the person is found—that is, in the power of separation.[106] Esposito finds evidence of this separation in Roman law, where not all men were defined as persons.[107] Indeed, in the case of the slave, the domain occupied was that of a thing, as well as other categories between the thing and the person. [108] Esposito focuses on the effect of depersonalisation—that is, being reduced to a thing—that occurs.[109] Esposito argues that this notion of depersonalisation is implicit in the concept of a person, since its definition emerges from a supposed difference with respect to 'those men and women who were not persons or who were only persons in part and temporarily, ones always exposed to the risk of falling into the domain of the thing.'[110] Esposito goes further and highlights the fact that Roman law not only practiced the distinction among persons, semipersons and nonpersons but also elaborated on intermediate situations—that is, zones of indistinction that regulate the movement between one state 'of being' and another.[111] In other words, Esposito shows that no one is born a person: some may become one, though only by pushing others into the 'dimension' of the thing.[112]

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[103] Roberto Esposito, 'For a Philosophy of the Impersonal' (Fall 2010) 10(2) CR: The New Centennial Review 121, 124.

[104] Campbell, *Improper* (n 99) 67.

[105] ibid 66.

[106] Esposito, 'For a Philosophy of the Impersonal' (n 101) 124.

[107] ibid 125.

[108] ibid.

[109] ibid 125-6.

[110] ibid.

[111] ibid 126.

[112] ibid.

Esposito argues that this mechanism of exclusion and inclusion via the dispositif of the person is passed down to modern juridical systems. [113] As such, 'person' becomes the technical term that separates a human being's juridical capacity from its 'naturalness' and, as Esposito argues, detaches 'humanity' from 'being', or 'being with respect to its mode of being.'[114] Indeed, to be a person is to be divided—that is, to make possible the subjugation of one part to another.[115]

In nuce, Esposito argues that, in order for some to be recognised as 'person', a difference must be identified from those other categories—no longer persons, not yet persons or not persons.[116] It is at this juncture of exclusion and inclusion that Esposito introduces his notion of the impersonal. Through the lens of Simone Weil, Esposito argues that if rights belong to the person then justice is situated in the impersonal.[117] Indeed, according to Esposito, Weil argues that the notion of rights is deeply connected to the dispositif of the person since they are exclusionary in nature in both their 'private (*privato*) and depriving (*privativo*) features.'[118] In other words, rights exclude all those that do not belong to the category of the subject or citizen. Weil argues, therefore, that the person has always constituted the originary figure endowed with rights. As such, the only way to think a universal justice—one that belongs to or encompasses everyone—resides in the impersonal, common life.[119]

Depersonalisation of the Slave

Esposito shows that the 'division in the law of persons', in accordance with Roman legal tradition, distinguished people either as slaves or as free men. There was also a distinction between those who 'were *ingenui*, born free, and the *liberti*, those who had been

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[113] ibid.

[114] ibid 127.

[115] Campbell, *Improper* (n 99) 69.

[116] ibid.

[117] ibid 130.

[118] ibid.

[119] ibid.

freed by their masters.'[120] Indeed, what characterised the slave in Roman law was the middle status occupied between person and thing such that the slave was defined as a living thing and as a reified person.[121] Esposito shows that this status of the slave as thing radicalises the nature of person as involving the creation of new slaves as a way of guaranteeing one's status as person in Roman antiquity.[122] In other words, to be a person in Roman antiquity meant that others 'had to be pushed across the threshold of person so as to become less a person.'[123] It also meant that those who were already nonpersons, slaves, had to stay that way.[124]

The role of the law was recognised to be a kind of mechanism charged with defining breaks between categories, based on a continuum structured according to varying thresholds of inclusion and exclusion. The slave, Esposito explains, was suspended between the condition of person and thing. In addition, a slave was entirely under the control of its owner, both with regard to his/her actions and with regard to his/her body.[125] The transition from slavery to freedom is what is of interest here. Of real significance are the countless intermediary stages marking the transition between person and thing, which was never completed and always reversible. Esposito shows that the Roman legal experience of freeing a slave—*manumissio* (manumission)—could take three different forms and always depended on the sovereign will of the owner. Freedom—only if desired by the master—was limited in form, extent and duration. Indeed, Esposito highlights that this reflects the fact that 'freedom' as such was intended, not as an *originary* condition, but as a derivative one, which human beings could attain temporarily and occasionally, through an artificial process of 'personification.' Interestingly, no human being was a person by nature—not as such—neither the slave nor the free man since 'human beings arrived into life from the world of things, they could always be thrust back into it.'[126]

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[120] Esposito, *The Third Person* (n 98) 76.

[121] Campbell, *Improper* (n 99) 71.

[122] ibid.

[123] ibid.

[124] ibid.

[125] Esposito, *The Third Person* (n 98) 77.

[126] ibid 79.

The asylum seeker's fate rests wholly with the judicial decision of their claim, the sovereign decision could transform the status of—what the Home Office implicitly suggest to be—'non-existent' asylum seekers due for deportation, into that of temporary residents. This change of status would immediately grant certain rights that would otherwise not be available without recognition under the law, that is, without a turn from depersonalisation to personalisation. Like that of the 'continuum structured according to varying thresholds of inclusion and exclusion' in Roman law, recognition or personalisation could also occur under another category to get inside the law—by breaking it, rather than complying with it. Indeed, it is one rather paradoxical reality that an option exists of voluntarily taking on the status of a criminal.[127] Asylum seekers could relinquish 'a state of innocence' that is impossible—or even, undesirable—to keep since the law does not recognise it, and only then can they come to enjoy at least the rights granted to offenders.[128]

5. Closing Remarks

To be an asylum seeker in the UK is to be included within the juridico-political sphere solely in the form of an exclusion. Immigration controls serve to reproduce illegalities which justify repressive measures like periods of ad hoc detention in high security facilities. For those not detained, material and social destitution is instilled as a norm. Through the very fabric of the nation state schema, and the rights associated exclusively with citizenship, the production of asylum seekers as 'remnants' is inescapable. If the only way of realising the human is in the form of the procurement of rights, it is clear that asylum seekers today embody a category of other than human.

Current political and media portrayals of asylum seekers as criminals threatening the very fabric of society fail to convey the complexities at stake. One could therefore consider these portrayals as mechanisms of sovereign power introducing and maintaining breaks within the population—that is the manifestation of state racism. Yet the very experience of the figure of the asylum seeker is inscribed at

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[127] ibid 70.

[128] ibid.

the inception of the nation state, its existence is inevitable. Traditional 'push factors' in migration discourse covered by the 1951 Geneva Convention for the protection of refugees will have to be revised, particularly given the growing number of 'climate' refugees, which is likely to impact upon 50-350 million people by 2050.[129]

In the end, we will necessarily have to revise our understanding of belonging, individual rights and material ownership or risk, further expanding the space of exclusion until inclusion becomes nothing other than a limited concept, a mirage.

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[129] UN General Assembly, 'Climate change and its possible security implications: report of the Secretary-General' (11 September 2009) A/64/350 <www.unhcr.org/refworld/pdfid/4ad5e6380.pdf> accessed 20 January 2014.