

Finding a New Way to Guarantee Human Dignity: An Analysis of Arendt's Notion of the Right to Have Rights

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I Introduction

This thesis will discuss Hannah Arendt's (1906-1975) concept of the right to have rights, which finds ground in her famous work 'The Origins of Totalitarianism' (1951), hereafter 'The Origins'. Drawing on her own experience as an immigrant who fled from the Nazi regime, Arendt extensively wrote about the rights of stateless people and refugees. One only has to look at the recent ongoing European refugee crisis caused by the outburst of ethnic conflicts and religious fundamentalism and at migration flows forced by climate change, to see that this is a subject that has lost nothing of its relevance today. Bearing witness to the horrific events of the 1930s and 1940s, Arendt concluded that the conception of the inalienable Rights of Man had lost all validity and meaning.¹ In part II of the *Origins of Totalitarianism*, on imperialism, and in particular its chapter 9: *The Decline of the Nation-State and the End of the Rights of Man*, Arendt describes the situation of complete rightlessness in which the inter-war refugees found themselves. Parts of mankind were deprived of their rights because of the fact that they were only men, and had no political/national community to fall back upon. From this she concluded, that the Rights of Man are a mere abstraction of rights. They are the rights of those stripped from all further human qualities and dignity besides being only human. In all these cases it seemed that the loss of citizen rights was equivalent to the loss of human rights. Therefore, the rights of man are the rights of those that have no rights, they are nothing more than a hollow shell. For this reason, Arendt claims that we need a new law on earth, a new principle that will secure human dignity.² It is this principle that she calls 'the right to have rights'. It is the right to engage in meaningful politics, a right to autonomous political action.³

The concept of the right to have rights will stand at the center of this thesis. Chapter II will construe the situation that led to Arendt's conviction of the need for this new law on earth. It will do so by focusing on chapter 9: *The Decline of the Nation-State and the End of the Rights of Man*, in which Arendt describes, how imperialistic attitudes of Western states and the focus on state sovereignty led to the take-over of the state by the nation. This combined with the unrest caused by the First World War, created a position of extreme vulnerability for marginal

¹ Arendt, H., *The Origins of Totalitarianism (new edition with added prefaces)*, A Harvest Book Harcourt Brace & company, NY, 1973, p. 286.

² Ibid. p. IX.

³ Ingram, J.D., *What Is a 'Right to Have Rights'? Three Images of the Politics of Human Rights*, American Political Science Review Vol. 102, No. 4 November 2008, p. 411.

groups to maneuver in, which ultimately resulted in their expulsion from humanity all together.⁴ Hereafter, focus will shift to what Arendt calls the perplexities of the Rights of Man. Where the part about the nation-state and the inter-war refugees mainly focuses on a concrete historical situation, this will entail a more philosophical treatise, which encompasses the debate about natural rights opposed to Arendt's idea of rights as social/political constructs, but also her conceptual separation of the public and private sphere, of the man and the citizen. Here Arendt primarily builds upon Edmund Burke (1727-1797) and Aristotle (384-322 B.C.) respectively.

Chapter III, Arendt's Politics of Human Rights, will try to illustrate that, although sometimes perceived as a human rights opponent, Arendt is actually occupied with their critical reassessment and that in her subsequent political works she tries to formulate an answer to the perplexities surrounding human rights identified in 'The Origins'. Firstly, this chapter will elaborate on what Arendt actually wanted to accomplish with writing 'The Origins'. By shortly recapturing the content of 'The Origins' it will become clear that Arendt's objective is to show how human rights protection poses a sincere dilemma and that since the events of the 20th century rendered these rights invalid, there is need to rethink our understanding and practices hereof. Thereafter, Arendt's aporetic approach towards rights and her notion of historical events as being contingent will be discussed. This reaffirms her aim of a critical rethinking of human rights, giving rise to new questions and dilemma's, without offering definite answers. A closer look will also be taken on the different meanings of the notion of right in the phrase "the right to have rights". Seyla Benhabib (1950) distinguishes between its moral and its juridico-civil usage. The moral part of the notion of right is directed to humanity itself. It is the right to politics. The juridico-civil usage builds upon this moral imperative. It entails those reciprocal obligations created between people that are already members of a certain community. While the later constitute real rights, the former remains solely ideal. Therefore, it is crucial to find a way in which the moral use of the term rights can be transformed into positive rights as well.⁵ By discussing various of Arendt's later works, the remainder of this chapter will explain if and how Arendt gave substance to her concept of the right to have rights. I will argue that throughout her work Arendt was occupied with the perplexities of human rights and that she indeed tried, although not directly, to find an answer to the question of what this new political principle that guarantees human dignity should look like. Arendt's conception of political activity in 'The Human Condition' (1958) and 'Introduction into Politics' (never officially published) will be

⁴ Arendt, H., 1973, p. 297.

⁵ Benhabib, S., *The Right of Others: Aliens, Residents and Citizens*, Cambridge, 2004, p. 58

read in this light. Because of this, combined with an explanation of Arendt's account of the government structure preferred by her, namely republic federalism, it will become clear how her idea of politics at the same time provides, at least a partial, answer to the questions posed in 'The Origins'. Moreover, Philip Allott's (1937) ideal of Eunomia, demonstrates that state sovereignty is only one of the possible ways in which the world could be structured. This can help us understand if and why the alternative proposed by Arendt could be realized.

In chapter IV, interpreting the right to have rights, a closer look to a few completely different interpretations of Arendt's famous concept will be taken. The difference in interpretation can be traced back to the diverse outlooks on politics. Three positions will be discussed. First of all, there is the interpretation that sees rights in terms of the use of power to implement rights, associated with the modern practice of humanitarian intervention. The second interpretation seeks to achieve justice by establishing just laws and institutions. Contemporary proponents of this Kantian theory are Jürgen Habermas (1929) and Benhabib. This is contrasted by an interpretation that seeks to secure the right to have rights by basing it on the activity of the rights-claimants themselves. This bottom-up approach is mostly affiliated with thinkers such as Jacques Rancière (1940), Étienne Balibar (1942) and Claude Lefort (1924-2010). By explaining the various positions, it will become clear which of these offers the best solution to the dilemma in which human rights find themselves. Additionally, by looking back at chapter III: Arendt's politics of human rights, we will identify the position most closely related to Arendt's own vision on politics and human rights.

Finally, what this thesis hopes to accomplish, is finding a solution to Arendt's claim posed in 'The Origins', namely that:

'human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted and controlled by newly defined territorial entities.'⁶

In the conclusion, I will argue that this can best be realized, by combining Philip Allott's (1935) theory that rethinks the world as a social international society, with Arendt's concept of

⁶ Arendt, H., 1973, p. IX.

democratic political action within a federalist structure, complemented by just laws and institutions and Rancière's idea of rights claiming through social struggle.

II The Nation State, Statelessness and Problems Surrounding Human Rights

This chapter will explore Arendt's notion of the nation state, identifying its revolutionary potential and give an explanation for its decline. Furthermore, it will sketch the situation of the post-World War I refugees in Europe and explain how their statelessness had a destructive effect on rights recognition and the strength of legal regimes in Western Europe. In the second part, focusing primarily on 18th and 19th century France, it will become clear in what way the notion of natural human rights, proclaimed by the Declaration of the Rights of Man and of the Citizen (1789), legitimized the modern nation-state. Moreover, it will explain why Arendt came to the conclusion that these newly laid down natural rights, were actually rights of peoples, of members of a particular community and did not apply for those people falling outside these communities. To show this Arendt's own characterization of rights as based upon mutual recognition will be set out against the notion of rights as naturally given. This in its turn, leads to an explanation of Arendt's view of the political as opposed to a mere private life, which corresponds to her concept of citizen and man respectively. Her characterization of the political as the only place in which humans consider each other as equals in a meaningful way, together with the historical events of the 20th century, made her proclaim that there was need for a new law on earth: the right to have rights.

2.1 The nation state and the inter-war refugees

Western states failed to act as a safe haven for the inter-war refugees that fled their countries of origin en masse. Knowing this it is not surprising that these refugees were not treated as equals by the countries in which they sought refuge. Arendt, however, acknowledges the great emancipatory potential emanating from the modern Western nation state. For her, the modern state, which finds its roots in the French revolution, was a legal institution built on the principle of equality.⁷ This could result in an open and equal society for all people residing within its territory. At the same time, however, the modern state is also based upon the consent of its citizens, which together form a nation. To this nation you belong by way of birth.⁸ This twofold conception of the state, combined with the formation of a comity of nations in the international sphere, as opposed to an international sphere based upon the conception of state sovereignty, could have led to an emancipatory wave across the whole of Europe. However, within the nation states, this potential was heavily undermined by what Arendt calls sentimental nationalism. As

⁷ Arendt, H., 1973, p. 11.

⁸ Larking, E., *Refugees and the Myth of Human Rights: Life Outside the pale of the Law*, Ashgate, Burlington, 2014, p. 29.

a result, the state based upon legal institutions was ‘conquered’ by the nation. Externally, the rise of nationalism led to power politics focusing on national sovereignty and territorial expansion. For this reason, a true covenant between the nations was never realized and race-thinking now, was never far away.⁹ Arendt is thus fully aware of the danger that the commitment to individual rights based upon nationalistic solidarity poses for outsiders. The most important question here is whether it is possible to reconcile the inherent friction between universality of individual human rights and sovereign autonomy of state peoples who are accorded rights because they are members of that community?¹⁰

World War I destabilized the structures of European civilization even further. Due to World War I and the revolutions, reconfiguration of state borders and civil unrest that followed hereon, millions of people were forced out of their countries of origin. More importantly, these same people could not find a home elsewhere, no state willing to take them in and treat them like fully rightful citizens, making them either de facto or de jure stateless. This group represented, what Arendt calls, the scum of the earth.¹¹

Nationalism, already on the rise, became even more present due to the fact that the right to national self-determination was adopted as the main principle for the reconfiguration of borders.¹² It was in the defeated states where the process of disintegration became mostly visible. After the collapse of the Austrian-Hungarian dual monarchy and the end of Czarist Russia, the successor states like Czechoslovakia and Poland consisted of mixed populations with a wide variety of nationalities, but lacked a central authority to bind these different nationalities together and create a sense of solidarity.¹³ It was assumed that, for example, the Slovaks would be equal partners of the Czechs in the Czechoslovakian government, however nothing came of this in practice. The treaties were therefore perceived as arbitrary by those groups excluded from public power. At the same time the newly formed governments felt that it undermined their national sovereignty because they were forced by Western states to sign the agreements. This resulted in an environment of great national hostility between neighboring countries but also in hostility towards the minorities within countries. Two groups emerged that were worse off than anybody else, namely: the minorities and the stateless. The post-World War I situation deprived them not only of the ability to work, but also of rights that were thought

⁹ Ibidem.

¹⁰ Larking, E., 2014, p. 31.

¹¹ Arendt, H., 1973, p. 267.

¹² Ibid. p. 275.

¹³ Ibid, p. 268.

of as being inalienable, namely the rights of man.¹⁴ They had lost the right to belong to a political community where they were recognized as citizens and were protected accordingly. Therefore, they lived either under the law of exception of the Minority Treaties which no country actually recognized, or under absolute lawlessness. Because Western European states were unwilling or unable to guarantee the human rights for stateless people denationalization became an effective tool of totalitarian regimes to force their values upon others and to exclude those people that it singled out as scum of the earth, namely Jews, Gypsies and others.¹⁵ As Arendt explains, it is not because people had committed a crime or because they had certain political belief that they were expelled from their country of origin, they were singled out only because they happened to belong to a certain oppressed minority.¹⁶

The Minority Treaties only offered protection to large minorities that were living in more than one of the newly formed states. All other minorities were not taken into consideration. In some states half of the population belonged to these excluded groups. Arendt points out that the most troublesome fact about this situation was not that these people deliberately sabotaged their imposed government when possible and vice versa, but the conviction that freedom can only be achieved through national emancipation. The thought that only with the formation of one's own national government you would be able to fully enjoy your human rights. This can be traced back to the French Revolution that combined the declaration of the Rights of Man with national sovereignty.¹⁷ It were not the governments themselves, but the League of Nations that was entrusted with the safeguarding of those people that fell within the boundaries of the Minority Treaties. However, the League of Nations itself consisted of a system of sovereign states. If the representatives of the League of Nations would grant too much freedom to the minorities in the succession states the same could happen within their own Western states, which could lead to the reduction of one's own national sovereignty. This way the Minority Treaties were in practice merely an instrument that laid down the duties that the minorities owed to their respective governments.¹⁸

Arendt explains that the importance of the Minority Treaties primarily lies in the fact that for the first time minority rights were protected by an international institution. It institutionalized the minority as a permanent situation in which a certain group of people are in need of additional

¹⁴ Ibidem.

¹⁵ Arendt, H., 1973, p. 269.

¹⁶ Ibid. p. 294.

¹⁷ Ibid, p. 272.

¹⁸ Ibidem.

guarantees of their rights from an entity not being their government. The Treaty recognized, what until then was only implied in the practice of states, namely that only state peoples or in other words citizens are fully protected by the legal institutions of states. Therefore, when these minority groups were forced outside of their country of origin and became refugees, these people needed to be completely assimilated from their origin, if not, they became dependent upon a law of exception to defend their rights.¹⁹ Moreover, the fact that the refugees were part of an international system primarily based upon states instead of individuals was of great importance. Within this system the definition of a 'normal' individual as a national of a state enjoying the protection of this state is upheld. Nationality is the factor upon which legal recognition depends, both within the home state and outside. Consequently, when someone loses his nationality, one is not only expelled from his nation-state, but one falls outside the whole international sphere and therefore loses all rights.²⁰

Arendt speaks of two different negative consequences for nation states caused by the big influx of stateless people. First of all, the right of asylum, the only right in international relations ever to do justice to the Right of Man, was dissolved. Originally it served as a protection mechanism for both the refugee and the country of refuge, however in a world structured into nation-states the right of asylum was perceived as being in contradiction with the international rights of states. Therefore, in that time, no written law existed validating the right of asylum and its implied power was only used in highly exceptional cases.²¹

The other problem was that the two possible solutions to the refugee influx did not seem to work. On the one hand repatriation was simply impossible, due to the fact that both the country of origin and any other country were not willing to accept the refugees.²² For a stateless person it seems he is undeportable per se, which should be ground for a state not to expel him. However, because such a person lives outside the pale of the law and is therefore considered as an outlaw, he is completely delivered at the mercy of the police. This was among others due to the fact, that by then, the refugee regime was not yet institutionalized. What does it mean to live outside the pale of the law? It means to be excluded from all forms of legal recognition. The police forces of western states did not hesitate to diminish the amount of stateless persons residing within their territories. They did this by illegally smuggling the refugees to neighboring countries. In other words, how Arendt puts it: 'the state, insisting on its sovereign right of

¹⁹ Ibid. p. 275.

²⁰ Larking, E., 2014, p. 17.

²¹ Arendt, H., 1973, p. 280.

²² Ibid. p. 283.

expulsion, was forced by the illegal nature of statelessness into admittedly illegal acts.²³ Moreover, there was a link between the expanding power of the police forces, acting independently from their governments and state laws, and the growing number of refugees entering a country. The threat of the constantly growing influx of refugees was therefore that the rule of law in western European countries would corrode and that they would become police states. It is within totalitarian regimes where this power of the police became most evident and where any opponent could possibly end up beyond the pale of law. Most exemplary, the anti-Semitic Nuremberg Laws threatened all nationals not being Reich citizens with the potential loss of their nationality.²⁴

Naturalization, the second available solution, did not work either. Traditionally, naturalization was like the right to asylum only used in exceptional circumstances. When confronted with mass naturalization requests, however, states were both insufficiently prepared to deal with these applications and showed a reluctant attitude towards it. States became afraid and instead of giving the refugees a new nationality, they paradoxically started reversing the situation by annulling certain naturalization procedures and by laying down new laws which formed the basis for mass denaturalization.²⁵ The possibility for a naturalized person, someone who already once before in his life has lost his citizenship, to be denaturalized obviously dramatically increased the potential group of stateless people. Because stateless people were treated with hostility elsewhere, mass denaturalization became a strong tool for totalitarian regimes to get rid of parts of their population.²⁶

For Arendt the most troublesome fact about statelessness was not the nation-state's claim to sovereignty accompanied by the right to expulsion or the difference in treatment of nationals and foreigners. The worst thing about statelessness was the inability of the legal institutions of states to adequately deal with these people and therefore the inevitable decline of their importance. They were not allowed to work and enjoyed no protection, so while their numbers were growing, more and more people were forced into crime in order to survive. This is where a frightful reversal of a society's values took place. It turned out that it would actually be better

²³ Ibid. p. 283-284.

²⁴ Arendt, H., 1973, p. 287-288.

²⁵ Ibid. p. 285.

²⁶ Larking, E., 2014, p. 22.

for the stateless person to be a criminal than to live outside the legal framework all together.²⁷ Arendt explains this terrible situation in a famous passage:

‘The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime. If a small burglary is likely to improve his legal position, at least temporarily, one may be sure he has been deprived of human rights. For then a criminal offense becomes the best opportunity to regain some kind of human equality, even if it be as a recognized exception to the norm. The one important fact is that this exception is provided for by law. As a criminal even a stateless person will not be treated worse than another criminal, that is, he will be treated like everybody else.’²⁸

This illustrates that equality before law only exists for citizens: the rights of man apply only to citizens. However, for stateless people that exactly needed these rights, the rights of man had absolutely no meaning at all, because they were perceived by the state as legal abnormalities who had no rights.²⁹ It seems that to counter a situation of absolute rightlessness it is needed to challenge the sovereignty discourse and instead follow a right based approach with regard to refugees. The legal institutions and principles of law that only seem to apply to the citizen would then also be applicable to the refugee. This way it might be possible to recognize the refugee as having inalienable rights and as a consequence he would not be considered an outlaw no more.

2.2 The difficulties surrounding human rights

The events of World War II proved that the Rights of Man had lost all significance.³⁰ This combined with the conviction that totalitarianism might well survive the defeat of totalitarian regimes let Arendt to believe there was need to establish a different right, namely the right to have rights.³¹

To Arendt, the declaration of the Rights of Man and of the Citizen, 1789, was a marking point in human history. Political power would no longer be justified on the basis of divine law or a country’s custom, but the declarations of man would be the source of law instead. This paved the way for true emancipation.³² Those are the declarations that the inter-war refugees should have been able to invoke to guarantee their human rights.

²⁷ Arendt, H., 1973, p. 286.

²⁸ Arendt, H., 1973, p. 286.

²⁹ Larking, E., 2014, p. 13.

³⁰ Arendt, H., 1973, p. 447.

³¹ Ibid. p. 459.

³² Ibid. p. 291.

‘The National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen: Men are born and remain free and equal in rights The aim of all political association is the preservation of the natural and imprescriptible rights of man.’³³

For Arendt, the French and American declarations of inalienable human rights constituted a paradox. They described an abstract human being, who in reality does not exist. This is because every human being lives in some sort of social order.³⁴ Human rights were enjoyed only by communities that had reached the stage of national sovereignty and were not held back by internal or external oppressors.³⁵ According to Arendt, human rights are intrinsically linked with national emancipation, because they are only secured in a truly sovereign state with the emancipated sovereignty of its people. The rights of man therefore became not the rights of the individual, but the rights of the people.³⁶ Because human rights were deemed inalienable, were part of the human nature, no mechanism existed to endorse them. However, the events of the 1930s and 1940s made clear that the conception of ‘inalienable’ human rights collapsed at the very instance when people actually needed them and had lost all further qualities besides being merely human.³⁷ When confronted with the loss of citizenship, the rights of man should apply instead, however, the loss of citizenship always entailed an accompanying loss of human rights.

It was clear that rights do not exist because of some shared qualities of mankind. Nor should they be connected with the privileges that history accorded the bourgeoisie.³⁸ Within the nation-state it became possible to create a political community where rights are attributed to all individuals who although naturally diverged by physical traits, intellect, etc., were perceived as equals by law. Ergo, man is not born equal, but becomes equal by being a member of a group that guarantees each other mutual right recognition.³⁹ Moreover, it is possible that humans regard themselves as equals based upon human nature or religion, however, this is a strictly private and apolitical matter.

Not granting the refugees legal status, made it impossible for them to appear in court where they could argue that their rights have been breached. Without legal recognition, refugees are

³³ Declaration of the Rights of Man and of the Citizen, National Assembly of France, 26 August 1789.

³⁴ Arendt, H., 1973, p. 291.

³⁵ *Ibidem*.

³⁶ *Ibidem*.

³⁸ *Ibid.* p. 298.

³⁹ *Ibid.* p. 301.

reduced to their natural nonpolitical status. In this private domain equality is replaced by the universal law of differentiation and inequality.⁴⁰ But it is only possible for someone to claim that he is entitled to rights when he is recognized as an equal subject of law. As mentioned before, the only way in which the refugee was able to regain some of his rights and to improve his legal situation was by committing a crime. Now he was judged again by what he had done, instead of by who he was.⁴¹ This illustrates what Arendt means with the concept of the right to have rights. Namely, the existence of a situation where one is judged by his actions and opinions and therefore enjoys legal recognition.⁴²

Arendt explains that it is possible for a citizen to be deprived of certain legal rights, without ending up in a situation of absolute rightlessness. Like the criminal, who is temporarily deprived of the right to freedom, or the soldier in wartime who does not enjoy the right to life. These are measures that try to establish a strong rule of law in a given community. The problem of stateless people is of another order entirely. The trouble is that they do not belong to any community whatsoever.⁴³ Hence, it might be the case that stateless people are able to move more freely than for example a convict, but this does not change the fact that they live outside the pale of the law. As Arendt puts it:

‘The prolongation of their lives is due to charity and not to right, for no law exists which could force the nations to feed them; their freedom of movement, if they have it at all, gives them no right to residence which even the jailed criminal enjoys as a matter of course; and their freedom of opinion is a fool's freedom, for nothing they think matters anyhow.’⁴⁴

Thus, to be stripped of your human rights means above all, to lose a place in the world where your opinions and actions matter and are recognized. In other words: to be deprived of the right to belong to an organized community.⁴⁵ It entails the loss of the importance of speech and of all human relationships. Aristotle characterized man as a speaking animal and as a political animal necessarily living in a community. Hence, it includes the loss of two vital aspects of human life.⁴⁶ Arendt concludes that a person can lose all rights of man without losing his

⁴⁰ Arendt, H., 1973, p. 301.

⁴¹ Larking, E., 2014, p. 25.

⁴² Arendt, H., 1973, p. 296.

⁴³ Ibid. p. 295.

⁴⁴ Ibid. p. 296.

⁴⁵ Ibid. p. 296-297.

⁴⁶ Ibid. p. 297.

qualities that make him a man, without losing his human dignity. The loss of the right to politics or the loss of a community, is the only thing that excludes a person from humanity all together.⁴⁷

Arendt explains that the right that should counter such a loss could not possibly be conveyed in 18th century categories. Because with both natural rights and divine law, what stands out is the fact in these views rights would still be applicable even if only one single human was left on earth. Therefore, rights would remain in place even when one is expelled from a community.⁴⁸

While the 18th century declarations illustrated a shift from rights awarded to certain classes in society which was based upon a country's history, towards rights proclaimed in the name of human nature. The 20th century demonstrated that man, now, had become equally detached from nature as 18th century man had been from history. This means that the essence of human nature cannot be properly described anymore by either one of these classifications. For this reason, the right to have rights, the right to politics, should be guaranteed not externally, but by humanity itself. However, Arendt is not sure if this is possible.⁴⁹ In the next chapter it will become clear how Arendt envisions this guarantee based upon humanity.

In his reflections on the French Revolution Burke offers a completely different conception of rights. As a Christian, Burke believed in divine law. God has given men natural law and the rights derived from this. Our natural instincts about good and evil are derived from this natural law. For him these feelings are more important than rational abstract theories. Consequently, when these two are in conflict with one another, priority should be given to the former rather than the latter. Abstract reasoning should therefore be seen in a social context. What is politically important is not whether these abstractions are true or false, but whether they are good or evil in a particular practice. Burke's conception of rights is purely empirical and abstract rights do not have any real use for the people. This is why Burke proclaims:

'What is the use of discussing a man's abstract right to food or medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician rather than the professor of metaphysics.'⁵⁰

⁴⁷ Arendt, H., 1973, p. 297.

⁴⁸ Ibid. p. 297-298.

⁴⁹ Ibid. p. 298.

⁵⁰ Burke, E., Reflections on the French Revolution, 1790, <http://socserv2.mcmaster.ca/~econ/ugcm/3ll3/burke/revfrance.pdf>, p. 51

Within a particular society, these instincts about good and evil are gradually evolved into morals. This way they are articulated and are eventually laid down in state institutions and codified as law. This is where Burke's appeal to traditionalism stems from. As explained, natural law is embedded in the conduct of a state, mediated by traditions, laws and institutions. We should therefore build upon the principles laid down by our ancestors and use them in such a way that they reflect current needs and wishes. Hence, only in the artificial creation of a particular civil society, people are able to benefit from natural law. In other words, in the artifice rights are made meaningful.⁵¹ In a striking passage in *Reflections on the French Revolution* Burke declares this by citing 'the petition of right' a constitutional document in which the English parliament addresses the rights that the King is not allowed to breach:

“Your subjects have inherited this freedom,’ claiming their franchises not on abstract principles ‘as the rights of men,’ but as the rights of Englishmen, and as a patrimony derived from their forefathers.’”⁵²

As seen, like Arendt, Burke is opposed to the idea of inalienable rights of men that spring from a pre political state of nature. Yes they may exist, but they have absolutely no use in guiding civil society. Instead it is in the process of developing particular societies that the actual rights of men are created. Rights that can differ in each different civil society.

To Arendt, it is clear that in every instance the loss of national rights was accompanied by the loss of human rights. The founding of Israel showed that the reversal of this process could also take place. Only when national rights were created the Jewish holocaust survivors saw their human rights restored.⁵³ According to Arendt, all of those who are forced to live outside the pale of the law are characterized by the fact that they have all lost those aspects of human life created by the human artifice. Consequently, only the nakedness of human nature, the private sphere of mere being remains. Moreover, this private sphere is a constant threat to the public sphere. Where the principle of the public sphere is equality, the private sphere is characterized by the notion of difference and differentiation. Thus, equality springs not from nature, but is constituted by collective human activity. It is in the community where we guarantee each other mutually equal rights.⁵⁴ Since equality is achieved in a political organization where men treat

⁵¹ Ibid. p. 29.

⁵² Ibid. p. 27.

⁵³ Arendt, H., 1973, p. 299.

⁵⁴ Ibid. p. 301.

each other as peers, the stateless person who is associated with mere givenness is seen as an alien that reminds one of the limitations of human equality and activity. It is this fear of the different intruder that makes modern political organizations so often persist on ethnic homogeneity. However, when one is forced into a life of mere existence, one ‘begins to belong to the human race in much the same way as animals belong to specific animal species’.⁵⁵ Arendt identifies two dangers arising from such a situation. First of all, the group of people living under such conditions keeps getting bigger, therefore it poses a greater threat to the political life, to the achievements made by the human artifice. Moreover, it is possible that in a globally civilized society the danger arises from within. Considering that people living under conditions of absolute rightlessness are in this situation inevitably created within the global society itself

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⁵⁵ Ibid. p. 302.

⁵⁶ Ibidem.

III Arendt's Politics of Human Rights

This chapter will explore Arendt's politics of human rights. By discussing some of Arendt's work it will become clear what Arendt finds troublesome about human rights. Besides, it will give an account of her conception of political action that tries to regain the guarantee of human dignity and explain in what kind of political structure this can best be realized. A good starting point to do so is the famous passage Arendt wrote in the preface of 'The Origins':

'Antisemitism, imperialism, totalitarianism... have demonstrated that human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted and controlled by newly defined territorial entities.'⁵⁷

Although not a convention theorist of human rights, Arendt's conception of politics originates from the fact that she witnessed a world that deprived human rights of any significance. Throughout her work, Arendt always tried to explain the problematic situation in which the concept of human rights found itself. Besides, Arendt wanted to find a way that could serve as new validation for these rights.⁵⁸ According to Arendt, the events of World War II had proven that the rights of man had lost all validity and meaning. The way in which human rights and human rights protection pose a sincere dilemma and the need to rethink our understanding and practices thereof, forms the essence of what she is trying to accomplish in 'The Origins'.⁵⁹

As the title of 'The Origins' implies, Arendt not only identifies the elements of totalitarianism, by analyzing Nazi Germany and Soviet Russia, but she also looks at the factors that made the horrible crimes of these regimes possible. Part two, Imperialism, which includes chapter IX 'the decline of the nation-state and the end of the rights of man', explains that the territorial expansion tendencies of western states were the result of surpluses from capital. This line of thought can be traced back to the works of Rosa Luxemburg (1871-1919), a Marxist theorist of Polish-Jewish decent, and John A. Hobson (1858-1940), an English economist and avid imperialist critic. According to the latter, imperial expansion is driven by the pursuit of overseas investment opportunities. However, for Arendt the consequences of imperialism are of greater importance than its causes. Because it is partly the conflicts caused by imperialism that led

⁵⁷ Arendt, H., 1973, p. IX.

⁵⁸ Isaac, J., *A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights*, American Political Science Review 90(1), 1996, p. 64.

⁵⁹ Ibidem.

Europe into the devastating World Wars of the 20th century.⁶⁰ Moreover, to Arendt, imperialism and the focus on national-sovereignty are characteristics of the changing political attitudes of Western states that made certain marginal groups extremely vulnerable to state power, and whereof totalitarian genocide was only the worst possible expression.⁶¹ There were humanitarian attempts to protect these groups, for example, the Minority Treaties which came into existence as a result of the Paris Peace Conference (1919), but these could not possibly lead to a solution as long as the international sphere was based upon a discourse of national sovereignty, relating citizenship with nationality.

When confronted with the horrors of the totalitarian regimes it became clear that the concept of natural rights, on which the modern-nation states were based, was nothing more than a hollow shell. Allegedly unalienable, the victims of the genocide lost the rights of man at the very instance they started needing them. In every case, the loss of national rights entailed the loss of human rights.⁶² When no longer a citizen, there was no place left in the world where one's actions and opinions mattered. Instead, Arendt follows Burke, who proclaims that one enjoys his rights due to the nation where is a part of. They are artifacts that are realized through human agreement and recognition.⁶³ Because human rights were rendered meaningless, Arendt calls for a new guarantee to secure human dignity in the future.⁶⁴

3.1 Aporetic thinking

According to Rancière, Arendt's account of the perplexities of the rights of man leads to a vicious circle. Either the rights of man belong to those who have nothing else besides these rights (the stateless), consequently it does not provide the stateless with a basis on which it can regain his rights. Or, the rights of man belong only to citizens, to those that are already fully recognized. This makes Rancière believe that such an account of human rights can only lead to either a void or as in the later situation, a tautology.⁶⁵ This will be more extensively discussed in the next chapter, however, it is good to mention that it does not do fully justice to Arendt's endeavor to rethink human rights by means of posing new questions instead of offering definite

⁶⁰ Isaac, J. 1996, p. 61.

⁶¹ Ibidem.

⁶² Arendt, H., 1973, p. 299

⁶³ Ibidem.

⁶⁴ Isaac, J., 1996, p. 63.

⁶⁵ Gündoğdu, A., *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants*, Oxford University Press, 2015, p. 36.

Rancière, J., *Who is the subject of the rights of man?*, The South Atlantic Quarterly, Volume 103, Number 2/3, 2004, p. 302.

answers. Typical for her critique on human rights in 'The Origins' is Arendt's aporetic approach, where she takes Socrates as her example. Instead of offering a new normative foundation, or creating a different institutional model, Arendt believes that a critical inquiry should not be focused on finding such a solution. Rather it should be occupied with the examination of the perplexities of the rights of man, so that one understands the problems surrounded with rightlessness and is able to rethink human rights in response to these problems.⁶⁶ In Arendt's case, as we have seen, this entails the reassessment of human rights as a right to have rights. Accordingly, characteristic for Arendt is her political hermeneutic approach, focusing on concrete situations instead of on abstract philosophical ideas. What matters is an inquiry into the shared beliefs about human rights and into the difficulties disclosed by the statelessness phenomenon attached to these beliefs.

Besides this aporetic approach, it is also important to note that Arendt understood historical events as being equivocal and contingent. As a consequence, the Declaration identifying man and citizen does not necessarily need to lead to statelessness, but has democratic potential. However, as chapter 2 explained, specific political and social conditions subverted this potential. Thus, according to Arendt, statelessness is a contingent phenomenon that came into existence due to a certain combination of these conditions, such as imperialism, the decline of the nation state and race thinking, all of which she describes in 'The Origins'. Because of this contingent relationship between statelessness and the enigma of the declarations of the rights of man, it is possible for Arendt to combine a critique of human rights with their profound rethinking.⁶⁷ Arendt does not offer us a solution to these perplexities. With her conception of the right to have rights, which she does not extensively elaborate upon, she even brings new perplexities of human rights to the table. However, following Arendt's vision on what critical thinking should achieve, this is not a flaw. It is because new perplexities arise that we do not automatically follow a dogmatic standpoint or rule. It is this Socratic way of philosophizing that Arendt prefers over the philosophical tradition that believes that philosophical thought, if meaningful, should always end up in certainty.⁶⁸ Thus, aporetic thinking is useful because it scrutinizes common opinions and prejudices that do not seem to work anymore and at the same time it reveals a possible path that was not thought of before. Arendt felt that the notion of

⁶⁶ Gündogdu, A., 2015, p. 13.

⁶⁷ Ibidem.

⁶⁸ Ibidem., p. 33.

human rights was in a crisis and with their critical rethinking she tries to make the notion of human rights meaningful again.

3.2 Uses of the notion “right” in : the right to have rights

The first use of the term right in the phrase the right to have rights is directed to humanity as such. As already discussed, this means the right to membership of a particular community in which one is recognized. Because the use of the term here is intrinsically pointed at humanity, Arendt here calls upon a moral imperative, because it addresses the human species as such. This imperative asks for the treatment of all human beings as persons of a community, who should be treated and protected accordingly.⁶⁹

The second use of the term right is of a different dimension. It builds upon the preceding moral claim to membership and creates reciprocal legal obligations between members of a particular group. Thus, to invoke these rights it is necessary that one is already a member of a legal community. What becomes clear is that the rights described here correspond with the rights of the citizen. Benhabib calls this use of the term its juridico-civil usage. She explains that such a use of the term generates a triangular conjunction between the one entitled to rights, the others to which this obligation creates a duty, and the legal institutions of a state that need to protect and enforce these rights claims.⁷⁰ Hence, those are the positive rights that are guaranteed, which means that either their violation is prevented, or when violated their bearer has effective recourse.

The right to humanity makes it possible for us to become a member of a political community, so that we are able to enjoy our juridico-civil rights. Arendt believed that formation of republic federalism would be the political structure most suitable for realizing and guaranteeing the right to have rights. In such a structure the equality of each is guaranteed by the recognition of all.⁷¹ These two different uses of the term rights already illustrate the paradox wherein Arendt finds herself, and of which she is fully aware. It is the paradox between a universalistic moral claim of recognition depending upon humanity itself and the establishment of republican polities depending on membership, which has an excluding/including policy inherent in its very structure. Thus, while positive rights can be seen as real rights, moral rights remain solely ideal. Arendt, however, made it clear that the challenge is to find a way in which these moral rights

⁶⁹ Benhabib, S., 2004, p. 58.

⁷⁰ Ibid. p. 59.

⁷¹ Ibid. p. 65.

are transformed in positive rights and therefore become real. The only problem is, how do we achieve this?

3.3 The Human Condition

Arendt does not explicitly lay down a theory of human rights. However, she tries to find a way to reassess human rights in a way that it secures human dignity. In her second major work ‘The Human Condition’ (1958) she explores this alternative way of framing human rights.⁷² In this book, Arendt frames human existence by identifying three fundamental human activities: action, labor (to fulfil your basic needs), and work (which contributes something meaningful to the world). These form the *vita activa* and correspond to the basic conditions under which humans live. Herein, she distinguishes two different spheres: the political, which correlates with action, and the private, which corresponds with labor and work. For Arendt, what is typical for a human being and what is therefore most important, is the ability of creative action, the ability to start something new. The two main characteristics of action are freedom and plurality. Freedom here means the capacity to being. This can therefore be traced back to natality, since every birth constitutes a new beginning. Plurality, the fact that different men live on earth, the opposite of totalitarianism, is the vital principle of all political action.⁷³ Thus, Arendt’s ideal of politics is a situation where everyone has the same equal claim to political activity. Politics should reinvent itself as a bottom-up process where all people have a voice and more importantly are heard. The relation between action, the political and citizenship is perfectly reconcilable with her Burkean account of human rights that she laid down in ‘The Origins’. When one loses the ability to participate, to membership, however, what remains is the naked human that has lost all human dignity.⁷⁴ What characterizes refugees is their inability to fulfil these activities of human life. Arendt’s explanation of action in ‘The Human Condition’ and in ‘Introduction Into Politics’⁷⁵, where she states that the meaning of politics should be freedom, could be interpreted as resolution she finds for the problems surrounding human rights put forward in ‘The Origins’.⁷⁶

⁷² Isaac, J., 1996, p. 64.

⁷³ Arendt, H., *The Human Condition*, second edition, The University of Chicago Press, 1998, p. 7.

⁷⁴ Isaac, J., 1996, p. 64.

⁷⁵ Arendt, H., *Introduction into Politics, In The Promise of Politics*, ed. Kohn, J., New York: Schocken, 2005.

Arendt started writing the Introduction into Politics in 1956, but never completed it.

⁷⁶ Isaac, J., 1996, p. 64.

3.4 Government structures and human rights

Going back to Arendt's claim in the preface of 'The Origins', the new law on earth is a law whose validity must on the one hand include the whole of humanity, but on the other hand must be restricted in power, rooted and controlled by newly defined territorial entities.⁷⁷ However, traditionally, a law's validity lies precisely in the fact that it is backed up by power, which on its turn is linked with the principle of state sovereignty.⁷⁸ Arendt on the other hand tries to break down this belief. Important for her is the existence of constitutional limits to state power.⁷⁹ This can already be traced back to 'The Human Condition' where she describes law and legal institutions as necessary for the creation of a space where politics can take place.⁸⁰ However, constitutionalism is still linked with national sovereignty and therefore civil liberties are only granted to its members, excluding the stateless people from protection. Arendt, therefore, suggests that a more global system would possibly be better to solve the problem of human rights.⁸¹ Part of this is the creation of international judicial bodies dealing with grave human rights violations and founded on the basis of humanity all together. In this light, Arendt felt that the Israelis missed an opportunity when they charged Eichmann with war crimes committed against the Jewish people and not with crimes against humanity.⁸² Importantly, such an international body could also protect these minorities who do not possess a sovereign territory. The territorial principle in international law, strongly related with national sovereignty, should thus be neglected. However, as long as international law is grounded in Conventions that are based on the principle of state sovereignty it cannot guarantee human dignity, since these conventions form a restriction to the right to intervene in another state.⁸³ Instead of forming a world government, Arendt thought that the Kantian Idea of a federation would be the best structure to secure human rights. This was among other things due to the fact that such a structure takes the difficulties into account that arise by the many differences between the different communities and nations. Because of these differences a world state would never constitute enough civic initiative, people would simply not care. More importantly however,

⁷⁷ Arendt, H., 1973, p. IX.

⁷⁸ Power as the guarantee of rights is maybe most famously described by Hobbes. For Hobbes, those who try to reduce the power of the sovereign, must subject themselves to the power that is able to do so. This is to say that one needs to subject itself to an even greater power.

⁷⁹ Isaac, J., 1996, p. 68.

⁸⁰ Arendt, H., 1998, p. 194.

⁸¹ Isaac, J., 1996, p. 68.

⁸² Ibidem.

⁸³ Ingram, J.D., 2008, p. 41108.

Arendt sees the possibility of a world state as a disaster, because of her fear of the tyranny of majority. As she puts it:

‘The crimes against human rights...can always be justified by the pretext that right is equivalent to being good or useful for the whole in distinction to its parts...And this predicament is by no means solved if the unit which the ‘good for’ applies is as large as mankind itself. For it is quite conceivable...That one fine day a highly organized and mechanized humanity will conclude quite democratically- namely by majority decision -that for humanity as a whole it would be better to liquidate certain parts thereof.’⁸⁴

In such a world government, nations would transfer all political power to a central authority, just like the individual does in the Hobbesian state. James Ingram therefore argues that the issue with a world government is not its global scale, but the way it exercises its power. It is not the scope but the mode of unchecked sovereign privilege what Arendt rejects.⁸⁵ This creates a situation where the citizen’s capability of creative action is restrained, which directly opposes Arendt’s vision of authentic politics.⁸⁶ Because for Arendt the meaning of politics is freedom, and as noted before, this freedom lies in the capacity of political activity. However, it is my view that it is not only the mode but also the scale that is not compatible with Arendt’s thought. This is precisely because of the lack of civic initiative, a lack of political engagement, that would be achieved in a world government.

In ‘The introduction into Politics’ Arendt categorizes three different functions of politics. Besides its ‘meaning’, she states that political activity is always directed towards the achievement of certain ‘goals’. Whereas she reserves the term ‘ends’ for the aims of politics altogether.⁸⁷ According to Arendt, plurality is the condition sine qua non for all forms of political life. If men would all be duplicates of the same model action would be an unnecessary affair. Obviously this is not the case. It is because we are all identical, by the fact that we are human, that every man that inhabits this earth is actually different and unique. When one attempts to strip the political of its plurality, one abolishes the public realm altogether. We would then be left with a one-man-rule. Not that this ruler would necessarily be bad for its people, but it would inevitably remove all its citizens from the public sphere. The result of a one-man-rule is therefore the loss of power of the citizen.⁸⁸ Due to the plurality of the political

⁸⁴ Arendt, H., 1973, p. 299.

⁸⁵ Ingram, J.D., 2008, p. 409.

⁸⁶ Benhabib, S., 2004, p. 61.

⁸⁷ Arendt, H., 2005, p. 108.

⁸⁸ Arendt, H., 1998, p. 7-8 en 220-221.

sphere these 'goals' are only sporadically realized. However, political actions that do not achieve their goals are not rendered pointless. What is important is not whether they achieve their goal or not, but that the activity itself constitutes an ongoing space of appearances among people.⁸⁹ On the other hand, Arendt feared a politics completely focused on the realization of ends. This would lead to a situation where politics is associated with instrumental action, resulting in coercion and violence.⁹⁰ This space of public appearances can be upheld in a federal system, which safeguards the power balances both internally and between states, so that all federal states are able to prosper without the system being vulnerable to tyrannical domination, as is the case with the forming of a world government.⁹¹ In such a federation citizen councils should be formed, which would result in a degree of engagement not known in systems solely based upon electoral politics. Hence, besides voting on election day once every four years, there is need to create more possibilities for people to be directly involved. Otherwise, these people will get alienated from politics, from the public world, which will result in a simultaneous loss of a sense of responsibility for this world.⁹²

For her notion of council democracy, Arendt turns to Thomas Jefferson's (1743-1826) notion of the ward republic. In *On Revolution* Arendt argues that positive freedom has historically only been enjoyed in spatially limited territories. It is amongst equals that you are able to enjoy freedom, and as we have seen before equality is not a natural universal principle but is constituted through membership of a specific political alliance. Arendt thinks of these spaces of freedom as 'islands in a sea or oasis in a desert'.⁹³ When Arendt speaks of a formation of citizen councils, this formation is primarily territorial-based. Arendt proposes a pyramidal structure with at the bottom the local councils. These councils are open to everyone living in this particular area and is interested in joining. The higher councils (encompassing a larger territory) are formed by representatives of the local councils. A government with a pyramidal structure looks like an authoritarian way of governing. However, in Arendt's case no authority is constituted, not from below or above do representatives feel any form of pressure. This is because none of the representatives, at any level, are bound towards each other. The relationship is built upon trust and the participants do not owe their position to anyone because they are self-

⁸⁹ Ibid. p. 193.

⁹⁰ Ingram, J.D., 2008, p. 409.

⁹¹ Larking, E., 2014, p. 158.

⁹² Ibidem.

⁹³ Arendt, H., *On Revolution*, New York: Viking, 1965, p. 275.

chosen. Therefore in this system, there exists an open discussion between peers at every different layer of the pyramid, without any pressure from the bottom or the top.⁹⁴

3.5 The contingency of state sovereignty

Philip Allott, a prominent international legal scholar in the United Kingdom may help us understand how we can move away from a world ruled by sovereign states. What is in first instance needed is a different mindset that has the prosperity of humans at heart, rather than the prosperity of states. If we recall, the current international law system, based upon state sovereignty, cannot guarantee a right to have rights.⁹⁵ For him, what matters is humanity as such, and not states which, as history has pointed out, do not act in accordance with the wishes of its particular societies. Allott has developed a theory of action that moves away from the state-centric logic as the basis of governing the world.⁹⁶ It is through the human mind, by our consciousness that constitutes ideas that we create specific institutions that form a human world. Therefore, by way of new thinking we could reshape the world as a social international society. His aim is to achieve the highest ideal of all, Eunomia, the good ordering of a self-ordering society.⁹⁷ Especially by looking at international relations between states, he concludes that it is a mistake to seek this relationship in terms of state centralism. In this scenario, states only pursue their own interests, not taking humanity into account. This is especially noticeable in the international sphere because Allott sees a discrepancy between the way states act in international and in national affairs respectively. In the former, state citizens have even less influence, therefore, states are more willing to neglect moral restraints they might feel in national realm. This results in devastating wars and in lenience towards oppression, poverty, towards human indignity in general.⁹⁸ Moreover, this state-centric structure of international relations results in the abolishment of moral responsibility with regard to international law.⁹⁹ This perfectly aligns with Arendt who also thought that alienation of political affairs would lead to a lack of sense of responsibility for its outcomes. Moreover, internally a state possessing sovereign authority within its territory, makes membership of an alternative form of society that might not be so particularly exclusive, impossible. However, Allott admits that in the national arena such forms of sovereignty have been impoverished by the notion of democracy, occupied

⁹⁴ Ibid. p. 278.

⁹⁵ Ingram, J.D., 2008, p. 408.

⁹⁶ Scobbie, I., *Wicked Heresies Or Legitimate Perspectives? Theory and International Law*, in *International Law*, third edition, edited by Evans, M.D., Oxford University Press, 2010, p. 61-62.

⁹⁷ Ibid. p. 80-81.

⁹⁸ Ibid. p. 82.

⁹⁹ Ibid. p. 62.

with the redistribution of power instead of imposing it. The problem, therefore, primarily exists within the external affairs of states, which are undemocratic and unsocial, this should change, so that humanity will develop in a more just manner. When instead individuals would be central to governing affairs, a sense of consciousness of international relations will arise, so that individuals would be the primary agents involved in international law making. This would create a sense of responsibility, which should lead to a morally just domestic and international society.¹⁰⁰

Allott's theory illustrates that authoritarian rule of the sovereign state is only a contingent outcome of a particular mindset together with past-made social choices, hence it is possible to rethink and restructure society in such a way that it serves the interests of humanity instead. When such a consciousness of Eunomia, the good ordering of a self-ordering society, is created, it is easier to see how Arendt's ideal of isonomia, the equal claim to political activity, could be realized through the establishment of new 'territorial entities' in the form of a cosmopolitan federated structure. This way rights promotion depends on the political action of its members, rather than on the leniency of a greater external power, which is the purpose of Arendt's democratic perception of rights.

¹⁰⁰ Ibid. p. 82-83.

IV Interpreting the Right to Have Rights

This chapter will elaborate on three different interpretations of Arendt's notion of the right to have rights. Since the right to have rights entails the right to engage in meaningful politics, these interpretations are all based on specific and implicit assumptions about the nature of politics. The first interpretation envisages this right in terms of the use of power to implement rights. The second is a Kantian interpretation described in the works of Habermas and Benhabib, which sees it in terms of law and institutions. The third and most vividly discussed in this paper, argues that 'the politics of human rights must be rooted in the practices of the rights-bearers themselves.'¹⁰¹ This last view is associated with thinkers such as Jacques Rancière, Étienne Balibar and Claude Lefort.

This overview will show which of these interpretations is most closely related to Arendt's politics of human rights as discussed in the previous chapter. Moreover, it will become clear whether either one of these alternatives offers a way out of the paradoxes Arendt found herself in.

4.1 The right to have rights as the use of power to implement rights

The aim of human rights is to protect the dignity of every human being, it exists to give voice to the voiceless.¹⁰² However, sometimes it is deployed in such a way that it actually achieves the exact opposite. Instead of restoring power balances it then only increases the imbalance. This way human rights tend to create dependency rather than achieving its original aim of autonomy and freedom.¹⁰³

The first interpretation of the right to have rights can be read in such a light. This interpretation starts out with identifying the right to have rights with the right to citizenship, the right to belong to a political community. However, we have seen that it is often the case that a certain state is unwilling or unable to protect this right. This interpretation is therefore primarily concerned with finding an organization that acts as a substitute for the failing state and ensures the effective enforcement of rights instead.¹⁰⁴ Here, a moral imperative is invoked in order to circumvent the state sovereignty discourse, namely: in times of crimes that 'shock the conscience of mankind' one should be able to intervene in the internal affairs of a state.

¹⁰¹ Ingram, J.D., 2008, p. 402.

¹⁰² Ibid. p. 401.

¹⁰³ Ibidem.

¹⁰⁴ Ibid. p. 403.

However, this kind of intervention leads to certain problems. First of all, in absence of an international military force humanitarian intervention is dependent on the power and the willingness of a powerful state. Therefore, the state-centric logic of external affairs stays intact. Moreover, humanitarian intervention often even increases the great imbalance of state power relations.¹⁰⁵ Even more problematic is the fact that because intervention is based upon morality the means by which this happens become subordinate to its ends. It also oversimplifies the situation, framing it in terms of we are good and they are evil. This can lead to devastating situations where out of the conviction for human rights crimes are committed that are equally bad as the rights violations combatted in the first place. This has led many people to say that human rights should not stand above politics. Weber's distinction between ethics of conviction and ethics of responsibility could be invoked here. This means that the pursuit of an end should always be restrained by the willingness to answer the consequences of one's own actions.¹⁰⁶

Hence, the paradox at the root of the interpretation of rights as coercive power is the friction between the moral ends of human rights and the means used to secure them. In order to protect people from the wrongful use of power, one depends on an even greater power. This contradicts the idea that human rights are based upon the principles of autonomy and equality. Rights in this perspective are handed out to someone as a gift. They are not one's own, nor do they create obligations. Therefore it does not do justice to the way Arendt envisages rights.¹⁰⁷

The account of rights described here is not only a politico-conceptual approach to human rights problems, but it seems to closely resemble today's political practice. In 'The Origins', first published in 1951, Arendt wrote that although there were well intended humanitarian attempts to realize new declarations of human rights from international organizations, this idea transcended the then present sphere of international law that was still based upon reciprocal agreements and treaties between sovereign states.¹⁰⁸ Has international law changed in this regard in the last sixty years? After the end of the cold war you can see that the United Nations became increasingly willing to intervene in the domestic affairs of a state under the banner of the protection of human rights. Chapter VII of the UN Charter provides the basis for the United Nations Security Council (UNSC) to take such measures as seem necessary to restore international peace and security. However, the UNSC became more and more lenient with interpreting the scope of the concept of international peace and security. The intervention in

¹⁰⁵ Ibid. p. 404.

¹⁰⁶ Ibidem.

¹⁰⁷ ibid. p. 404-405.

¹⁰⁸ Arendt, H., 1979, p. 298.

Haiti (1994) showed that the UN was willing to intervene with the sole purpose of enforcing a democratic government. Thus, a threat to peace seems to be an elastic concept, which could possibly entail the right to democratic governance if the UNSC wants it to.¹⁰⁹ Therefore, it seems that the classical concept of sovereignty, once the corner stone of international law, in today's world is no longer accurate. However, at the same time as the Haiti intervention, there had been a coup in Algeria (1992) which overthrew an elected government, but contrary to the Haiti intervention, this received international acceptance. Furthermore, in Pakistan (1991) the military overthrew a democratic government, yet this got accepted by the west after Pakistan declared their fight against terrorism.¹¹⁰ It is therefore contingent if and how the UNSC will act in future scenarios, as their reactions seem to be highly politically dependent.

It seems that although the international community is slowly shifting away from state sovereignty, humanitarian intervention is ultimately based upon the UN Charter, a treaty created and ratified by sovereign states. Moreover, people that have to suffer human rights violations are dependent upon the security council members to defend their rights. These are big countries with their own political agenda, sometimes only inclined to help when there is something in it for them. The theoretical paradoxes attached to the interpretation of rights in terms of the use of force have become reality. The state centric logic of the international system stays the same and people in need become dependent on an even greater power because of which they will not enjoy true autonomy and equality themselves.

4.2 Rights as just laws and institutions

If we conclude that the guarantee for human rights enjoyment should not come from outside, it makes sense to say it should come from within instead. In other words, it should be based upon the rights bearers themselves. The second interpretation of rights does not see politics as the use of power to achieve particular moral ends, but instead it tries to reframe the structures in which these powers operate.¹¹¹ Based on the Kantian concept of rights it seeks to translate morality into just laws and institutions. Therefore, the ultimate goal is to achieve justice. This way morality is disconnected with power, but finds its way back in institutions. Kant's writing, however, was still based upon the conventional state sovereignty discourse. According to

¹⁰⁹ Several authors like Thomas Frank argue that there is an emerging right to democratic governance, which exists for the international community as a whole. This right might broaden the concept of peace and security, giving the UNSC more room to act. Frank, T.M., The right to democratic governance, *The American Journal of International Law*, Vol. 86, No. 1. (Jan, 1992), pp. 46-91.

¹¹⁰ Modeme, L. E., *Democratic entitlement in International Law? Still far from the promised land*, Institute for Cultural Diplomacy, The Berlin Human Rights Congress, September 2010, p.15

¹¹¹ Ingram, J.D., 2008, p. 405.

Ingram, the only human right he recognized in modern terms was the right to visit in other countries. This interaction between states would create a sense of solidarity. Nevertheless, rights protection was still a matter of state concern.¹¹² If we recall Arendt's claim that the new guarantee on earth to belong to humanity should be based upon humanity itself, we can confirm that Kant's proposition is not conclusive.

However, since Kant international law and its institutions have obviously developed a lot. Habermas and Benhabib argue that both Arendt and Kant could not envisage supranational institutions, such as the European Union, limiting the absolute territorial control of the nation-state.¹¹³ In other words, they took the nation-state system as a given. Having this possibility, makes Habermas and Benhabib believe that the best way in which human rights can be protected is through the creation of international legal systems. This way state sovereignty would be reduced by 'reciprocally enforced cosmopolitan law'.¹¹⁴ Benhabib argues that the common division between human rights on the one hand and civil/political rights on the other should be abolished. To her, both civil and political rights, including the right to citizenship should be regarded as human rights.¹¹⁵ In this respect Benhabib closely resembles Arendt.. These in first instance moral rights, are more and more incorporated into legal practices and institutions. Thus, the moral right is transformed into institutional terminology. If we recall the characterization of rights set out in chapter 3.3 this was precisely the challenge of the moral term right.

In both international law and European law there have been efforts in making asylum law more expansive . Then, also this interpretation of the right to have rights has been partially incorporated into the practice of international human rights protection mechanisms. For example, the conception of 'refugee' entitled to legal protection was broadened overtime. Moreover, article 14 of the Universal Declaration of Human Rights reads as follows:

- “(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”¹¹⁶

¹¹² Ibid. p. 406.

¹¹³ Benhabib, S., 2004, p. 64 and 67.

¹¹⁴ Ingram, J.D., 2008 p. 406.

¹¹⁵ Benhabib, S., 2004, p. 140.

¹¹⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), article 14.

This sounds promising, however, a corresponding obligation for states to grant asylum does not exist. Hence, it appears that the issue of asylum is balanced in such a manner, that it pleases human rights advocates, but at the same time it keeps state sovereignty relatively unthreatened. The same line of reasoning applies to the right of non-refoulement, Article 33 of the 1951 Geneva Convention. This article states that a state is not to return a person to a place where he or she is in danger of persecution. Nevertheless, it does not pose an active obligation on a state to provide a refugee with access within its territory, nor does a state have to accord legal status to a the refugee that already successfully obtained access.¹¹⁷ Maybe most striking is the fact that although the Human Rights Commission (HRC) emphasizes that the freedom of movement is ‘an indispensable condition for the free development of a person’, the international human rights system nowhere recognizes a right equivalent to the international freedom of movement.¹¹⁸

It is true that since the Second World War there have been good developments for the protection of human rights. In the sense that more and more rights are codified in laws and monitored by international institutions. Think of conventions and declarations laying down the rights of indigenous people, children, disabled people and the human rights bodies monitoring the implementation. An international refugee regime is set up and governed by the United Nations High Commissioner For Refugees (UNHCR). However, sovereign states remain the prime actors involved in safeguarding these human rights. In doing so, they now have international obligations to grant these rights indifferent to nationality, citizenship etc. Besides, because of international legal institutions individuals now enjoy legal standing, to an extent that did not exist for the inter-war and Second World War refugees.¹¹⁹ These advancements correspond to the changed meaning of the right to have rights in today’s politics. According to Benhabib:

“The right to have rights today means the recognition of the universal status of personhood of each and every human being independently of their national citizenship. Whereas for Arendt, ultimately, citizenship was the prime guarantor for the protection of one’s human rights, the challenge ahead is to develop an international regime which decouples the right to have rights from one’s nationality status.”¹²⁰

¹¹⁷ Larking, E., 2014, p. 128.

¹¹⁸ Ibid. p. 127.

¹¹⁹ Ibid. p. 119.

¹²⁰ Benhabib, S., 2004, p. 68.

However, besides from the improvements already made, the examples sketched above show that we are still far away from realizing the Habermas and Benhabib ideal of a global society based upon mutual promises of states securing both peaceful relations between themselves and individual human rights for all.¹²¹ Moreover and most importantly, this remains a system based upon the willingness and the power of states to accord rights, potential rights bearers are only beneficiaries of rights and do not create them. This harms political plurality, which as we have seen in chapter 3 is a vital condition for any form of politics. The right to have rights should instead be viewed in terms that are compatible with this essential principle of conducting politics. It seems that the essential problem with the accounts of Habermas and Benhabib is that there is an insurmountable gap in between political particularism and moral universalism and to overcome this one would need a global hegemon that is able to enforce these rights, something that many people for good reasons, as outlined earlier, reject.

4.3 Human rights and political action: enacting the right to have rights

The third interpretation of the right to have rights is based not upon morality or law, but on politics itself. Rights are secured due to the practical activities of rights-claimants themselves. Characteristic for this vision of politics is that rights ‘are the products of past struggles and the object of current ones’.¹²² Because these rights are realized through a process of continuous struggle, rights do not have a fixed meaning. As Lefort explains, the fact that rights are open-ended makes politics a process of ongoing disputation.¹²³

Balibar shares this conviction of the indeterminacy of human rights. This is how he can transform Arendt’s juxtaposition between man and citizen, where loss of citizenship rights was equivalent to the loss of human rights, into a positive one. For Balibar, the affiliation between the two means that there is a potential universal right to political activity for everyone. Moreover, as explained, the open-endedness of human rights means that they always carry a potential transformative power within them. Therefore, human rights politics presumes a social order that is always contested and a right to politics means a right to autonomous political action. This individual right, is a right potentially for everyone, that can only be actualized by the individual himself and cannot be granted top-down. Recently such a bottom-up approach towards the realization of rights can be found in the works of Jacques Rancière.

¹²¹ Larking, E., 2014, p. 162.

¹²² Ingram, J.D., 2008, p. 411.

¹²³ Ibidem.

In his writings, Rancière firmly distances himself from Arendt by stating that her conceptualization of the citizen and man, between the public and private sphere, cannot but lead to the conviction that human rights mean nothing. However, by reframing politics as a process wherein people, through dissensus about rights and political activity, claim the rights of those who have not the rights that they have and have rights that they have not, there might be a way out Arendt's vicious circle.

Rancière starts out by looking at what he calls the suspicion 'that the man of the Rights of Man was a mere abstraction because the only real rights were the rights of citizens, rights attached to a national community as such'.¹²⁴ As discussed this view is attributed to both Burke and Arendt. The connection between The Rights of Man and those humans that have nothing left besides the property of being human is made possible by Arendt's conception of the public sphere of speech and appearance as distinguished from the private sphere of mere being. This corresponds with the identifying of the human with mere life, a state of necessity, and the citizen with the good life. The Rights of Man were precisely those of these unpoliticized individuals living under a state of exception. Arendt's concept of a 'state beyond expression', in which the rightless are characterized by the fact that no law exists for them, is according to Rancière above all a result of Arendt's ontological distinction between the public and private sphere.¹²⁵

Rancière argues that it is a mistake to equate a conception of the good life with the conception of a human as a speaking animal. Not only does this contradict Arendt's refusal of any notion of human nature, but also, for Rancière, what amounts to speech and merely (animal) voice expression is a political question to begin with. What he means by this is that to be recognized as a speaking animal is already politically contestable. For everyone possesses speech, however, recognition hereof is socially contingent. Moreover, speech is already a precondition for identifying those animals that do possess speech (humans) and those that do not. Accordingly, Rancière distinguishes between speech and the account that is made of speech. Political exclusion amounts to establishment of certain groups of people of which their ability to speak is not recognized.¹²⁶ What becomes clear is that dissensus is inherent to the question of who possesses the quality of speaking, therefore, one should not associate the political with a conception of the speaking animal. Rancière claims that in doing so, Arendt, finds herself in a vicious circle. She takes the separation of voice and speech as the principle on which the

¹²⁴ Rancière, J., 2004, p. 298.

¹²⁵ Ibid. p. 299.

¹²⁶ Schaap, A., *Enacting the right to have rights: Jacques Rancière's Critique of Hannah Arendt*, European Journal of Political Theory 10(1), 2011, p. 30.

political is based, but in fact this separation is precisely what proper politics should be contesting in the first place.¹²⁷

Rancière, therefore, objects to Arendt's notion of the political as a space in which individuals act and recognize each other as equals, which would result in situation of singularity, of a single people, where everyone is taken into consideration. This process is what Rancière calls the formation of a 'ethical community'. The problem with such a consensus politics is the fact that it automatically excludes dissension.¹²⁸ Consequently, those that fall outside the political sphere have no way of getting in. All those people that do not fit in this ethical community based upon equality, that are alien to it, such as the stateless, the sick or disabled, are seen as the absolute other. It is the absolute rejection of the other.¹²⁹ Rancière sees politics rather as a platform on which those people who do not possess speech, try to make themselves heard. It is through dissensus and social struggle that political exclusion is contested. Human rights, therefore, do not belong to a specific form of life, but are more like a disputable vehicle that can be used to claim, or to enact equality.¹³⁰

If we recall chapter 3, according to Arendt, the Rights of the citizen are either the rights of man, they are the rights of those who have no rights or the rights of man are the rights of the citizen, the rights connected with a political community. This can only lead to either a void or when associated with the citizen, a tautology. They lead to a void not only because of the fact that they are the rights of people that cannot realize them, but also in that human rights turn into the rights of others. Hence, for Rancière the right to have rights based upon an Arendtian perspective on politics necessarily leads to either a depoliticized account of human rights or to a justification of humanitarian intervention politics.¹³¹

However, with a puzzling formulation Rancière offers a different conception of the rights of man. He states that: 'the Rights of Man are the rights of those who have not the rights that they have and have rights that they have not'.¹³² Contrary to Arendt, this reading of the Declaration, does not distinguish the rights of man from the rights from the citizen, and pace Balibar, it does not combine them either.¹³³ Instead, they have two different meanings that should be used

¹²⁷ Ibidem.

¹²⁸ Rancière, J., *The Ethical Turn of Aesthetics and Politics*, Critical Horizons 7:1, 2006, p. 6.

¹²⁹ Ibid. p. 7.

¹³⁰ Schaap, A., 2011, p. 23.

¹³¹ Ibid. p. 29.

¹³² Rancière, J., 2004, p. 302.

¹³³ Ingram, J.D., 2008, p. 412.

together to achieve politics. On the one hand rights exist as written rights. As such, they resemble the concepts of freedom and equality of a community. It is important that even though actual rightlessness might exist, this does not make these rights to be mere abstractions. On the other hand there is need to follow up on these rights, not only to use them, ‘but also to build up such or such a case’.¹³⁴ What Rancière means here, is that the de facto practice of claiming rights can exceed their original definitions. Hence, rights do not belong to definite subjects, to the citizen as opposed to the man. Instead man and citizen are political subjects open to change.¹³⁵ Human rights politics, therefore, is the activity of claiming those rights that are initially denied and subsequently contested. Rancière calls this the process of ‘subjectivization’. Even though a particular group of people lacks the right to have rights, they act and speak as if they enjoy this and by doing so they manifest their equality. In this view, mutual recognition is not necessary or desirable for genuine politics per se, as is the case with an Arendtian perspective. Instead the political is formed by those that enact equality in a position of inequality.¹³⁶

Rancière provides us with an example of a woman, Olympe de Gouges, during the French Revolution. She claimed that in a situation in which women were ‘entitled to go to the scaffold, they are entitled to go the assembly’.¹³⁷ At that time de Gouges, as all women, was an equal born woman, but unequal citizen that was supposedly only suitable for a mere private life and was not allowed to vote or be elected. However, at the same time women who opposed the revolution, were sent to the guillotine. In other words, they were sentenced to death because of a political reason. By dying a political death, the mere life of these women ended up in the realm of politics where they were finally treated as equals to their male contemporaries. De Gouge’s line of reasoning illustrates that the barrier between the private and the political life is not as clear cut as Arendt suggests.¹³⁸ Politics, thus, involves a normative dimension of an open-ended claim (by means of political action) to citizenship.

When you go a step back to Rancière’s formulation of the Rights of Man that are the rights of those who have not the rights that they have and have rights that they have not, you see that these women could illustrate, due to the rights laid down in the Declaration, that they were stripped of rights they should have had. But at the same time they claim, through public activity,

¹³⁴ Rancière, J., 2004, p. 303.

¹³⁵ Schaap, A., 2011, p. 34.

¹³⁶ Ibid. p. 35.

¹³⁷ Rancière, J. 2004, p. 303.

¹³⁸ Ibid. p. 303-304.

those rights denied to them, such that they were able to enact those rights.¹³⁹ In doing so they have created a scene of dissensus through which a group is established that is no part of the current political landscape but demands to be. As such, these women make themselves count as speaking animals.¹⁴⁰ Monika Krause, by reflecting on the struggle of the sans papiers, sees this as a process not in which they ‘ask for recognition of their status, but for the end of their identity as imposed by the state’.¹⁴¹

To recapitulate, two main differences between Arendt and Rancière have been identified above. Firstly, Rancière views politics in terms of a process of subjectivization, where rights activation depends upon people on which they could but do not yet apply.¹⁴² Because of this specific outlook on the political, Rancière argues that Arendt, in a way, understands politics in essentialist terms. Not that she identifies the human with some sort of essence. But she associates authentic politics with the realization of a specific human potential.¹⁴³ Aside from this, where for Arendt equality is the fundamental precondition for politics, to Rancière equality is a presupposition of politics. In later case, equality is important insofar as there actually exists social inequality, however, it does not embody any concrete content itself.¹⁴⁴

Besides these differences, it is my view that Arendt’s own perception on human rights politics is still more closely related to Rancière, Lefort and Balibar, than to the other discussed interpretations of the right to have rights. This is because they all share a perception of human rights politics that is based on praxis. For Arendt this meant the creation of an intersubjective space of appearances, in which subjects enjoy freedom and equality by means of recognition. Hence, equality is not naturally given to us, but is achieved through practice by guaranteeing each other, as members of a group, mutual equal rights. For Rancière, those that are excluded enact equality by claiming the rights they do not yet possess, but by challenging the prevailing social structure they become a part of it. By putting the emphasis on dissensus, Rancière circumvents Arendt’s problem that arose by the limits of the practices of mutual recognition. Rancière is able to do this because of his different understanding of what politics is and who has access to it. To Arendt only people who possess ‘speech’ have access to the political. Rancière removes this limitation by also including all the potential ‘speech’ possessors.

¹³⁹ Ibid. p. 304.

¹⁴⁰ Schaap, J., 2011, p. 36.

¹⁴¹ Krause, M., *Undocumented Migrants: An Arendtian Perspective*, *European Journal of Political Theory* 7(3), 2008, p. 342

¹⁴² Ingram, J.D., 2008, p. 412.

¹⁴³ Schaap, J., 2011, p. 38.

¹⁴⁴ Ibid. p. 38-39.

Whereas, with the interpretation of the use of power to implement rights, rights enjoyment was still dependent upon another greater power to grant them, with Arendt one will always be dependent on others for recognition as well. With Rancière's conception of human rights politics, however, rights realization is solely based upon the right bearers and claimants themselves. This way, rights can be acquired by potentially everyone; they just have to claim them yet.

V Conclusion

In the course of this paper we have come across various difficulties surrounding human rights securement. In chapter II it became clear that there exists an inherent friction between national sovereignty and the apparent universality of human rights. Additionally, Arendt's conceptual disjunction between the citizen and the human demonstrated that the prevailing human rights discourse based upon the nature of men did not offer an adequate answer to the grave problems that arose in the modern age. Against this, Arendt argued that equality was not given to us by nature, but is only achieved through political practice. It is by virtue of belonging to a political community wherein everyone guarantees each other mutual equal rights that one is considered an equal. Arendt, therefore, stretched the need to see human rights in a different light. Accordingly, she established a new right, the most important right of all: the right to have rights, the right to action within a political community.

With her aporetic approach Arendt tried to rethink human rights and its practices, which has proven to be very successful, considering how others after her have tried to interpret her notion of the right to have rights in various ways. Moreover, her accounts of action, civic initiative and republic federalism in her later works, are particularly useful for establishing a way of thinking about structuring society, such that the new law on earth whose validity comprehends the whole of humanity, while restricted in power and controlled by newly defined territorial entities, can be actualized. However, there is a lot of validity in Rancière's claim that Arendt's static conception of the citizen as opposed to man does not offer the rightless a solution by which they are able to regain their rights. Arendt herself was already aware of the practical limitations of her mutual recognition thesis.

If we really want to guarantee rights to those that need them, the stateless and the refugees, the sick and retarded, we need to read Arendt in combination with the interpretations discussed here. In particular, the interpretation that understands rights in terms of just institutions and laws and the one that sees rights as action from below

The conception of human rights based upon just institutions and laws, as explained by Habermas and Benhabib is useful because rights are dependent upon institutions and laws to secure them. As Arendt explained, the creation of a good framework of law is necessary for the maintenance of a space where free politics could be exercised. Following the cosmopolitan perspective, these institutions should also be of a global or regional nature. An example is the European Court of Human Rights, a supranational institution that, although created by the

ratification of sovereign states, provides individuals with a way to challenge alleged rights violations of member states. However, rights should not be reduced solely to formal institutions, precisely because they depend on someone else than the right claimant to be enforced. Rights can only be truly secured when they rely on their own bearers or claimants and are an expression of one's own autonomy.

With Allott we have seen that state sovereignty is only one of the possible ways in which we can structure our world. It is the outcome of choices made in the past specific social choices. Choices that emerge from the human mind. Therefore, with the power of ideas we can think of a more social way of structuring society and we should reshape society accordingly. However, Allott's vision of the good ordering of a society, based upon individual democratic participation, seems to enshrine the idea, that a society structured this way will necessary result in a morally just society for everyone. Therefore, it seems that he views humans as beings that are morally just by nature. It is precisely such a human nature that Arendt tried to reject. I think that with a world view and structure directed at humanity as such, democratic politics would indeed create more individual responsibility and solidarity, and therefore would result in a more just world. However, the possibility remains that within such a society created from the bottom-up, certain vulnerable groups of people, which can differ per time and place, are still not being recognized. Taking Ranciere's approach we can understand how these excluded people, the absolute others, as he calls it, can enact the rights they do not have, as if they have them, so that they too find their place in society.

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