

Civil identity and 'bare life': Arendt and Agamben's challenge to human rights

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Introduction

Those familiar with the thinking of Hannah Arendt and, recently, with that of Giorgio Agamben will know that they pose a number of difficulties — related to issues of civil identity and the emergence of biopolitics — for a defence of human rights (see Arendt 1968 and Agamben 1998; 2005). With human dignity and therefore human rights being violated — often horrendously — throughout the world on a daily basis, Lord knows that a defence is sorely needed. While neither Arendt in her time, nor Agamben today, is optimistic, their work, because it examines rights in relation to the art of governing, must be engaged with if any headway is to be made in making human rights more universally plausible. A key point here is that human rights, unlike citizen rights, are not acquired or bestowed, but are deemed to be naturally inherent in being human. Indeed, the more legalist term, 'rights', could be thought to be more metaphorical than actual, as what is effectively being defended is the human being as a moral and political existence. Arendt, and Agamben in her wake (a point reiterated by Fitzpatrick (2005, 72 note 27)), are dubious about rights or a legal status that stems from pure existence — Arendt because for her, the art of politics is creative action in the public sphere, not activity in the private sphere related to the satisfaction of physical needs; and Agamben because natural, physiological and biological existence itself has, as 'bare life', come to assume a political importance not previously grasped.

Two historical events have come to reveal the vulnerability of human rights understood as a natural inheritance. For Arendt, the event is the re-drawing of the map of Europe after World War I and the subsequent creation of stateless people: people without a civil identity. For Agamben, it is 9/11 and its aftermath: the 'war on terrorism', which produced the Guantánamo Bay internment camp, and the suspension of the Geneva Conventions. Neither event in itself is the cause, both authors respectively affirm, of new violations. Rather, each serves to reveal a

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vulnerability that is at the very heart of human rights as a concept and which would have continued to exist even if such political events had not intervened. In other words, human rights defence, as conventionally understood, is not just about contingent action but, more importantly, is about the legal and political framework which is supposed to give 'force' to these rights. To speak of 'force' here does not imply making exclusive recourse to legal history, much as Agamben's etymological and philological approach, with its references to ancient Roman legal terms, might encourage such an assumption. Thus, when Peter Fitzpatrick, no doubt correctly, points to Agamben's extravagant use of Roman law in relation, particularly, to the status of *homo sacer*¹ and to his questionable history of habeas corpus (Fitzpatrick 2005, 55), the main thrust of Agamben's essentially political approach begins to be obscured. But, given that Agamben's concerns are political rather than legal, why does he persist in this way? While a complete answer to this question is not possible here, two lines of inquiry are relevant: the first concerns Agamben's claim that he is not a historian but a researcher who works 'with paradigms' (Raulff 2004, 610). A paradigm, according to our author, who also provides additional information about his method, is:

... something like an example, an exemplar, a historically singular phenomenon. As with the panopticon for Foucault, so is the *Homo Sacer* or Muselmann or the state of exception for me. And then I use this paradigm to construct a large group of phenomena and in order to understand an historical structure, again analogous with Foucault, who developed his 'panopticism' from the panopticon. But this kind of analysis should not be confused with sociological investigation. [Raulff 2004, 610.]

So, to summarise, Agamben's claim is that his is a paradigm approach, not a historical or sociological one. Furthermore, at the start of his analysis of Jacques Derrida's lecture 'Force de loi: le "fondement mystique de l'autorité"',² Agamben makes another statement of clarification regarding his relation to legal culture: 'the fact that no one attempted to analyse the seemingly enigmatic formula that gave [Derrida's] text its title is an indication not only of the complete separation between philosophical and legal cultures, but also of the latter's decline' (Agamben 2005, 37). In short, legalists are not aware of the key philosophical questions which underpin the law as a whole. I believe, as I reiterate below, that

1 'Homo sacer': the one who may be killed but not sacrificed; the one whose killing does not incur a charge of homicide: the model of 'bare life' for Agamben, as we shall later see.

2 The full text, Parts 1 and 2, is published in English as Derrida J (2005) 'Force of law: the "mystical foundation of authority"', trans Mary Quaintance, in D Cornell, M Rosenfeld and D G Carlson (eds) *Deconstruction and the Possibility of Justice* Routledge, New York and London 1992.

Agamben's paradigmatic and philosophical stance needs to be taken into account in any immanent critique of his work.³

In what follows, I give an exposition of the key ideas relating to rights and politics in the work of Arendt and Agamben before offering some thoughts, in light of their thinking, on where we now stand in affirming human rights.

Arendt on civil identity and its erasure: the stateless person

To engage with Arendt's view is to engage with the most sophisticated exponent of the theory of what civil identity can mean in relation to being human. With civil identity, revealed uniquely in the public domain, *who* somebody is comes to take precedence over *what* somebody is. The *who* reveals itself in speaking and acting in the public space, over and beyond the appearance of the *what* (Arendt 1958, 176–81). Arendt thus valorises the public sphere in a way that is quite unique. Engaging with this argument, which embraces the idea of civil identity, can lead to a deeper understanding of the place today of cultural difference in societies of a European complexion. But I will not venture there in this discussion.

Recalling the terms used to define 'life' in classical Greece, Arendt shows that *Zoé* refers to the domain of necessity and labour, to life as biological survival, as the private sphere excluded from the domain of law. This is the sphere of *what*, of objects, not of *who*, of subjects. *Zoé* was the life lived by slaves, the life of biological survival from which they could never escape. *Bios*, by contrast, referred to the domain of freedom, to life as a way of life, life as action and creativity — as politics. As we shall see, Agamben also refers to these categories. But whereas Arendt implies that the realm of necessity, the realm of *Zoé*, should be excluded from the public sphere of freedom, due also to the fact that it includes the domain of the social, Agamben discusses the need for *Zoé* as 'bare life' to be brought within reach, if not of law as

3 These two claims by Agamben — that he is working with paradigms and that legal culture is philosophically ignorant — are contested, especially in light of the sophisticated work now being carried out in legal sociology and history. It will be said that Agamben wants to have it both ways: he wants to pinpoint a paradigm (*homo sacer*) and also give this paradigm historical validity. If we followed Fitzpatrick (2005), it is clear that the latter claim is found to be seriously wanting. This issue — legal history versus paradigm — requires attention that cannot be given here. Instead, the key argument of the paper is that, even if Agamben's legal history is found to be wanting, the ideas of 'bare life (*Zoé*)', 'state of exception', state of sovereignty as a state of emergency, have a plausibility that calls for them to be addressed — which is precisely what scholars are doing, even legalists.

such, then certainly of ethics and language. Thus, civil identity, for Arendt, is part of the world of bios (of freedom), not of Zoé (of necessity).

More specifically, Arendt's theory re-opens issues relating to human rights and national sentiment. As we shall see, she provides a poignant picture of those bereft of civil identity, and shows why the public sphere is crucial to citizenship.

The importance of civil identity emerges most strongly in Arendt's argument in *The Origins of Totalitarianism*. This is confirmed in the discussion of 'stateless', or 'displaced', persons (Arendt 1968, 147–82). Although it is not initially apparent, Arendt raises the question of the place of transcendence in the political process in an important way.

A stateless person, then, particularly a European stateless person between the two world wars, is an anomaly. Being without a civil identity, such a person is subject to no law, and is not the subject of any law. Although potentially criminals, stateless people are in fact entirely outside law, outside justice, beyond the boundary of human and civil rights. Being without the right of residence or of work, stateless persons could be imprisoned without ever having committed a crime. In the often appalling conditions of their civil anonymity — conditions which made them victims of arbitrary police harassment — committing a crime could become a way of rising above the abject status of an anomaly. In a lengthy and telling passage, Arendt elaborates:

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 by the 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. Only as an offender against the law can he gain protection from it. As long as his trial and his sentence last, he will be safe from the arbitrary police rule against which there are no lawyers and no appeals. The same man who was in jail yesterday because of his mere presence in this world, who had no rights whatever and lived under threat of deportation, or who was dispatched without sentence and without trial to some kind of internment because he had tried to work to make a living, may become almost a full-fledged citizen because of a little theft. Even if he is penniless he can now get a lawyer, complain about his jailers, and he will be listened to respectfully. He is no longer the scum of the earth but important enough to be informed of all the details of the law under which he will be tried. He has become a respectable person. [Arendt 1968, 166–67.]

Later, Arendt adds:

The clearer the proof of their [the civil authorities'] inability to treat stateless people as legal persons and the greater the extension of arbitrary rule by police decree, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police. [1968, 170.]

So, in a society where there is no credible principle operating above the cut and thrust of the everyday pragmatic sphere, control of affairs is likely to fall into the hands of the police. The pitiful portrait of the displaced person highlights the logic underlying civil identity. It is a transcendent logic enshrined in law; it enables the citizen to belong to a polity, with all the rights and obligations that this might entail, and despite what has subsequently been discussed in relation to needs and equality in the notion of 'social' citizenship (see Marshall 1950).

Extreme as Arendt's picture of the stateless person might have appeared to be a decade ago, it now touches on processes at work today.⁴ It shows that the erasure of civil identity might be as disastrous as the construction of an identity which is imposed on people. For Arendt, a legal status — which bestows a civil identity — is absolutely crucial to being human. To be deprived of this status, as the Jews were under Nazism, and as the Kulaks and many others were under Stalinism, means being without a law of any kind. Clearly, the Stalinist use of psychiatry often aimed to expunge civil identities through expunging identity *tout court*. Such deprivation, says Arendt, is the true basis of a totalitarian government in a police state. Totalitarian regimes do not have enemies. Only despotisms do. Such regimes work by erasing otherness from the symbolic order. Practically, this means erasing the identity, not primarily of those whom it dislikes or distrusts (although, of course, this often happens as well, as when the Nazis opposed the communists), but of those scapegoats from whom it has, in reality, nothing whatever to fear. Totalitarian rule is based on the terror of rendering the innocent anonymous, especially in civil terms. This is not essentially the terror of bombs and summary executions, but the terror of bureaucratic efficiency become detached from any concern to justify an end. Thus the Nazi persecution of the Jews, at its heart, amounted to the search, in Arendt's terms, for the most efficient way to render the Jews anonymous, to make them civil non-persons, to reduce them to 'bare life', as Agamben notes (see Agamben 2002). We would do well

4 Refugees interned in Australia — people who literally lack a civil status — were they to escape and thus break the law and be arrested, would thereby receive all the rights of a normal prisoner: access to a lawyer, visitors, etcetera — things denied to them as stateless persons in the internment camp.

to remember this today when some are expressing concerns as to whether any (European) state apparatus can really do justice to diversity and to difference.

Although the main issue raised by stateless people concerns the relationship between transcendence and pragmatism, there are further aspects to be considered. While some stateless people were undoubtedly able to exploit their statelessness and avoid certain obligations, the majority suffered the insecurity provoked by the arbitrary actions against them. Although the French Revolution inaugurated the principle of the universal 'Rights of Man and of the Citizen', it failed to show how these universal rights could be enforced other than through national legal systems — through, in other words, the accompanying principle of national sovereignty. However, as Arendt reminds us, '[t]he Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon minimum rights, no authority was left to protect them and no institution was willing to guarantee them' (Arendt 1968, 171–72). In theory, human rights should have been the foundation of government, whether national or international. For government is embodied in a state apparatus, a legal structure of rights and obligations, and of political and administrative principles. In practice, the state became confused with 'nation' as embodied in the language and culture (the 'soil') bequeathed by history and tradition. Legitimate members of a state had thus become confounded with the bearers of a particular nationality. Rights had yet to hold sway over national sovereignty — that is, over specific national histories and traditions. Minority treaties worked out to protect displaced minorities in the inter-war period gradually gave voice to what was implied in the notion of nation-state, 'namely, that only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions' (Arendt 1968, 155). In sum: 'the nation had conquered the state, national interest had priority over law ...' (1968, 155). As such, the sovereignty of a people (nation) came into conflict with 'the Rights of Man'. On what basis could the violation of human rights within the sovereign boundaries of one nation be challenged? Or again: on what basis could human rights be enforced?

This question is even more difficult to answer today because although national boundaries are perhaps easier to cross in a literal sense, acquiring citizenship in another nation-state has become increasingly difficult. The sovereign nation-state, as the only possible guardian of human rights, often sanctions human rights abuses. The closer we move towards 'nation', the further we seem to move from away from abstract human rights.

As we know, Marx (and before him Edmund Burke, but in a different way) condemned the human rights in *On the Jewish Question* because they implied, first,

that the individual was prior to, and essentially distinct from, society and, second, that human rights were ultimately the rights of the bourgeois individual — not of individuals per se — for whom the idea of the priority of the individual was a convenient support for capitalist society based on the dominance of the bourgeoisie, as it justified egoism and the pursuit of self-interest. In short, the abstract nature of 'rights' disguised the class basis of capitalist society. Human rights cannot be separated from civil rights, for the individual is always located in a socio-political context, never isolated in a mythical 'state of nature'.⁵ In capitalist society, commodities, money, symbols 'mystified' the situation. What appeared to be relations between individuals in the market place was in fact the articulation of class relations in a historically specific form of society. Behind the abstraction of individuality, Marx saw real, communally based, human labour power, the true basis not only of value, but of the political and legal 'superstructure' that gave expression to human rights. By analogy, the committed nationalist says that behind the appearance of the state lies the history and tradition of a people, the real, material basis, as it were, of the modern nation-state.

From another angle, the nationalist often speaks about 'community'. Such a community would be composed of those who are essentially included in the nation and who recognise themselves and others as part of the same heritage (linguistic, historical, etcetera). 'Community' here connotes Weber's notion of 'ethnic group' as related to *Heimatsgefuehl* (identification with a homeland). As only those who belong to the community of the nation can effectively have rights, the first among rights becomes the right to be the member of a national community. In this sense, stateless persons and, after the war, 'displaced persons' had, and have, no rights:

The calamity of the rightless [says Arendt] is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion — formulas which were designed to solve problems *within* given communities — but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them. [Arendt 1968, 175–76.]

Before Jews were exterminated, Arendt adds, the Nazis first made them 'rightless': they made sure that they belonged to no political community, and were thereby deprived of any vestige of civil or even psychological identity. Thus, in his memoirs of captivity, Robert Antelme (sometime husband of Marguerite Duras) writes that the

5 For further commentary on this, see Brown (2003) and Roth (2004).

more the SS reduced him and the other prisoners to indistinctness and anonymity, the more distinctions were insisted upon in the group: 'the more the SS thought they had reduced us to indistinctness and to irresponsibility — of which we incontestably presented the appearance — the more our community in fact contained distinctions, and the stricter they were. The man of the camps is not the abolition of these differences. He is, on the contrary, their actual realisation' (Antelme 1957, 93). Under these circumstances, freedom is physically possible but also meaningless because it is not recognised within the framework of a community. This notion of community therefore presupposes a frontier as the condition of possibility of community as such. Without division, there can be no unity of rights. In Arendt's terms, 'division', 'distinction', 'difference' and what Arendt thinks of as essentially 'human rights' are all products of human organisation and of living in common with others. They are not natural, or given. Consequently, Arendt would differ with Antelme when he writes at a later point in his memoirs that, ultimately, and beyond all differences, 'there is one human species' (Antelme 1957, 229), and that it is for this reason that the SS are impotent before the prisoners in the camp. This is to say that the very givenness of each one's humanity condemns to failure the effort to construct a radical difference between camp inmate and prison guard.

The positive view of the essentially immanent nature of the human implied in this claim is what Arendt sets out to contest. Her position, by contrast, is characterised by a positive view of transcendence. For her, it is only because the human is essentially transcendent that actual human beings can be reduced to the misery brought by the erasure of their civil identity — the identity which derives from a profession, citizenship, an opinion (as opposed to solitary thinking), a public action (Arendt 1968, 182). That the *who*, as we have said, comes into appearance in the public sphere and can only make its appearance there; it is revealed in speech and action, despite the intensions of the subjects involved. Who one is, we recall, is quite distinct from what one is, even if the *what* (the person's 'qualities' are the means by which they are revealed) enables the *who* to appear, or to be disclosed. The human thus requires that the public sphere be maintained in its integrity in order that the essentially human (the *who*) might appear. Civil identity is thus crucial to the appearance of the *who*. 'Because of its inherent tendency to disclose the agent together with the act, action needs for its full appearance the shining brightness we once called glory, and which is possible only in the public realm' (Arendt 1958, 180).⁶

Community, therefore, will have to be brought into this transcendent sphere where it will in no way be equivalent to a private domain (where people live in a state of

6 The 'who' and the 'what' are also part of the 'aletheological' (veiling/unveiling) view of being and truth inspired by Heidegger's philosophy.

natural difference); nor will it be equivalent to ethnic identity. Arendt's notion of ethnicity is a state of 'natural givenness'. Just to have an identity based on ethnicity, or on natural difference, is to render impossible the attainment of true equality. 'Our political life rests on the assumption that we can produce equality through organization ...' (Arendt 1968, 181). In effect, equality is not the result of natural conditions, but of human action. 'The dark background of mere givenness, the background formed by our unchangeable and unique nature, breaks into the political scene as the alien which in its all too obvious difference reminds us of the limitations of human activity ...' (1968, 181). According to Arendt, 'mere differentiation' cannot serve as the basis of equality; it cannot, of its own accord, emerge into significance. For this it needs the 'human artifice' of abstract rights, rights that can only be articulated by a civil life within a community (1968, 181). If there are to be abstract rights, Arendt claims, these must have an environment, or a context — a community — in which they can have meaning. Universal human rights that are not grounded in a particular civil framework cease to promote the truly human, for the most general of rights can just as easily apply to animals, or to other living entities. The human, therefore, has to be more than acts in the interest of survival (compare Agamben). Indeed, human action has to be more than the liberty to act in general. An act which has the entire world as its context would, in human terms, be meaningless. And in terms of the implementation of human rights, a world perspective is a recipe for failure, for there can be no higher authority than the world body to call upon to enforce rights. When such a body fails in its task, everything fails. On the other hand, when nations fail, there is still the possibility of pressure being brought to bear by other nations.

Agamben on bare life

Concerning Agamben, we can certainly say that Arendt's work has inspired his. However, he seeks to go beyond Arendt's pessimism regarding the impossibility of bringing 'bare life' (Arendt's 'necessity'), based on the theory of the Roman law notion of *homo sacer*, into the political community — even if he is sceptical about the success of human rights being affirmed if they are based in the mere fact of being human.⁷ Agamben also argues that the 'camps' are the one domain not sufficiently addressed in Arendt's theory. He thus attempts, as we shall see, to correct this. First, it is necessary to understand where 'bare life' fits into the framework of modern politics.

7 Peter Fitzpatrick, who challenges the validity of Agamben's enterprise, acknowledges that Arendt is one of the main sources in Agamben's book *Homo Sacer* (see Fitzpatrick 2005, 72 note 27). Fitzpatrick's critique of Agamben's reconstruction of the Roman origin of the law in relation to *homo sacer* has gained considerable acclaim. See Vogt (2005, 200–01 note 17) and Benjamin (2005, 168 note 1).

As well as the Greek distinction between *Zoé* and *bios*, Agamben is interested in the focus on bare life (*Zoé*) that emerges in Foucault's theory of 'biopolitics'. First mentioned as early as 1976 in the last chapter of the first volume of the *Histoire de la sexualité* (Foucault 1976, 183), the term was further elaborated in lectures Foucault gave in Paris at the Collège de France in the academic year 1978–79. Like the theme of governmentality, biopolitics has become an important aspect of Foucault's thought, even though it was never the subject of a full-length book, and it is quite different to the approach Foucault takes to the history of sexuality, where the individual subject assumes centre stage.

Although managed within a political framework of liberalism, biopolitics has a population rather than the individual as its focus. It first arises in the 18th century and is defined by Foucault in the summary of his course as 'the way attempts were made to rationalise the problems raised for governmental practice by phenomena proper to a collection of living beings constituted as a population: health, hygiene, natality, longevity, races' (Foucault 1989, 109). Debates in England in the 19th century around public health are thus an indication of the emergence of biopolitics. While, for Foucault, biopolitics pushes the juridical framework to one side in relation to power and entails that the management of the biological life of the people as a population becomes the focus of attention, Agamben is keen to retain the juridical perspective and to link it to biopolitics. The latter he sees as the emergence, in the political domain, of 'bare life', after so many centuries of its exclusion (recall that it was *Zoé* in ancient Greece).

For Agamben, then, biopolitics brings with it the echo of Roman law, where *homo sacer* is the one who cannot be sacrificed (cannot have a definite legal or moral status, is prior to the law), yet is the one who can be killed by anyone — because of this entity's bare life status. *Homo sacer* is the point of exception that gives the law its capacity to function according to the normal case. The law needs an outside, external element in order to constitute its internal order. *Homo sacer* is thus included in the legal system only by being excluded. It also has the status of the exception. For the exception is also included within sovereignty by being excluded. This is the most complex and paradoxical aspect of Agamben's theory and, after mention of the role of the exception in Roman law in *Homo Sacer* (Agamben 1998, 22–23), the discussion turns to the way the logic of the exception might be understood in set theory, as developed by the French philosopher-mathematician Alain Badiou (Agamben 1998, 24–25). Within set theory an element can be a member of a set without being included, or it can be included without being a member. Set theory, in short, provides an explanation of relation where otherwise there would only be totally isolated and separate elements. It is a way of thinking what would otherwise remain unthinkable. On the other hand, the question of whether what becomes, in Agamben's hands,

such a politically charged notion as homo sacer can be translated into a mathematical formula needs further consideration, something that is not possible here.

The 'sacer' in homo sacer evokes the sacred, but not as sacrifice. Sacrifice entails purification and consecration prior to the act of killing (the sacrifice). The point made in the Pompeius Festus treatise *On the Significance of Words* — frequently reiterated by Agamben (Agamben 1998, 71) — also appears in Émile Benveniste's *Indo-European Language and Society* (1973), to wit: 'A man who is called *sacer* is stained with a real pollution which puts him outside human society: contact with him must be shunned. If someone kills him, this does not count as homicide' (Benveniste 1973, 453). Initially (in ancient Greece, for example), life in itself is not sacred. It only becomes so in the course of history, and so part of Agamben's task, as he sees it, is to spell out how life as 'bare life' becomes implicated with the sacred.

Homo sacer, then, is the outcast who can be killed, but not sacrificed. Sacrifice is a ritualised activity and thus has a quasi-legal status as it is enacted according to forms of the law (Agamben 1998, 102). Homo sacer is never subjected to 'sanctioned forms of execution' (1998, 103). Thus, 'sacer', in the sense Agamben focuses on, is 'bare life', is 'Zoé': the fact of being alive and nothing more, the fact of life exposed to death.

Along with Fitzpatrick's criticism of Agamben's reading of the Festus, on whom Agamben relies for his interpretation of homo sacer, is van der Walt's critique, in an article dealing with the whole issue of the nature of sacrifice in deconstructionist thought as well as in Agamben (van der Walt 2005). Van der Walt is sceptical as to whether there can be any non-sacrificial life, as Agamben claims (see van der Walt 2005, 279), and he ponders over the strength of Agamben's insistence on the non-sacrificial nature of the killing of homo sacer. As he points out in a lengthy footnote, for him, Agamben's 'biopolitical narrative in *Homo Sacer* could have been told as well without this insistence' (van der Walt 2005, 279 note 5).⁸ So, the question for van der Walt is: 'Why does [Agamben] make so much of *Homo Sacer* as the one who could not be sacrificed?' (van der Walt 2005, 287).

8 Note here the above reference to Benveniste, whose definition of the homo sacer includes the point reiterated by Agamben that homo sacer can be killed but not sacrificed. To the non-specialist, if Agamben is wrong in his reading of Festus on the distinction between bare life and sacrifice, then presumably the world-renowned linguist is also wrong. For critiques of Agamben on this issue, see Fitzpatrick (2005, 51–53) and van der Walt (2005, 279 note 5). Both critiques, in their own way, dispute the validity of the category of 'bare life'. Both tend to make law or sacrifice entirely primary, so that there is no domain exterior to the law (Fitzpatrick), or one exterior to sacrifice (van der Walt).

In contrast to van der Walt (2005, 278),⁹ a key political implication for Agamben is that it is a big mistake to see the Holocaust as a form of sacrifice. Rather, the Jew becomes homo sacer (can be killed by anyone, but not sacrificed). 'The dimension in which the extermination took place is neither religion nor law, but biopolitics' (1998, 114). As has been mentioned, the work of both Foucault and Arendt is limited to the extent that it does not include a consideration of the 'camps', and we will expand on this shortly.

Sovereignty and the exception as bare life

'[T]he production of bare life', says Agamben, 'is the originary activity of sovereignty' (1998, 83). The point is that the sacredness of life is currently claimed to be opposed to power, whereas homo sacer implies that sacredness is constitutive of power. A symmetry exists between the two. Sacredness (inclusive exclusion) becomes the original mode of the inclusion (as that which is excluded) of bare life in the juridical order. Life is sacred only to the extent that it is 'taken into the sovereign exception' (1998, 85).

Quite pointedly (for it touches upon post-9/11 politics), a state of exception gives force to sovereignty: after Carl Schmitt, whose work is analysed in Agamben's more recent work, *State of Exception* (2005), Agamben says that the one is sovereign who can determine the state of exception. The paradox of sovereignty is that the sovereign, like homo sacer, is both 'outside and inside the juridical order' (Agamben 1998, 15). According to Schmitt, liberalism is unable to understand the true nature of politics because it assumes that, on the whole, the juridical system will incorporate political events, will anticipate them and so make legal relations the dominant form of political relations. One should think here of constitutions setting the ground rules of political conduct and the court system as ensuring that constitutions are adhered to by all parties. Were such circumstances to be the norm, there would not be any issue of establishing the nature of sovereignty. However, Schmitt argues, political life is subject as much to the contingent and the unpredictable as it is to any normality anticipated by the law. The contingent and the unpredictable form the basis of the state of exception. The sovereign must, first of all, decide when a state of exception exists and, second, decide upon strategies

⁹ As van der Walt notes (2005, 278), Philippe Lacoue-Labarthe also argues that death at Auschwitz and the other camps, because it was purely and simply a technical exercise, had absolutely no sacrificial aspect (Lacoue-Labarthe 1987, 62). Surely this is true, particularly as the Jews had their civil identities expunged in order that they could be treated as complete nonentities, and surely it is a kind of obscenity to propose that sacrifice might have been involved in such circumstances.

— including the suspension of normal legal processes — to deal with it. These include, above all, calling a state of emergency. There is thus a correlation between the sovereign and the exception. The exception has no power as such (for the exception is determined by the sovereign); however, without the exception, it would be impossible for sovereignty to be and to maintain itself. Following Jean-Luc Nancy, Agamben invokes the old German term 'ban' to describe exclusion (Agamben 1998, 28–29). He who is banned by the law is not simply set outside the law, but is 'abandoned by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable. It is literally not possible to say whether the one who has been banned is outside or inside the juridical order' (1998, 28–29, Agamben's emphasis). Thus, the law both posits the sovereign and makes the sovereign the one who is also outside the law. This is the paradox of sovereignty.

The issue arising for contemporary societies with their juridical systems, and in particular for Western-style liberal democracies, concerns the extent to which the empty space beyond (and within) the law is taken up by violence. For, with the law (legally) suspended, the will of the sovereign becomes supreme. This 'will' can be imposed on a situation with any means chosen by the sovereign, and these might well include violence. Indeed, the sovereign in Hobbes is precisely the extent to which the state of nature 'survives in the person of the sovereign' (1998, 35), and we know that this state is one where, famously, people live in fear of violent death and the life of man is 'solitary, poor, nasty, brutish and short' (Hobbes 1962, 100). In the state of war, 'nothing is unjust' (1962, 101).

Here then is the worry behind the paradox of sovereignty: the risk that a sovereign might resort to violence in an irresponsible way. Agamben points, for example, to the suspension of law in the 'war on terrorism' with respect to those interned by America at Guantánamo Bay. Such prisoners had no, and now only minimal, legal identity and recall the plight of stateless people referred to by Arendt.¹⁰ Agamben also cites the arbitrary policies involving the suspension of the law being employed to deal with asylum seekers. Increasingly, asylum seekers are purposely processed and their

10 It is true that, unlike stateless people, the Guantánamo prisoners have now become the focus of legal processes that have taken place in the US Supreme Court, a point reiterated by legal theorists (see, for example, Johns 2005, 613–35). However, in principle, such legal considerations would cease were the 'war on terror' to intensify. Thus, on the one hand, Agamben's uncompromising stance perhaps needs to be nuanced; on the other hand, the US has been quite clear that the context is a state of war and that, therefore, exceptional/emergency measures are justified, including the suspension of rights, in order that the war against terror can be successfully waged.

claims assessed outside the boundaries of any state, in international territory. They thus have no legal status and cannot appeal to any authority if their human rights are violated. They are non-persons, as Arendt showed. Agamben's point is that the condition of the asylum seeker seems to be the general condition on the horizon, as ever-larger numbers of people find that conditions have become impossible within the state of origin. Increasingly, too, therefore, the political entity of the nation-state becomes unequal to the challenge of this new political reality. It is unable, for example, to guarantee human rights by virtue of a person's humanity, founded as it is on essentially legal principles.

Law can be in force without significance, as illustrated by Kafka's *The Trial* (1968) and as demonstrated to be the normal case by deconstruction. Moreover, the 'force of law' is the phrase used when the sovereign rules by decree, the latter being said to have the 'force of law'. 'Force of law' implies that what would normally be outside the law (arbitrary will) is brought inside. Decrees founded on violence (sovereign violence) mean that a zone of indistinction is introduced between law and nature, outside and inside.

Human rights and 'bare life'

What is the connection between human rights and the nation state? Natural, or bare, life is the subject of the French Declaration of 1789, not the free self-conscious individual. Also, the Declaration separates active rights of the citizen from passive rights acquired by virtue of one's humanity. The same is true of the United Nations Declaration on Human Rights of December 1948. Can passive rights (those acquired simply by virtue of being human) be sustained and defended? The record is not good when it comes to supporting refugees and stateless people.

Refugees put sovereignty in question because they cannot be classified in terms of 'blood and soil', 'nativity and nationality' (compare the German 'blood and soil' and the juridical *ius soli* and *ius sanguinis*, from Roman law), but only in terms of passive human rights (Agamben 1998, 131). The problem is that human rights are linked to the rights of the citizen. Bare life has no rights (Arendt more or less supports this). And Agamben points to the inadequacies of attempts to defend the human rights of refugees and stateless people on the basis of passive rights derived from the fact of being human:

What is essential is that, every time refugees represent not individual cases but — as happens more and more often today — a mass phenomenon, both these organisations [Bureau Nansen (1922) and the UN High Commission for Refugees (1951)] and individual states prove themselves, despite their solemn invocations of the 'sacred and inalienable'

rights of man, absolutely incapable of resolving the problem and even of confronting it adequately. [1998, 133.]

The problem concerns the separation of the rights of man from the rights of the citizen. Rwanda is an example where human life, as sacred, could be killed but not sacrificed.

As Arendt said, human rights are connected to the fate of the nation-state, and when the latter declines, so does the defence of human rights. The implication is that globalisation impacts negatively on human rights.

In his chapter 'Biopolitics and the rights of man', Agamben takes up the question raised by Arendt (and also by Marx) as to whether human rights (rights derived from the fact of being human) can be separated from citizen's rights (rights acquired by being the member of a polity). The irony is that human rights were proclaimed so that those who had ceased to have the protection of a state or society to turn to could receive some protection, whereas, as soon as civil rights are inexistent, human rights seem to be an impotent weapon against violations of human dignity. Whatever the success in defending human rights, Agamben claims, 'bare life' is at the origin of rights, whether natural (passive) or civil (active). Agamben's point is that human rights cannot be separated from citizen rights because 'bare life' is at the heart of the *polis* and thus of citizenship. Human rights, indeed, when viewed in the context of refugees and other stateless people, allow the truth of 'bare life' as the foundation of the polity to become visible for a moment (Agamben 1998, 131). Like the figure of 'bare life' itself, the figure of the refugee is included in the political order by its exclusion. Unlike Arendt, who said that the stateless person placed the nation-state in question, Agamben says that such persons are a necessary part of the nation-state's existence. 'In the final analysis', he says, 'humanitarian organisations ... can only grasp human life in the figure of bare or sacred life, and therefore, despite themselves, maintain a secret solidarity with the very powers they ought to fight' (Agamben 1998, 133). Even more proactively, Agamben continues: 'A humanitarian separated from politics cannot fail to reproduce the isolation of sacred life at the basis of sovereignty, and the camp — which is to say, the pure space of exception — is the biopolitical paradigm that it cannot master' (1998, 134).

The camps and rights

The Nazi concentration camp is the exemplar of the space of the state of exception, created under the *Schutzhaft* (protective custody), which allowed for imprisonment without trial, and had no need for a juridical foundation in existing institutions. If rights, human and otherwise, can, in some way, be brought to the shocking image of

the camp survivor, something important will have been achieved. The question the camps raise in relation to rights is twofold. First, if, as Agamben maintains (and one can only agree), the camps, as a purely technical operation, are bereft of any aspect of sacrifice whatever, how can one speak at all about 'rights'? Rights entail some sacrificial content — that is, some ritualised and symbolic action. Of course, for those supporters of human rights outside the camps, it is important to keep attributing rights to the inmates of the camps, even if their actual condition as persons reduced to 'bare life' seems to make this implausible. Second, might there not be another — perhaps ultimately complementary — way of rendering dignity to the camp inmates, thereby restoring their humanity beyond the status of 'bare life'? Such, in effect, is Agamben's question, which he pursues through an expanded notion of witnessing.

The camp, then, is included in the political system through its own exclusion. 'Whoever entered the camp moved in a zone of indistinction between outside and inside, exception and rule, licit and illicit, in which the very concepts of subjective right and juridical protection no longer made any sense' (Agamben 1998, 170). Unlike previous uses of 'states of emergency' based on a factual situation, the camp is the 'most absolute biopolitical space ever to have been realized' (1998, 170), which served to confirm the power of the sovereign. No act committed against the inmates of the camps could count as a crime. How was this possible?

Without the camps, without refugees, without cases of life and death — that is, without factual situations — Agamben's thesis would have no meaning. In other words, it is not a matter of searching for the essence of the Western juridico-political system in the interest of a new political philosophy, but of understanding how, in light of the existing juridical imperatives, the most horrific political events of our era — from Nazi concentration camps to Guantánamo — could have come about.

Auschwitz

In his controversial *Remnants of Auschwitz: The Witness and the Archive* (2002), Agamben investigates how witnessing and thus testimony are possible in relation to the Nazi concentration camps, particularly Auschwitz. How is testimony possible? Agamben's view is that it *is* possible and that to deny this is to unconsciously accept the Nazi view that no one would believe the survivors of the camps when they described what happened. The camps become the focus of an inexpressible mystical realm. It is also important to link the camps to law, even if they are the negative aspect outside any juridical framework, and even if many (including Eichmann) wanted to put them entirely beyond the law and out of reach of everyday criminal activity. In *Homo Sacer*, Agamben asks, as he implies we all must ask: 'What is a camp, what is its juridico-political structure, that events could take place there?' (Agamben

1998, 166). And he controversially answers that 'in some way [the camp is] the hidden matrix and *nomos* of the political space in which we are living' (1998, 166).

Through a lengthy excursus inspired by Primo Levi's writing on surviving the camps, Agamben works above all to counteract the view that to understand Auschwitz is impossible, that being a witness to what happened is impossible, that attempting to put witnessing into some form of language is impossible — rather, all of this *is* impossible but we must confront and work with the impossible as a way of access to the human. The impossible itself must be symbolised in some way. 'No poetry after Auschwitz', as Adorno once said, is not what it's all about. Equally, for Agamben, Auschwitz is not about sacrifice, so the term 'Holocaust', which implies 'an unacceptable equation between crematoria and altars', must be abandoned. It must be abandoned, too, because 'it also continues a semantic heredity that from its inception is anti-Semitic' (Agamben 2002, 31).

Many, it is true, find Agamben's penchant to work in this context with paradox and even contradiction unsettling. Thus, Agamben will argue for the idea that the figure, in the camps, of one bereft of the last vestige of humanity, who is nothing but a survivor, who embodies bare life and nothing else — the *Muselmann* (Muslim) — is the one who can signify humanity most surely. Thus we read: '*The authority of the witness consists in his capacity to speak solely in the name of an incapacity to speak — that is, in his or her being a subject*' (2002, 158, Agamben's emphasis).

Using Émile Benveniste's theory of *énonciation* (enunciating act), which sees subjectivity established in the act of language, Agamben analyses the category of the *Muselmann*, described particularly poignantly in Primo Levi's writings. The *Muselmann* is a person in the last stages of survival, on the edge of death, a person whose status consists of nothing other than being 'bare life'. Testimony takes place in the space between the sayable and the unsayable which captures the position of the *Muselmann*. Testimony takes place even though the subject (as in the *énonciation*) is constitutively fractured. Furthermore, testimony takes place in the *fact* of survival. Survival is the bridge between *Zoé* and *bios* (Agamben 2002, 156). The notion of *énonciation* — with its focus on the act of saying — also thus brings together lived experience (biological being) and the symbolic (language).

In sum, Agamben argues for the possibility, however minimal and paradoxical, of 'speaking Auschwitz', or bearing witness, against the notion (asserted by the Nazis) that the event is too monstrous ever to be 'sayable'. Agamben is for the idea that Auschwitz is sayable, that there can be a witness: 'The witness attests to the fact that there can be testimony because there is an inseparable division and non-coincidence between the inhuman and the human, the living being and the speaking being, the *Muselmann* and

the survivor' (Agamben 2002, 157). It is a matter of establishing a monument to the impossibility of fixing the truth in relation to real events, or to memory. Testimony occurs where there is an impossibility of speaking. The movement from Zoé to bios is also one in which the witnesses of the camps cease to be pure victims without symbolic status, to survivors, to a status which is of the most human complexion. Effectively, the Nazi wager was that all the inmates of the camps would remain victims, condemned to silence, not only through death, but because no one would believe anyone who tried to describe what had happened. Agamben's — admittedly large — claim is that to survive is to testify is to communicate something fundamental. As Catherine Mills notes in an illuminating essay, '[t]o endure the inhuman is to bear witness to it' (Mills 2005, 201).

Human rights now — or the destiny of civil identity and passive politics

To speak now in a more pragmatic vein, Hannah Arendt's critique of the failure of the nation-state to protect civil identity might well entail the creation of a robust international legal system, such as has been aspired to with the prosecution of war criminals. Only an international body, it might be thought, is capable of redressing national human rights violations. The problem is that any international body will inevitably be composed of national interests, as is evident from the composition and behaviour of the UN Security Council.

For his part, as we have seen, Agamben points to the abject failure in the past of any internationally based system to intervene successfully in light of human rights abuses. For him also, however, the experience of Auschwitz, in its very horror, holds out a hope of redemption: the possibility of a witness who, even in expressing the impossibility of witnessing, can inspire an ethical framework. Here, the equivalent of homo sacer is brought within the bounds of human community. Humanity, in its basic existence, is something — something essentially human. This does not mean, though, that rights can be derived simply on the basis of some natural state of 'being human'. It means that existence, following the model of Benveniste's theory of énonciation, is always enacted rather than being passively attributed to humanity. To be sure, this seems to mean that, ultimately, Agamben is proposing that we should have faith in the human capacity to survive and to be a witness. It thus may not be, in the end, a very refined or subtle political program.

Arendt, on the other hand, despite her fierce defence of civil identity, cannot envisage the excluded element — Zoé — being brought within the confines of civil society proper. In this, we could say, she is just a little too Greek. Nevertheless, without her revelations (revelations connected to European history) as to the importance of civil identity, the debate today would be all the poorer.

Finally, between Arendt and Agamben there is no basis for common ground when it comes to defending human rights and the lives of the 'rightless'. But by confronting the issues that both have revealed in relation to what it can mean to be human in politics, a way forward may now be possible. ●

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