NAKED CITIZENS: TOWARDS RIGHTS BEYOND SOVEREIGNTY

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Following the Paris attacks of November 2015, the response of the French government was twofold. First, President François Hollande declared the state of emergency, which reinforced the executive powers of the president and public authorities, and second, he proposed a law to revoke the nationality of individuals who put in peril the state’s order and security by engaging in terrorist activities. What is crucial to note about these two measures is their connectedness. The state of exception, which is a suspension of rights, facilitates precisely the adoption of such a drastic measure as denationalization in that a suspension of citizen rights makes it all the more easier to revoke them in their entirety. Furthermore, the two measures suggest that state interests take precedence over the rights of people. The state of emergency thus exposes the state as pure power, exercised on the very members of the state – its citizens – that, in principle, are entitled to state protection. The state of exception reveals sovereign state power at work. It offers a glimpse of the extent of sovereign power.

The present paper describes the impasse into which sovereign power forces citizens. In its essence, sovereign power reduces citizens to mere biological bodies by stripping them of their rights and civic identity. And yet, at the same time, the loss of state – being outside sovereign power – leaves persons desperate for being under the authority of sovereign power. The thread running through this paper is thus the tension between sovereign power and citizen rights. Hannah Arendt deplored the fact that the only rights worth having are those of the citizen, since the rights of man are meaningless and inconsequential if they are not also the rights of the citizen. In this paper, it is argued that despite their apparent reliability and sturdiness, even the rights of the citizen are hollow at their core precisely because they are rooted in sovereign power. Citizen rights are vulnerable because what they are buttressed upon, their condition of possibility, is sovereign state power. Nowhere is this more evident than in situations of exception.

The paper proceeds as follows. It first presents the concept of sovereignty from a Hobbesian perspective and then shows how this conception is at work in Carl Schmitt’s understanding of the state of exception. Following Giorgio Agamben’s critique of the state of exception, it is shown how the essence of sovereign power is the production and management of bare life stripped of legal identity. This, together with the flaws of the system of sovereign states, sheds light on the impasse faced by citizens and the fragility of their rights. The final section considers Arendt’s right to have rights as the possibility of thinking rights beyond sovereignty.

Sovereign Power: A Hobbesian View

As the dominant paradigm of political organization, the state continues to defy

attempts to capture its essence, its nature and its content. In the words of Quentin Skinner, “as the genealogy of the state unfolds, what it reveals is the contingent and contestable character of the concept, the impossibility of showing that it has any essence or natural boundaries.” However, few would contest that one of the most important attributes of the modern state is its sovereignty. Sovereignty means that the state not only has supreme authority within a certain territory, but that it also has the means, including coercive means, to support that authority and maintain order.

One of the major theorists of sovereignty is Thomas Hobbes. Hobbes starts from the premise that men in the state of nature live a brutish life. Since men are equally endowed with the faculties of mind and strength, everyone has a right to everything. The state of nature is a state of fear, and it is this fear that drives men to seek the Leviathan’s protection, i.e. the protection of the state. Hobbes writes “we must therefore resolve, that the original of all great and lasting societies consisted not in the mutual good will men had toward each other but in the mutual fear they had for each other.” Men thus come together, and through a covenant, create the Leviathan to maintain order and security. Rather than fear each other, men now fear the Leviathan. Power and fear are thus the essence of sovereignty.

By virtue of this covenant, the sovereign is given absolute authority over people. This is because, in Hobbes’ view, the sovereign is not party to, but above the social contract. The contract is an agreement of men among each other and it does not bind or constrain the sovereign. As Hobbes writes “because the right of bearing the person of them all is given to him they make sovereign, by covenant only of one to another, and not of him to any of them, there can happen no breach of covenant on the part of the sovereign.” It is as if all men entered in Civil Society while the Sovereign alone remained in the State of Nature. The sovereign’s role is to ensure neither the happiness nor the rights and liberties of the people; only to maintain peace and order. And for this purpose, it falls upon him to determine the kinds of actions, opinions and people that constitute a threat to peace, and also the means necessary to maintain peace, for in Hobbes’ words, “whosoever has right to the end has right to the means, it belonged of right to whatsoever man or assembly that hath the sovereignty to be judge both of the means of peace and defence, and also of the hindrances and disturbances of the same.” There is thus no legal contractual constraint on the sovereign, as the law-giver and law-enforcer, but he remains sovereign only as long as he maintains order.

In the Hobbesian conception of sovereignty, the sovereign is authorized in all his actions, and this authorization springs from the consent of the people. Consent means the convergence of the wills of men to give the sovereign authority to act in their name. And because they have so authorized the sovereign, it follows that the sovereign cannot be held accountable for his actions. And it would be absurd for subjects to disobey the sovereign, question or complain about his actions, or accuse him of injustice, since they themselves are the authors of what he does, and thus this would amount to self-accusation. Because Hobbes considers that, from the very beginning, the sovereign has

6 - Hobbes, Leviathan, or the Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil [1651], ch. 18. Available at University of Adelaide eBooks.
7 - Ibid
8 - Ibid.
the exception. Nor can the measures that become necessary in situations of exception be codified in advance. The exception, Schmitt says, “can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.”

The sovereign is he who declares, or more accurately decides on, the exception[6]. That is, he decides when there is an exception – what situation qualifies as an exception – as well as what actions and means are consequently needed in response to the emergency. Sovereignty is thus associated with unrestrained authority and concrete decision. In the state of exception, the sovereign exercises supreme authority through the suspension of the law, and only his actions and decisions are in force. In Schmitt’s words, in the exception, “it is clear that the state remains whereas law recedes.”[7]

Schmitt thus takes Hobbesian sovereignty, unchecked and unaccountable, and encapsulates it in the ‘box’ or the framework of the state of exception. Even though the state of exception is essentially the suspension of the law, Schmitt insists that it continues to be related to the juridical order. This is because he conceives law as being constituted not only of legal norm, but also of decision. Whereas in ordinary times, the element of decision retreats to leave space to norm, “the norm is destroyed in the exception.”[8] This does not mean, however that the state of exception is a situation of anomic in the sense of chaos and anarchy. Rather “the exception remains, nevertheless, accessible to jurisprudence because both elements, the norm as well as the decision, remain within the framework of the juristic.”[9] In his critique of Schmitt’s state of exception, Giorgio Agamben contends that the paradox of the state of exception as a space devoid of law that is nonetheless related to law serves to sustain a myth (a fictio iuris) that the unlawful somehow continues to be lawful, that it is an attempt to legalize lawlessness[10].

The state of exception is, in this reading, the device by which the sovereign appropriates pure violence[11].

What is problematic about linking sovereign power to decision on the exception is that the sovereign, because he can decide on the exception, can effectively also create the exception. This means that the state of exception contains in its core the germs and the possibility of its misuse and abuse by the sovereign. Furthermore, in the state of exception, the sovereign cannot be held accountable for his actions, “the nature of which seems to escape all legal definition. Because they are neither transgressive, executive, nor legislative, they seem to be situated in an absolute non-place with respect to the law.”[12] The denationalization of Jews in Nazi Germany was thus technically not illegal, since denationalization orders were enacted under the state of exception which, once

15 - Carl Schmitt, Political Theology, 6
16 - Ibid., 5.
17 - Ibid., 12.
18 - Schmitt, Political Theology, 12.
21 - Agamben constructs this argument by using Walter Benjamin’s “Critique of Violence” in which he argued that pure violence neither makes nor preserves law, but rather deposes it. Pure violence is thus outside the law.
22 - Agamben, State of Exception, 51
been authorized, we may, as Ross Harrison puts it “be criticised for stupidity if we chose something harmful, but we cannot complain that the harms are unjust.”

Yet, as Harrison argues, under the veneer of consent there is the unlimited power of the sovereign; beyond the appearance of authorization, there is power, fear and violence. Once the base of violence and fear is established, “then a superstructural description in terms of will can be erected. The mighty Leviathan may seem to be morally tamed and all its terrifying actions properly authorized. But we only need to lift the mask to see sheer power still doing all the work.”

What makes sovereignty such a complex and contentious concept is that while it definitely revolves around protection and security, the subject of protection and security is continuously shifting. In the Hobbesian worldview, the concept of sovereignty conflates the protection and security of the members of the state (in the form of the multitude) and the state per se (that is the Leviathan).

as an independent artificial creature). Given that what counts for Hobbes is the stability and security of the state, the question of the rights of people (let alone that of individuals) – beyond safety and survival – have no place in this perspective.

**The State of Exception: A Glance into Absolute Sovereign Power**

There is no doubt that this Hobbesian understanding of the state and sovereignty has deeply influenced the political thought of German theorist Carl Schmitt. Like Hobbes, Schmitt is most concerned about order (what he calls *salut public*). In fact, the role of the state in preserving security and stability is so essential to Schmitt’s thought that he has been described as “the Hobbes of the twentieth century.” Schmitt wants to consolidate an idea of sovereignty in which power is personal, concentrated and indivisible. In his *Political Theology*, he argues that all concepts in the theory of the state are secularized theological concepts. The sovereign in the state is viewed to be the transposition of an omnipotent and ubiquitous God in politics. Sovereignty, in Schmitt’s thinking, is equated with transcendence.

Schmitt embraces the definition of sovereignty as “the highest power, not a derived power” and specifically focuses on the “concrete application” of sovereign power – how it functions in practice. Schmitt considers sovereignty as a concept located at the boundary of the juridical order, because it demarcates two different spaces, a space in which law is in force and a space in which it is suspended, known as the state of exception. As such, sovereignty is also situated at the boundary between law and politics. Sovereignty therefore acquires its meaning only insofar as it “opens on to the province of the exception.” In Schmitt’s view, the legal norms that are in force in ordinary times cannot be applied in extraordinary circumstances. In times of emergency, it is the decision rather than the norm that counts, because legal norms cannot possibly anticipate

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10 - Ibid., 130.


13 - Ibid., 5.

instituted in 1933 *sine die*, remained in force during the entire Nazi period.

**Is the Exception Exceptional? Sovereign Power and the Naked Citizen**

The predicament of citizen rights is that they rely on sovereign power for their existence. This means that the same power that grants and protects them also can revoke and violate them, as the possibility of denationalization in the state of exception demonstrates. The proposition to strip individuals of their citizenship indicates that individuals are not safe in their citizenship, since sovereign power can decide their expulsion from the body politic altogether. More generally, the suspension of civil liberties, of the law itself, and the strengthening of executive powers, all of which characterize situations of emergency, create favourable conditions for measures that depoliticise citizens and which would otherwise be considered to violate their fundamental rights.

One could argue that since the state of exception is precisely that – an exception – the tension between sovereignty and rights is of little significance, and sovereign power is generally not a threat to citizen rights. However, Giorgio Agamben argues that the exception has become the norm, and that it “tends increasingly to appear as the dominant paradigm of government in contemporary politics.”

The state of exception as an established technique of government, which paved the way for the institution of totalitarian regimes in the twentieth century, has today, according to Agamben, “reached its full development.” Modern societies are subjected to state surveillance and control of the population in the name of security. In the context of the war against terrorism, sovereign states have enriched their arsenal of emergency powers in ways that not only blur the boundary between the public and the private, but also, given their penetration, make individuals ‘watch’ and discipline themselves. We might not always be aware of the processes of sovereign power in which we are wrapped and which the state of exception exposes, but they are constantly at work.

If we accept Agamben’s contention that we live in a permanent state of exception, then there are serious implications for citizen rights. They seem indeed very fragile in the face of sovereign state power. In Agamben’s view, sovereign power is biopolitical in the sense that it reduces subjects to bare life without civil identity. In fact, Agamben says, “the inclusion of bare life in the political realm constitutes the original – if concealed – nucleus of sovereign power. It can even be said that the production of a biopolitical body is the original activity of sovereign power.”

Sovereign power, as revealed in the state of exception, is thus – as a foundation of rights – in its essence a production not of citizens, but of bare life. That is, it deprives individuals of their existence as citizens and treats them as mere biological bodies. Agamben’s concept

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23 - Article 48 of the Weimar republic and the Reichstag Fire Decree were the basis for the proclamation of the state of exception in the beginning of the Nazi period.


of bare life is based on the distinction between the Greek terms for life, zoē and bios. The former refers to natural life and “the simple fact of living common to all living beings,” while the latter refers to a “particular way of life” that is the public political life in the polis. Western politics, Agamben says, have been predicated on the exclusion of natural life from the polis. But sovereign power, Agamben continues, produces bare life, the politicised natural life, by including as an object of power what has been excluded. Sovereign power includes people not as political beings, but as a politicised biological life. The epitome of this process is the homo sacer who has been excluded from the public (religious) life of his community and “his entire existence is reduced to a bare life stripped of every right by virtue of the fact that anyone can kill him without committing a homicide.”

Agamben’s thesis that, from the outset, the essence of sovereign power is the management of bare life, leads him to conclude that “that every attempt to found political liberties in the rights of the citizen is, therefore, in vain.”

### Rights Beyond Sovereignty

The problem of sovereign power assumes a different dimension in Hannah Arendt’s analysis in *The Origins of Totalitarianism* of the condition of statelessness which followed WWI and intensified during and after WWII. In this analysis, citizens who were denationalized by their home states, who became refugees and asylum seekers, “were welcomed nowhere and could be assimilated nowhere.” The aspect of sovereign power that Arendt describes is its systemic organization. The fact that the world is entirely divided in sovereign nation-states means that “those whom the persecutor had singled out as scum of the earth – Jews, Trotskyites, etc. – actually were received as scum of the earth everywhere.” The system of sovereign nation-states, Arendt says, is a system that makes people illegal. Even more, exclusion from the state is tantamount to exclusion from humanity as a whole. This is because, in Arendt’s view, appealing to human rights is a futile enterprise, since only membership in a state can preserve human rights. In other words, human rights are meaningful only insofar as they coincide with citizen rights. Those who had nothing but the rights of man to fall back on were left naked.

Here we are faced with a dilemma regarding the structure and the functioning of sovereign power. On one hand, sovereign power produces bare life by exercising unlimited control over persons, as for example the subjection of the Jews in Germany to absolute state violence shows. Yet on the other hand, the loss of state leaves one desperate for membership in a state, for statelessness in a system of nation states is also a condition of bare life, of life without political status. It is “the abstract nakedness of being human and nothing but human.” So sovereign power functions in such a way that it oppresses persons and, paradoxically, makes them in need of being oppressed. As Arendt put it, “their plight is not that they are not equal

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27 - Ibid., 9.
28 - Ibid., 103.
29 - In contrast to Foucault who argued that in modernity, sovereign power became biopolitical as it shifted from control of territory to control of population, Agamben argues that sovereign power has always been biopolitical. Agamben, *Homo Sacer*, 11.
32 - Ibid., 269
33 - Ibid., 297.
34 - Ibid.
before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them."^35 Jews thus escaped sovereign power of the Nazi state only to find themselves needing the protection of sovereign power when they became stateless. That the world is now constituted of “tightly closed organized communities” ultimately makes oppression not only inevitable, but also necessary.

Arendt’s diagnosis of the condition of statelessness leads her to conclude that in a context dominated by the system of nation-states, there needs to be a right to have rights, which she defines as the right to belong to an organized political community. In this respect, the right to have rights fits within the Arendtian view that the only worthy life is a life in the polis, that is, a political life based on opinion and action, as opposed to the unpolitical private life. But because the right to have rights has commonly been interpreted as the right to citizenship and membership in a state^36, at first sight, Arendt’s position seems to indicate ambivalence about the relation between the modern nation-state and rights, in that intrinsic flaws in the system of sovereign nation-states produce statelessness and deprive persons of fundamental rights, and yet at the same time, only the state can protect those rights (in the form of citizen rights). The perplexity that Arendt’s right to have rights gives rise to is expressed by Seyla Benhabib when she asks: “Could Arendt be saying that no matter how contradiction-fraught the nation-state may be as an institutional structure, it is still the only one that defends the rights of all who are its citizens – at least in principle, even if not in practice?”^37

However, Arendt was critical less of the state as a political community than of sovereignty as the determinant and the foundation of the modern state system. She considered sovereignty as the main impediment for human dignity and freedom, and believed that “for men to be free, it is precisely sovereignty they must renounce.”^38 As James Ingram put it “what Arendt objects to is not the scope of such a politics (‘exclusionary territorial control’), but its mode or form (‘unchecked sovereign privilege’).”^39 The reason why the modern nation-state is defective is that the clash of exclusive, autonomous and untrammeled sovereignties of neighboring countries produces groups of people who are accepted nowhere.^40 The prevalence of sovereignty is also what, according to Arendt, weakens efforts for a universal commitment to the protection of the right to have rights, because international law “still operates in terms of reciprocal agreements and treaties between sovereign states.”^41 Neither would the problem be solved by a world government, since this would merely shift the problem of sovereignty to a higher level^42.

While sceptical about the possibility of its realization, Arendt nonetheless formulates a vision in which the right to have rights

36 - Arendt, cited in Ingram, ”What is a ‘Right to Have Rights’?,” 409.
37 - Ingram, ”What is a ‘Right to Have Rights’?,” 409.
38 - Arendt, ”The Decline of the Nation-State and the End of the Rights of Man,” 278. 41 Arendt, ”The Decline of the Nation-State and the End of the Rights of Man,” 298. 42 Ibid.
39 - Arendt, ”The Decline of the Nation-State and the End of the Rights of Man,” 298
40 - Ibid.
transcends sovereign power. She writes that “the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself.”43 Thus, a different interpretation of Arendt’s right to have rights dissociates it from the sovereign state by emphasizing its political foundation44. Whereas nature has been considered the ontological basis of the rights of Man, and history that of the rights of Citizen, the right to have rights is believed to be grounded in action and opinion, both of which constitute the basis of the political for Arendt.

Distancing the right to have rights from sovereign power therefore means the responsibility “to guarantee ourselves mutually equal rights.”45 In other words, this suggests that people themselves have the responsibility to make sure that everyone remains a citizen in the sense of retaining their ability to think and act politically. As such, Sofia Näsström observes that not only is the right to have rights political, it is more precisely democratic in the sense that it is enacted when people conceive of themselves as equals and guarantee each other the space for action and opinion in the political community46.

Jacques Rancière’s version of a political foundation of rights that dissociates them from sovereign power emphasizes how the distinction between man and citizen is a space where the individual becomes a political subject. It is a space where right-bearers claim their rights. From this perspective, rights are enacted not when they depend on sovereign power, but when the man entitled to them claims them. So the rights of Man, according to Rancière, are “the rights of those who have not the rights that they have and have the rights that they have not.”47 Through a process of political subjectivation, individuals demand rights to which they are in principle entitled (for instance those inscribed in the Declaration of Rights), but also demonstrate that they had rights which, until then, had not been recognized.

While sovereign power surrounds citizens continuously, it is through political action and continuous mobilisation that detaching citizen rights from sovereignty becomes possible. Only through democratic action can people free themselves from, or at least resist, the power exercised on them by the sovereign state, since “[...] rights are not established in principle and then protected by power, but by that of one’s own state or another; they are invented and reinvented by particular actors through the very practice of claiming them.”48 It falls upon citizens to claim rights as well as protect and defend them.

**Conclusion**

This paper has attempted to describe the deadlocked situation in which citizens find themselves with regards to sovereign power. The state of exception offers a glimpse of the power and violence that constitute state sovereignty, in the face of which citizens are reduced to bare life, life without rights and legal status. Still, in a world entirely dominated by sovereign states, those who have been excluded from their states lose their legal

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43 - Ibid.
44 - Ingram, “What is a ‘Right to Have Rights?’”
45 - Arendt, “The Decline of the Nation-State and the End of the Rights of Man,” 301.
47 - Jacques Rancière, ”Who Is the Subject of the Rights of Man?” The South Atlantic Quarterly 102, no. 2/3 (Spring/ Summer 2004), 302.
48 - Ingram, “What is a ‘Right to Have Rights?’” 411
existence and become naked human beings who only aspire to being once again included under the authority of a sovereign power. This impasse shows how fragile the rights of citizens in the face of sovereign power are. Rooted in sovereign power, they can always be taken away. In this respect, there is no real distinction between the citizen and the refugee as far as sovereign power is concerned because the citizen himself is ultimately no more than a refugee in waiting. Only democratic political action as the foundation of citizen rights can remedy the vulnerability of citizen rights and distance them from sovereign power.

Bibliography


______. De Cive. “Liberty,” [1642].


