

## Introduction

This project aims to understand the problem of the refugee: both why it is that there are refugees in the world in which we live and what the possibilities are to address this universally regretted phenomenon. The problem of the refugee demands discussion because the refugee is central to both the theory and practice of contemporary constitutional democracy; the refugee functions as a test case for whether or not a world populated by constitutional democracies would satisfy the demand for the universal recognition of human rights. Leaving aside important differences for the sake of analytic clarity, one can summarize the situation thus: there is one current of theorization that argues that if the whole world was populated by constitutional democracies, or liberal nation-states, then there would be no human beings who were not recognized as members of rights-respecting states (as all human beings in the world would belong to some constitutional democracy or other)[1] and then another current of theorization argues that the reason why nation-states still do not know what to do with refugees is that it is not possible to solve the problem of the refugee within the framework of nation-states, and that we therefore have to go “beyond” the framework of nation-states.[2] The problem of the refugee thus creates a line of demarcation between the people who believe that the framework of liberal nation-states is the best system for the most possible people, and the theories that hold that the nation-state is a version of governmentality that always will tend towards totalitarianism. In this essay I engage in these two different currents by discussing the way in which Hannah Arendt describes the connection between the problem of the refugee and the rise of the modern nation-state, and how this theorization points in different directions for three contemporary political theorists: Seyla Benhabib, Peg Birmingham, and Giorgio Agamben. Arendt is the key figure for at least two reasons: firstly because she is the first to argue that the problem of the refugee is co-terminous with the rise of modern nationalism, and thus with the nation-state system in which and through which human rights (including those of refugees) have heretofore been articulated, and secondly because she is claimed by both theoretical

currents responding to the defects of constitutional democracy.

### **Seyla Benhabib: the rights of “others”**

The starting point for *The Rights of Others*, is that the existence of “others”—refugees, immigrants, and asylum seekers (Benhabib, 2004, pp. 6)—points towards a dilemma in the heart of constitutional democracies between, on the one hand, sovereign self-determination (the undivided authority over a demarcated territory and the right to protect it) and, on the other hand, the adherence to universal human rights (the rights of all human beings regardless of their nationality) (Benhabib, 2004, pp. 2). These two principles—state sovereignty and human rights—are often in direct contradiction because the rights granted by nation-states only include citizens, and the rights granted by the declaration of human rights include all human beings regardless of their citizenship.

The tension of this “dual commitment” of constitutional democracies to sovereign self-determination and universal human rights is, Benhabib argues, neither to be bridged by calling for the end of nation-states nor by a system of world citizenship (2004, pp. 2). The point of departure for Benhabib is Kant’s *Perpetual Peace*, which put forward three conditions for a perpetual peace among nations: “The Civil Constitution of Every State shall be Republican,” “The Law of Nations shall be founded on a Federation of Free States” and “The Law of World Citizenship shall be Limited to Conditions of Universal Hospitality” (Benhabib, 2004, pp. 2). Perpetual peace among nations is to be reached through transforming all countries into republics, creating a federation of all the republics of the world (*Völkerbund*), and agreeing upon one single cosmopolitan right which is the right to be treated with hospitality when a person visits another country than his own (Benhabib, 2004, pp. 26-27). What Kant argues for is thus not “world government” (one world state) but a “world federation” among the free republics (Benhabib, 2004, pp. 39).

According to Benhabib, the key to the resolution of the tension in constitutional democracies between the exclusion of “others” by state-sovereignty and the inclusion of these same “others” within universal human rights rests at the basis of democratic sovereignty. The meaning of democratic rule, Benhabib argues, is that all members of the sovereign, the people, will be respected as bearers of human rights and that they freely associate to establish a rule of self-governance, meaning that they simultaneously are the authors and the subject of the law (2004, pp. 43). Within a democratic society in which this ideal is realized there is thus no contradiction between the rights of man and the rights of the citizen: they are co-implicated (Benhabib, 2004, pp. 43). If all human beings were to be included in such political systems the problem of the excluded “others” would be solved. However, there is always in real democracies, Benhabib argues, a split between the popular sovereign and the territorial sovereign, that is, between the people who are both authors and subject of the law and those who are merely subjects of the law (2004, pp. 20). Historically, the last category in European and American democracies did (in different periods) not only comprise refugees, immigrants and asylum seekers, but also women, minors, non-propertied men, non-white people and non-Christians (Benhabib, 2004, pp. 45-46). These historical discontinuities in the definition of the people of these constitutional democracies show that the boundary between the popular sovereign and the territorial sovereign in the foundation of democratic sovereignty is not set in stone (Benhabib, 2004, pp. 45-48). Every act of self-legislation of the popular sovereign is simultaneously an act of self-constitution, in which the scope and identity of “We, the people” is redefined (Benhabib, 2004, pp. 45). It is then possible for the popular sovereign through an act of self-legislation to reconstitute its own borders and thereby include some of the “others,” be that the women, the propertyless, the non-Christians or the foreigners. It is therefore in the heart of what Benhabib understands as the sovereign of democracy that she sees the potential to overcome the tension between national self-determination and universal human rights: through an act of self-legislation the boundaries and the identity of the *demos*, the popular sovereignty, can be reconstituted to include some of the “others.”

This act of self-constitution of the popular sovereignty (of “We the people”) that creates the

distinction between the included and the excluded is, Benhabib argues, a fluid process of public debate and negotiations both inside and outside of the institutional framework which she names “democratic iterations” (2004, pp. 179). The concept of “iteration”—which Benhabib takes over from Jacques Derrida—is the process through which a concept acquires new meaning through repetition (juxtaposed to an understanding of the existence of an original source of meaning for a concept and all repetition as mere replication) (2004, pp. 179). Through an ongoing deployment, the iteration is a continual reconstitution of “the origin” and it is thus at the same time a dissolution of the original and its preservation (Benhabib, 2004, pp. 180). The democratic iterations, through which the *demos* reconstitutes itself, make it possible to a larger extent to include the “others.” Furthermore, the democratic iterations have the potential, Benhabib argues, to give birth to new subnational and transnational categories of citizenship whereby they blur the line of inclusion and exclusion which was constituted with the Westphalian conception of sovereignty (2004, pp. 217). The EU, Benhabib argues, is a concrete example of this tendency; both because of its trans-national institutions (2004, pp. 217) and because of the partial political, social, and cultural rights which are granted to citizens of EU living in another EU-country than their own, e.g. the right to vote in local elections (2006, pp. 46), health care (2004, pp. 160), unemployment benefits (2004, pp. 160), educational subsidies (2004, pp. 161), and economic support to instruction in native language (2004, pp. 161).

Furthermore, Benhabib presents an argument for the moral obligations of liberal democracies not to permanently bar the “others” from full membership in the *demos*: “Theocratic, authoritarian, fascist, and nationalist regimes do this, but liberal democracies ought not to” (2004, pp. 135). The argument given is that of discourse ethics, namely, that there are some common grounds all participants in a conversation necessarily must agree upon. One of these common grounds is that it is not acceptable to bar out people from the *demos* on basis of their non-elective attributes[3] such as race, gender, religion, ethnicity, language community, or sexuality (Benhabib, 2004, pp. 138-139).

The concrete political changes that Benhabib calls for on basis of democratic iterations and

discourse ethics are: firstly, nation-states's recognition of the moral claim of *first admittance* of asylum seekers and refugees (that non-citizens have to be treated with hospitality when they are in another country than their own); secondly, for a regime of *porous borders* (it ought to be possible to obtain full-fledged political membership when non-citizens live in longer periods in another country than their own); thirdly, an injunction against denaturalization (2004, pp. 3). The challenge that lies ahead, Benhabib writes, is "to develop an international regime which decouples the right to have rights from one's nationality status" (2004, pp. 68). Benhabib argues that institutions founded after the Second World War such as UN High Commissioner on Refugees (UNHCR) and the International Criminal Court as expressions of such a new "international regime" (2004, pp. 67).

I will suggest here that, attractive as this proposal is, Benhabib actually presents a solution to the tension in constitutional democracies between the dual commitment to sovereign self-determination and universal human rights that is insufficiently radical to resolve this tension. Benhabib argues that it is possible for the popular sovereign to include the "others" in the *demos* through the reconstitutional act of self-legislation and that we furthermore are morally obliged to do that (at least under certain circumstances). With the help of Arendt's analysis, which Benhabib takes on to some extent but not in its full significance, I will voice three concerns about this position.

Firstly, I will challenge Benhabib's understanding of present-day European democracies as characterized by democratic iterations: is it really the case that we as "people" of different nation-states have the possibility of reconstituting us self in democracy through legislation? This notion seem to require a huge extent of participatory democracy; something that does not, self-evidently, exist in European democracies, where the only political act for a huge part of the population is going to the poll every second year or so. The democratic iterations presuppose that the "people" are in dialogue with each other; a dialogue that, if it exists at all, might in reality only include a small elite. Even if we accept that these democratic reiterations might exist (at least in some areas within the European democracies) is it then likely that they exist on the level of the EU? How could democratic iterations exist on the EU

level? The public debate of what the “European people” is, can mostly, if at all, be taken by the relatively few members of the parliament of the EU. It seems unlikely that the “people” of the EU—what ever that is—could reiterate themselves through self-legislation to include some of the “others.”[4]

Secondly, even if we accept Benhabib’s understanding of democratic iterations as foundational for Western democratic societies, is it then likely that the democratic iterations will lead to a greater extent of inclusion of the “others” into the *demos*, and not to a denaturalization of some of the people who already were a part of the *demos*: why should the scope of the *demos* become “wider” instead of “narrower”? Historically, it is true that for example women have been included in the *demos* but the opposite has also happened: as the denaturalization of the Jews in the Third Reich, the denaturalization of spies for the USSR, former Nazi criminals,[5] and suspected terrorists[6] in the US in the years after World War II until today, and the recent expulsion of Romas from France[7] bear witness to, the sovereign has the power both to grant and deprive individuals of their civic rights. Why then should we believe that the democratic iterations would lead to an inclusion of the “others” in the *demos*? Benhabib does not explicitly answer this question. Within her account the reason seem however to be, that since it is morally unacceptable to ban the “others” permanently, it is likely to be implemented by the *demos* over time. The argument for this assertion remains implicit in Benhabib’s argumentation; however as an heir to Habermas (Benhabib, 2004, pp. 12-13), Benhabib’s implicit argumentation seems to be that if the people of the popular sovereign realized that they cannot will the permanent exclusion of the others because their actions then would be a “performative contradiction” (because all the common grounds must be reciprocally acceptable), then they would reiterate the *demos* in a way in which the “others” were included. Leaving aside the question of whether discourse ethics as a normative system is persuasive or not, we must ask ourselves whether we really can expect something to be democratically introduced because it is “just” or “rational”? Is it not a reminiscence of the 19<sup>th</sup>-century conception of history having a direction towards a greater rationality? Is it not a long lost dream of the philosophers?

Thirdly, and most importantly for this essay, I want to challenge Benhabib's understanding of the EU as an exemplar of an institution build upon cosmopolitan norms. Even though the democratic iterations of the EU—if they exist at all—might be able to create some subcategories of citizenship for the citizens of EU, this does exactly not help the refugees and stateless who do not have the privileges which goes with a passport from the EU. The “hospitality” shown within the EU does, primarily if not solely, apply to citizens of EU; people who already belong to another political community. It is true that the walls within the EU no longer are as strong as they have been, but that might only mean that the borders around the EU have become something tantamount to “new Iron Curtain,” as Szmagalska-Follis has recently argued (1989, p. 385-400). What I will suggest is that Benhabib is missing something fundamental in Arendt's diagnosis of the problem of the refugee, namely, that the exclusion of refugees is an inherent problem of the nation-state and that we therefore might have to consider the possibility that the problem of the refugee is not solvable within a framework of nation-states. I will now try to qualify this claim by investigating Arendt's diagnosis of the problem of the refugee.

### **Hannah Arendt: the problem of the refugee**

In *Origins of Totalitarianism* the problem of the refugee is presented as the paradox that even though human rights are declared valid for all human beings regardless of their citizenship and nationality, human rights are only secured within nation-states. This paradox points towards a problematic and fundamental tie between the nation-state (particular rights) and human rights (universal rights). The problem of the refugee shows a fundamental bond in the West between *nationalism*, which is based on the principle of *exclusion* (only nationals, i.e. the people who are citizens by birthright, are citizens of the nation-state; only the citizens are equal before the law) and *human rights*, which are built upon the principle of universal *inclusion* (human rights are valid for all human beings regardless of nationality, culture, sex and the rest).

With what is commonly known as the *Declaration of the Rights of Man*, in the 18<sup>th</sup> century a new epoch of humanism, enlightenment and emancipation was announced: the Declaration announced that from now on man (and not religion or tradition) should be the source and fundament of Law (Arendt, 2009, pp. 290). Independently of all former organization, independently of the privileges some nations and classes had obtained, the declaration promised a new age of universal emancipation: *Liberté, Égalité, Fraternité*. This conception of universal emancipation was however from the very beginning tied to the emancipation of a concrete people: since the sovereignty of the people—in opposition to the sovereignty of the monarch—was not proclaimed in the name of God but in the name of Man, the Rights of Man became a source of emancipation for a concrete people (Arendt, 2009, pp. 291). The French Revolution was a battle for emancipation of the French people and of France as a nation, but it was fought in the name of the universal emancipation of Man. The question of national emancipation was therefore from the very beginning blended together with the proclamation of the universal emancipation of Man (Arendt, 2009, pp. 291). The Rights of Man were therefore from the start tied to the rights of the citizens; something the very title of the French declaration of the Rights of Man bears witness to: *Déclaration des droits de l'homme et du citoyen*. Human rights were declared “inalienable” and for that reason no authority was evoked to establish them; Man was the source and the ultimate goal of human rights and therefore they were supposed to be independent of all government (Arendt, 2009, pp. 291). What the problem of the refugee shows, however, is that the moment a human being loses his nationality (and thereby his citizenship, and the protection of his national government) he is left only with the rights he can claim as a human being, and no institution, government or authority is competent to guarantee such rights (Arendt, 2009, pp. 292). With the *Déclaration des droits de l'homme et du citoyen* human rights are realised through the nation-state by the principle of equality before the law. This law does however only apply to citizens. From the very beginning the emancipation of Man is only realised through the emancipation of the citizen.

The implications of the equation of the Rights of Man with the rights of the citizen first became apparent when refugees who had lost their citizenship showed up in the European nation-states (Arendt, 2009, pp. 299). As the problem of the refugee shows, the Rights of Man—declared inalienable for all human beings—proved to be impossible to enforce



whenever people appeared who were (*de facto* or otherwise) no longer citizens of any sovereign state (Arendt, 2009, pp. 292). The loss of citizenship meant that no government cared for them. The refugees became utterly rightless people who belonged nowhere and were welcome nowhere; they became “the scum of the earth” (Arendt, 2009, pp. 267).

What Arendt argues is however that the calamity of the refugees after the French Revolution—but especially in the 20<sup>th</sup> century—does not consist in their loss of human rights as they commonly are understood; the despair of the refugees does not consist in their deprivation of life, liberty, the pursuit of happiness, equality before the law and the freedom of opinion. Rather, the fundamental lack refugees suffer and represent is that they no longer belong to any community whatsoever (Arendt, 2009, pp. 295). The concern is not their inequality before the law, but rather their invisibility before it: they have no status before the law. They are not merely oppressed by the law; they are insufficiently visible for anyone to have an interest in oppressing them. Their opinions are not merely not valued; they simply have no voice (Arendt, 2009, pp. 294). The refugees did often enjoy more “freedom” than citizens imprisoned by the law, but the possibility for refugees to leave the country did not give them the right to become a part of a community anywhere (Arendt, 2009, pp. 296). The refugees might enjoy total “freedom of opinion,” but that did not mean that anyone would give them the possibility of uttering their opinions in a public space: it is the freedom of a fool to whom no one listens (*Ibid.*). In the refugee camps, their lives are sustained but this sustenance is due to charity and not to rights (*Ibid.*). The fundamental problem of the refugees is that they are totally expelled from all communities and political organizations—they are not worthy of being treated even like criminals or slaves, who both in some minor ways are included in a community (Arendt, 2009, pp. 295-297). The calamity of the refugee is not so much that they have lost their home, but that in a newly-reconstituted world of nation-states, it has become impossible for them to find a new home (Arendt, 2009, pp. 293). The refugees could not be assimilated into any community and no territory existed where they could create a new community on their own (Arendt, 2009, pp. 293-294). This was not grounded in overpopulation or material needs but because of the political organization of the nation-state (Arendt, 2009, pp. 294). With the global political organization of the nation-states, already in the aftermath of the First World War, and especially with the creation of the United Nations after the second, there was nowhere to go outside the nation-

states and the world of the nation-state thus is the world of humanity. The implication of the equation of the Rights of Man with the right of the citizen was that the lack of citizenship *de facto* meant an expulsion from humankind as such (Arendt, 2009, pp. 297). The bitter irony of the principle of equality before the law is that it established a razor-sharp dividing line between the *included* and the *excluded*: either one is protected by the law as a full member of a nation-state and a human being, or one is not protected by the law whereby one not only loses one's status of citizenship but also one's status as a human being.

This is what it means to say that Arendt's conclusion is that the calamity of the refugees consists in their loss of "the right to have rights," by which she means, the right to belong to a political community where one is judged by one's opinions and actions (Arendt, 2009, pp. 296-297). This right to have rights is in Arendt's perspective the very fundament of human dignity (Arendt, 2009, pp. 297), and the loss of this right is thus much worse than the loss of the rights commonly attributed to the Rights of Man. In Arendt's perspective, the Rights of Man have from the very beginning ignored the right to belong to a community as the fundament for human dignity. This stems from the tie between the Rights of Man and a conception of "human nature." Because the Rights of Man are founded upon "human nature" they ought to be valid even though only one human being lived on earth; the rights of man are independent from human plurality and they ought to remain valid even if a human being was expelled from the human community (Arendt, 2009, pp. 299). The idea of "human nature" is however a dubious category in Arendt's perspective; not only because it has been formed and reformed over the course of the history of Western philosophy and religion, but also because the "human" aspect of nature has become questionable to us: with the rise of destructive technologies such as the nuclear weapon human meddling with nature seems only to lead to a destruction of and alienation from nature (2009, pp. 298). Nature can no longer (if it ever could) serve as the fundament for the essence of Man: "We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights" (Arendt, 2009, pp. 301) In our society today a man who is nothing but a man will no longer be respected by his fellow human beings (Arendt, 2009, pp. 301). What the problem of the refugee shows is that a danger rests within our civilization of producing people who exactly are the abstract human beings that were envisioned in the 18<sup>th</sup> century but that these people have lost all human dignity.

The implications of the problem of the refugee are severe, in Arendt's perspective, not only for the refugees, but also for the nation-state (2009, pp. 290). If a huge number of members of a society lose their political rights and are left to the mercy of the executive power, the principle of equality before the law will break down, and the nation-state will turn into a police-state and the possibility of totalitarianism will be born. Arendt suggests that the crisis of human rights implies the end of the nation-state because the refugees, by not being equal before the law, tear away the cornerstone of the nation-state, the principle of equality before the law. The calamity of the refugees dissolves the nation into a mass of over- and underprivileged and clears the way for the dissolution and final breakdown of the nation-state in a totalitarian society (Arendt, 2009, pp. 279, 290). Thus it is that the refugee not only presents a serious problem for the elaboration and protection of human rights but also for nation-states. This is the greatest perplexity of human rights and it is a problem we in some way or another have to deal with.

The question is whether Arendt can provide us with any answers on how to approach the problem of the refugee? Since, according to Arendt's critique of the abstractness of human rights, it is only possible to secure individuals by national rights, the question is whether we have to give up altogether the notion of universal rights and confine ourselves within a conception of national rights? Is Arendt arguing that we should accept Edmund Burke's claim that it is much wiser to proclaim his rights as the "rights of an Englishman", than the inalienable rights of man? (Arendt, 2009, pp. 299) The problem with Burke's position—if suggested as a solution to the problem of the refugee—is of course that not everyone has the privilege of proclaiming the "rights of an Englishman" and as history has shown us it has proved utterly impossible to solve the problem of the refugee within the framework of nation-states. In the interwar period in Europe, the international community attempted to solve the problem of the refugee within the framework of the nation-states either by *repatriation* (deportation to the country of origin) or by *naturalisation* (assimilation) (Arendt, 2009, pp. 281), neither of which, in Arendt's perspective, did or could solve the problem of the refugee. With respect to repatriation, the country of origin would either refuse to recognize the repatriated as a citizen, or, on the contrary, the country of origin would want him back for

punishment (Arendt, 2009, pp. 279). Repatriation failed when there was no country to which the refugees could be deported because no country would accept these people within their borders (Ibid.). Naturalization failed in solving the problem of the refugee because of the nation-state's normal legislation that only "nationals," that is, those who are citizen by birthright, can be citizens (Arendt, 2009, pp. 284). The huge number of refugees produced by the two World Wars only made the situation worse: as a consequence of the mass applications for naturalization some nation-states started to cancel earlier naturalizations instead of at least naturalising a minor percentage (Arendt, 2009, pp. 285). A third solution to the problem of the refugee discussed and rejected by Arendt is cosmopolitanism, as the creation of a world-state. Arendt does not believe in the world-state, simply because if it were the only state in existence, it could all too easily resort itself to programs of "denaturalization" (the deprivation of citizenship: a tool that was used in many totalitarian states Nazi Germany included and that, though Arendt did not live to see this, has been proposed in a number of European democracies in the face of the "integration debates" of the past generation). She concludes: "The crimes against human rights, which have become a speciality of totalitarian regimes, can always be justified by the pretext that right is equivalent to being good or useful for the whole in distinction to its parts" (2009, pp. 298-299).

The refugees, Arendt seems to suggest, could only be secured by human rights if they were at the same time granted citizenship, but history has shown us that this is impossible. It seems that Arendt, with the problem of the refugee, is presenting a crisis for the nation-states and human rights and at the same time she does not offer any suggestions on how to approach this problem. This is disputed by Peg Birmingham, whose attempt to work out an Arendtian approach to human rights is discussed below. As we will see, Birmingham argues that a central project in Arendt's writings is a new formulation of human rights as the right to have rights, that is, the right for all human beings to belong to a political community, which calls for a fundamental restructuring of the relationship between the state, the people and the territory which constitutes the fundament for the nation-state. Before I turn to this attempt at a positive solution, I will however investigate the discussion of the problem of the refugee by another heir to Arendt, namely Giorgio Agamben.

### Giorgio Agamben: *homo sacer*

Arendt's diagnosis of the problem of the refugee (the refugee as the manifestation of the problematic tie between the nation-state and human rights) is the starting point for Agamben's diagnosis of the problem of the refugee. Agamben agrees with Arendt that the reason why the refugee is not protected by human rights is that rights can only be attributed to Man insofar as he is also a citizen. From this we can draw the paradoxical conclusion that the refugee, in the eyes of the law, is not even considered a human being (Agamben, 1998, pp. 128-129). Contrary to Arendt, Agamben argues that the problem of the refugee is best understood, not as a historical problem born with the nation-state, but as a symptom of the problematic nature of sovereign power as such. Where the problem of the refugee in Arendt's perspective is a symptom of the problematic historical connection between human rights and the nation-state, the problem of the refugee in Agamben's perspective is a symptom of the problematic trans-cultural and trans-historical nature of sovereign power. In Agamben's perspective, the exclusion of the refugee—*homo sacer*—is the original and fundamental activity of sovereign power, and the production of refugees as rightless human beings is thus not only a necessary implication of nation-states, but of all sovereign power. It is this connection between sovereign power and the rightless men that is the primary inquiry in Agamben's *homo sacer project*[\[8\]](#), to which I will now turn.

The starting point of the *homo sacer project* is the sovereign paradox: "The paradox of sovereignty consists in the fact the sovereign is, at the same time, outside and inside the juridical order" (Agamben, pp. 1998, 15). The sovereign is outside the juridical order in the sense that he has juridical immunity (the law does not apply to him) and he is inside the juridical order in the sense that he *is* the fundament of the juridical order. The structure of the sovereign paradox is the structure of the exception, in the sense that the sovereign is only included in the juridical order by his exclusion from it: the sovereign is the exception of the law, in the sense that the law applies to the sovereign by no longer applying (Agamben,

1998, pp. 15, 18). The core of state sovereignty lies in this exception: the sovereign is not defined by his monopoly to legislate but by his monopoly to decide whether the legislation applies or not.<sup>[9]</sup> The sovereign has the power to declare a state of exception, that is, the suspension of all laws. The state of exception, Agamben argues, is a threshold between inside and outside, between a normal situation and chaos, where the boundaries between law and violence become indistinguishable and everything becomes possible (1998, pp. 37-38). The state of exception is the originary and formal structure of the juridical relation, in the sense that the sovereign decides what is *included in* and what is *excluded from* the juridical order (Agamben, 1998, pp. 25-26). The state of exception is the principle of the law because it opens the very space of juridical order.

The exception as the structure of sovereignty is the originary structure of law, in which life is included in law by being suspended from it. This relation is named *ban*, that is, ban from the political sphere. The person who is banned is by his exclusion from the political sphere still included in the political sphere as an *exception* or an *exclusion*; he is abandoned at the threshold of society in a zone where the boundaries between law and life, inside and outside, disappear (Agamben, 1998, pp. 28). In this zone of pure ban, Agamben argues, the law does no longer prescribe anything, and it is oddly enough in this zone that the law affirms itself most rigorously, because literally everything becomes possible (1998, pp. 49-50). The pure ban is the zone where the law has no content and therefore the possibility of prescribing anything.

In this zone of indistinction a human being is trapped as the bearer of the sovereign ban. The banned is the refugee, the *Friedlos*, the “bare life” (*Bloßes Leben*), *homo sacer*. The existence of the banned is included in the political sphere only through his exclusion from the political sphere; he is abandoned on the threshold of society where the boundaries between violence and law become indistinguishable. *Homo sacer*—literally the *sacred human being*—is a figure from Roman law: he is the man no one can sacrifice, but everyone can kill without committing homicide (Agamben, 1998, pp. 71). At first glance, as Agamben points out, the definition of *homo sacer* seems to be a self-contradiction: if he is sacred why can everyone

kill him without committing homicide? (1998, pp. 72) The question is in what does the sacredness of the sacred man consist? In order to make sense of this, Agamben states, one must recognize that “sacredness” is ambiguous: it is both something *holy* and something *damned* or *tabooed*; something “unclean” that has to be banned from the religious sphere (1998, pp. 77, 79). The ambiguity of the ban, i.e., the inclusion through exclusion implies the ambiguity of sacredness: the tabooed is included in the religious sphere by being excluded from it. *Homo sacer*, Agamben concludes, is not a holy man but a cursed man; *homo sacer* is banned and tabooed; he is an outcast, a *Friedlos* (1998, pp. 79).

*Homo sacer*, Agamben continues, is banned from both religion and society; from heaven and earth (1998, pp. 81-82). He is banned from *ius humanum* because everyone can kill him without committing homicide, and he is banned from *ius divinum* because the sacrifice would be a purification rite and not strictly speaking a death penalty (if *homo sacer* was sacrificed he would be purified and thereby included in the religious sphere). The *sacratio* of *homo sacer* is then a double exception; *homo sacer* is excluded both from the *ius humanum* and from the *ius divinum*; he is excluded both from the sphere of the profane and from that of the religious.

We must understand that it is this double exclusion and *not* the ambiguity of the sacred that constitutes the core of *homo sacer*; *homo sacer* is a product of the sovereign ban, the product of earthly, human action. *Homo sacer* is the human being who is trapped in the double exclusion; he is trapped in a zone where the distinction between sacrifice and homicide disappears. This zone of indistinction—the inclusive-exclusion from both *ius humanum* and *ius divinum*—is the sovereign sphere: “The sovereign sphere is the sphere in which it is permitted to kill without celebrating a sacrifice, and sacred life—that is, life that may be killed but not sacrificed—is the life that has been captured in this sphere” (Agamben, 1998, pp. 83). The life of *homo sacer*, “bare life” or “sacred life”, is the first content of sovereign power, because the sovereign ban is the originary activity of the sovereignty, and the bearer of this ban is *homo sacer*. For this reason the problem of the refugee points towards the originary activity of sovereign power. In Agamben’s perspective, sovereign

power is founded upon the exclusion of some human beings *within* the sovereign to whom the normal rules of the state do not apply. These human beings, the *homini sacri*, are a mirror of sovereign power as such because they are the exception that allows the “normality” to endure. The refugees, as *homini sacri*, are a *locus* where the truth about sovereign power as the sphere in which it is possible to kill without committing homicide discloses itself.

In the modern nation-state a new space comes into existence, i.e. the sovereign sphere as the zone of indistinction where *homo sacer* is kept and where everything becomes possible discloses itself: this new space is the concentration camp. The camp is not defined by its geographical boundaries but by its juridical placement outside the law; the camp is not born out of ordinary law but out of *martial law*, that is, out of a state of exception (Agamben, 1998, pp. 167). An important transition of sovereign power in the modern nation-state is, in Agamben’s perspective, the tendency towards declaring a “state of willed exception,” (2005, pp. 3; 1998, pp. 169) or the *permanent* state of exception. By this Agamben means that the state of exception becomes a “paradigm for government”: the exception is used, not out of necessity, but as a political tool of governmentality (2005, pp. 1, 30-31). The state of exception is “willed” because it is an extremely effective tool to carry out political actions that could not have been carried out under “normal circumstances,” that is, outside the “exception” of martial law. An example hereupon is the laws in Germany between 1933 and 1945. In 1933, when the Nazis took power, a state of exception was declared by the “decree for the protection of the people and State” (Agamben 1998, pp. 168; Agamben 2005, pp. 2). This decree remained *de facto* in force until the end of the war and in that sense Nazi Germany can be understood as twelve years of state of exception, that is, a permanent state of exception, a state where the exception has become the rule (Agamben 1998, pp. 168-169; Agamben 2005, pp. 15-16). The concentration camp is the space where the permanent state of exception is in full power. This means that the concentration camp is excluded from ordinary legislation and for this reason anything can happen within the camp: there are no laws within the camp except the law that no laws apply. This is the meaning of Agamben’s cryptic formulation that the law in the permanent state of exception is in force as the “Nothing of Revelation” (1998, pp. 51): the law does not prescribe anything but that does not mean that a sphere of freedom is created; the camp is, on the contrary, the space where the highest possible control of human beings is possible. In the camp, the law is in force without



signifying anything. This space of the camp has become, in Agamben's perspective, the "nomos" of the modern, meaning that the camp as a juridical space not only exists in concentration camps but potentially everywhere: in airports, in public areas and in outskirts of cities in which we live (1998, pp. 175). In modernity, the state of exception becomes a latent possibility everywhere, and it is thus always possible to reduce human beings to the naked life of *homo sacer*: the willed state of exception signals the permanent possibility of violent government without juridical control.

What is truly radical about the *homo sacer project* is the notion that the society we live in today is a permanent state of exception and that all of us (citizens and refugees alike) in all present-day societies (authoritarian and so-called democratic) are reduced to the naked life of *homo sacer*: "If today there is no longer any one clear figure of the sacred man, it is perhaps because we all are *homini sacri*" (Agamben, 1998, pp. 115). In *State of Exception*, Agamben presents a theoretical and historical introduction to the juridical notion of the state of exception. What becomes clear from his analysis is an inner relation between the laws in Germany between 1933-1945 ("Decree for the protection of the people and State") (Agamben, 2005, pp. 2) and the USA Patriot Act from 2001, which was passed to protect "the national security of the United States" (Agamben, 2005, pp. 3): if you are suspected of endangering national security, your constitutional rights are *de facto* suspended. With the USA Patriot Act as a role model, "terror-laws" have been passed in most of Europe and at least to that extent it is understandable why Agamben understands the permanent state of exception as the new paradigm for government (Agamben, 2005, pp. 1-4). It is for this reason that Agamben argues that all present-day societies (totalitarian and so-called democratic) are ruled by a permanent state of exception where the law discloses itself as the pure "Nothing of Revelation" and where all human beings (citizens and refugees alike) can be reduced potentially to the status of the *homo sacer* and where all spaces can be transformed potentially into the juridical exception of the camp (Agamben, 1998, pp. 51).

Since, for Agamben, the origin of the problem of the refugee is the very nature of sovereign power, it is, in this view, necessary to challenge and overcome sovereign power as such, if

the problem of the refugee is to be solved. Put another way, for Agamben, it is necessary to go beyond politics in order to solve the problem of the refugee. One attempt to go beyond politics would be a cosmopolitan solution, such as the construction of a world state; something that however is incompatible with Agamben's philosophy. The cosmopolitan solution would be to include and unite all human beings in the world in one state and thereby do away with stateless and refugees simply by eliminating the plurality of nation-states. Following Agamben's philosophy, this solution does however not challenge the problematic core of sovereign power. The production of the bio-political body of *homo sacer* would also be the fundament of sovereign power of the world state: there would therefore still be human beings who are reduced to naked life even though they, strictly speaking, might not be stateless or refugees. As countless examples from 20<sup>th</sup>-century history show—concentration camps are only the most predominant and surely far from the most recent example—it is quite possible to repress a part of the population within the boundaries of a state. Cosmopolitanism does therefore not even address the pivotal problem of sovereign power. If the problem of the refugee is to be solved, it is necessary to question the notion of state-power as such.

Agamben's solution is in a way the very opposite of cosmopolitanism: instead of including all human beings in one world-state, what has to be done is a complete and total exclusion of all human beings by breaking down the territorial principle of nation-states. In short, if we want to solve the problem of the refugee, we must all become refugees. Agamben gives a concrete example by reference to the Israel-Palestine conflict and suggesting that Jerusalem become the capital of both Israel and Palestine (2000, pp. 23). In that way, Jerusalem is an *extra-territorial* space for both the Israeli and the Palestinians: no one really belongs there and, in that sense, everyone belongs there; no one belongs there more than the refugee. Agamben visualizes this reciprocal extraterritoriality by a reference to the Möbius strip: the reciprocal extraterritoriality is a locus where inside and outside, inclusion and exclusion, slide into one another (2000, pp. 24). In Agamben's perspective, the breakdown of the territorial principle of the nation-state might open the possibility of annihilating the link between the human being and the citizen and make a reformulation of the notion of a people possible which is independent from state-power (*Ibid.*). This conception of reciprocal extra-territoriality, of the citizens as mutual refugees, serves for Agamben as a new political model for Europe; if we

want to prevent the reopening of the extermination camps in Europe, Agamben writes, we have to question and ultimately abolish the state-nation-territory link (2000, pp. 23-24).

Needless to say, this solution is both radical and problematic. The first question that comes to mind is whether this solution does not only make the situation even worse? How is it possible to address the permanent state of exception in which we now live where we are all *implicitly* reduced to naked life by conceiving of an even more radical state of exception where literally everyone is *explicitly* excluded? Why is it necessary to respond to the state of exception with an even more radical state of exception?

Agamben, in "The Messiah and the Sovereign: The Problem of Law in Walter Benjamin," explicitly addresses the difference between the state of exception in which we are living where the law is in force, but does not signify anything (1999, pp. 170), and the *real* state of exception that somehow has the "potentiality" to overcome the problematic nature of sovereign power (1999, pp. 160), with reference to Walther Benjamin's "Theses on the History of Philosophy" (Ibid.). Here, Agamben sees the possibility of going beyond the fundamental structure of law and sovereign power, and, drawing on Benjamin's interpretation of the Messianic tradition names the *real* state of exception "The Messianic Kingdom" (Agamben, 1999, pp. 162). Messianism in religious context signifies a radical transformation of law (Agamben, 1999, pp. 162-163) as such because the Messiah at the same time has to re-establish the law as it was before the fall and at the same time bring a new utopian world order (Agamben, 1999, pp. 166). The Messianic task is thus paradoxical: with Messiah, "the Law will return to its new form" (Agamben, 1999, pp. 167). In the Cabalist tradition the Law before the fall is God's name written as a medley of letters without any order, that is, without any meaning; the law before the fall is utterly *meaningless* (Agamben, 1999, pp. 165). With this medley of letters that is God's name, all other laws can be written, which means that the originary structure of the law is pure "potentiality"; something that might best be understood as Aristotle's writing tablet, on which nothing was written and on which everything therefore *could* be written (Agamben, 1999, pp. 166). If this is so, the task of the Messiah is to bring a utopian renewal by *re-establishing* the law that has no meaning; by re-establishing a

commandment that does not command anything (Ibid.).

The structure of this Messianic law is structurally similar to the law of the state of exception in which we now live, where the law is in force but does not signify anything. The question now is how the Messianic Kingdom differs from the state of exception in which we now live and thereby introduces the *real* state of exception that has the “potentiality” of overcoming the very nature of sovereign power (Agamben 2005, pp. 59-64). The task of the Messiah is to make a small displacement that seem to leave everything intact (Agamben 1999, pp. 167) and this is why Benjamin writes that in the Messianic Kingdom everything is as it is today, just a bit different (Agamben, 1999, pp. 160, 164, 174). In the Messianic Kingdom, “humanity will play with the law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good” (Agamben, 2005, pp. 164). This does however not answer the question without a further investigation into what that small “adjustment” or “displacement” is.

To understand the difference between the state of exception in which we now live and the *real* state of exception we have to make a distinction between two different forms of Messianism or nihilism: “a first form (which we may call imperfect nihilism) that nullifies the law but maintains the Nothing in a perpetual and infinitely deferred state of validity, and a second form, a perfect nihilism that does not even let validity survive beyond its meaning but instead, as Benjamin writes to Kafka, ‘succeeds in finding redemption in the overturning of the Nothing’” (Agamben 1999, pp. 171). The first nihilism is the “willed” state of exception in which we now live, where the law has been deprived of all content (there is no clear demarcation line between legal and illegal) but at the same time the law remains valid (all acts can *potentially* be judged illegal and all punishments can *potentially* be judged as appropriate); the law of the state of exception is “violence without any juridical form” (Agamben, 2005, pp. 59). The second nihilism is the Benjaminian Messianic Kingdom, in which not only the law has been deprived of all content but also of its validity: the law is no longer in force in the Messianic Kingdom. This is why Agamben concludes that the Messiah, in order to open a passage for the perfected nihilism, “must confront not simply a law that

commands and forbids but a law that, like the original Torah, is in force without significance. But this is also the task with which we, who live in the state of exception that has become rule, must reckon" (Agamben, 1999, pp. 171). By which he means that the task for political action in contemporary society—the task of the Messiah—is not to challenge a law with a concrete content (which we might want to change); the law that has to be challenged in contemporary society is the law of permanent the state of exception (Agamben, 2005, pp. 58) that is, the law which is deprived of all content but still is valid; the law that has no content but has the force and validity to prescribe anything and pass any sentence.

The difference between the state of exception in which we now live and the *real* state of exception is that in the former the law is in force without signifying anything, and, in the latter, the law neither signifies anything nor is it in force. For this reason Benjamin writes that in the real state of exception everything is as it is now, just a bit different; the Messianic Kingdom is a small adjustment. This is why Agamben believes that the state of exception in which we now live can be transgressed only by an even more radical state of exception; the state of exception where the law is returned to its originary meaninglessness; to a medley of letter without any order. Even though Agamben does not discuss the connection, it seems to be obvious that this is the reason why, for his view, it is only possible to solve the problem of the refugee (which is in actual fact the one true *locus* where the horrible truth about sovereign power, namely, that everyone in the modern nation-state are *homini sacri* holds) by truly making everyone refugees, through an attack on the very fundament of the nation-state, that is, the trinity of state-nation-territory. The small "adjustment" that makes the difference between the state of exception in which we live and the Messianic Kingdom can be illustrated by the difference between *homo sacer* and reciprocal *exterritoriality*; between being a refugee in the nation-state and being a refugee in an *aterritorial* state.

An important question relating to the coming of the Messianic Kingdom has until this point in the analysis been excluded, namely the question of *who* the Messiah is or will be? Who are the (post)political agents in Agamben's prognosis? Who is capable of returning the law to its originary meaninglessness? Agamben points to two different fictional characters as images of

the Messiah: Franz Kafka's the man from the countryside (*The Trial*, chapter 9: "The Cathedral") and Herman Melville's Bartleby ("Bartleby the Scrivener: A Story of Wall Street"). It is only possible here to briefly recall the story told to K. in the Cathedral about the doorkeeper who guards the door of the law and the man from the country who spends most of his life waiting, continually asking for the permission to enter the law that is never granted him, until he, just before he dies, is told by the doorkeeper that the door only was meant for him, that only he could have entered it, and that the door now will be closed. Agamben presents an interpretation of this story as an allegory of the law in the state of exception as being in force without significance: where the law is in force precisely because it does not prescribe anything, the door is impossible to enter precisely because it is open (Agamben, 1999, pp. 171). The fundamental aspect of both is the *ban*, that is, the exclusion of the man from the countryside from the door of the law and the exclusion of *homo sacer* from sovereign power. It is easy to interpret the man from the countryside as a "hindered Messiah"; an interpretation Agamben however rejects in favour of the reverse interpretation: the entire behaviour of the man from the countryside is a complicated strategy to have the door closed and overcome the force of the law (Agamben, 1999, pp. 173-174). The story tells us, Agamben writes, not of the failure of the man from the countryside but of the complexity of the Messianic task; of "how something has really happened in seeming not to happen" (1999, pp. 174).

The man from the countryside is the Messiah who overcomes the force of the law by constantly refraining from an action he is capable of (walking through the door); a behaviour that seem to be structurally similar to Agamben's interpretation of Bartleby's "I would prefer not to." Neither the behaviour of the man from the countryside nor the behaviour of Bartleby is direct refusals to act. Instead, each actually expresses the potentiality both to act and not to act, that is, an expression of true potentiality which does not dissolve itself in actuality. Potentiality, that is, the moment where the possibility of acting and not acting, being and not being co-exist, rests in the heart of Agamben's conception of (post)political action. Bartleby's "I would prefer not to" is the formula of potentiality (Agamben, 1999, pp. 253) because Bartleby *could* do what he is asked but he *prefers* not to; in Bartleby's behaviour there is always the possibility that he could act differently. It is not immediately understandable why this notion of potentiality is crucial for Agamben; why is the potentiality to act and not act

more important than the actualization of this potentiality? If we are to challenge the sovereign power and solve the political problem of *homo sacer*, then why is potentiality more important than action (the actualisation of the potential)? Why does Agamben point to two characters who *prefer* not to act as the image of he who is the only one that can overcome sovereign power by returning the law to its originary meaninglessness—the Messiah?

Agamben does not explicitly discuss Benjamin's "Critique of Violence" in his analyses of Bartleby and the man from the countryside as images of the Messiah; this connection is surely on his mind,<sup>[10]</sup> however, and can shed some light on the reason why (post)political action must lie in the heart of the potentiality and contingency (that which could have been its opposition). In *Critique of Violence* Benjamin argues that all violence as a means either is lawmaking or law-preserving, (Benjamin, 1996, pp. 236) which means that human actions under normal circumstances either will be an affirmation of the present law, or human actions will strive to transcend the present law by creating a new law. Since all law is pernicious—something that Agamben and Benjamin agree upon but for different reasons—it is only possible to overcome sovereign power by an utter destruction of the law without instituting a new law (Benjamin, 1996, pp. 246-250). This call for something which does not rest within the realm of means to ends since this realm necessarily will be either lawmaking or law-preserving. What is demanded in Benjamin's perspective is violence as pure means, that is, violence as a means *without* ends; "divine violence" (Benjamin, 1996, pp. 249). Agamben's conception of potentiality is an answer to what this divine violence is. Bartleby's behaviour exceeds the realm of means to ends; he does not act to obtain anything; his behaviour is utterly deprived of meaning. Bartleby's "I would prefer not to" is neither law-making nor law-preserving; Bartleby neither challenges the law by negating it nor does he reaffirm the law; he neither accepts nor refuses the law and in that sense he renders the law meaningless. In this sense the nihilism of Bartleby is structurally similar to Benjamin's conception of divine violence. For both Benjamin and Agamben it seems to be only the nihilism of the divine violence that finally can destroy the force of the law by returning the law to pure potentiality, that is, its originary stage of meaninglessness.

The question is however whether we can accept this understanding of the conditions for political action. Is it not very dangerous to argue for a theory where the only possibility for political actions is the Bartlebyian gesture of “I would prefer not to”? Within Agamben’s diagnosis of contemporary society there is absolutely no room for full-fledged action, not even for the action of saying *no*, there is no possibility for political organization, even a hunger strike is precluded exactly because it also works within the categories of means and ends (I will start to eat again if you do so and so). Notwithstanding Agamben’s elegant explanation of how the Bartlebyian gesture has the possibility of leading us to the “Messianic Kingdom”, where everything will be a bit different, I would maintain that this is not the most likely result, should all critical political actions come to be like Bartleby’s gesture. I will argue against Agamben that it is dangerous to give up the possibility of political action and political organization. The challenge for a critical continuation of Agamben’s thinking, I will argue, is to find a position from which it is possible to criticise the problems of the nation-state without giving up the notion of political organization and political action. In the following section I use Birmingham’s proposal for an Arendtian reconstruction of human rights, so as to investigate whether we can find the potential, within Arendt’s philosophy, to think a possible way of overcoming the inherent problems of the nation-state that does not preclude political action and political organization.

### **Peg Birmingham: the right to have rights**

In *Hannah Arendt and Human Rights—The Predicament of a Common Responsibility*, Peg Birmingham argues that much to the contrary of what is generally accepted, it is possible to find an argumentation for and a justification of universal rights within Arendt’s philosophy (2006, pp. 1-3). Birmingham argues that Arendt’s has a positive project of formulating a new universal principle of humanity that is to provide a guarantee for human dignity (2006, pp. 4). This new universal principle is the right to have rights, that is, the right to belong to a political community (Arendt, 2009, pp. 296). The starting point of Birmingham’s analysis is the



introduction of *Origins of Totalitarianism*, where Arendt gives a short statement that might help us in understanding her position:

“Antisemitism (not merely the hatred of Jews), imperialism (not merely conquest), totalitarianism (not merely dictatorship)—one after the other, one more brutally than the other, have demonstrated that human dignity needs a new guarantee which can be found only in a new political principle, in a new law on the earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.” (Arendt, 2009, pp. ix)

In Arendt’s perspective, Birmingham argues, the problem of the refugee demands that we reformulate the conception of human rights on the basis of a new understanding of humanity (Birmingham, 2006, pp. 6-12). As discussed earlier, the calamity of the refugees is not their loss of human rights as they normally are declared (life, liberty, the pursuit of happiness, equality before the law, and the freedom of opinion), but that the refugees are utterly excluded from any political community. The right to have rights, that is, the right to belong to a political organization where one is judged by one’s opinions and actions—exactly the right the refugee has lost—ought in Arendt’s perspective to be the new universal political principle; the new “law of the earth.” This right to have rights ought to be founded upon a new conception of humanity and have universal application but at the same time it ought to be instituted by new local governments with limited power.

Arendt’s conception of humanity is, in Birmingham’s interpretation, a critique of the conception of “human nature” that make up the foundation of the Rights of Man, that is, a sovereign subject who is endowed with inalienable rights (Birmingham, 2006, pp. 54-57). As earlier discussed, Arendt regards it as a fundamental problem of human rights that they apply to *man* and not *men*; that human rights, in principle, would be meaningful even though only one human being existed on earth (Arendt, 2009, pp. 299). This conception of human beings misses, in Arendt’s perspective, the fundamental human condition that “men and not

man inhabit the earth" (Birmingham, 2006, pp. 7); that *plurality*, the fact that if there is ever anywhere a human being, this is so only because there is more than one human being and that we human beings are different. This, for Arendt, is the very foundation of human existence. In Arendt's perspective it is therefore necessary to return to an understanding of human existence which is closer to both Aristotle and Heidegger: the nature of human beings is the *bios politicos* and human existence is always already *Mittsein* (Heidegger, 1962, pp. 154-155). It is therefore not meaningful to think of humanity on the basis of individual sovereign subjects: humanity has to be thought on the basis of a shared and common human world; put more practically, on the basis of possible membership in a political community.

In Arendt's perspective, we are not born with rights; rights are something granted to us in a political community. The event of birth—the fact that we are born creatures—lies however at the heart of Arendt's understanding of humanity. Arendt terms this condition of our existence *natality* and it is the most fundamental condition for human existence (Arendt, 1998, pp. 8-9). The event of birth is not only the physical and biological event of birth, but also the linguistic and political birth: that we are born creatures into a common world of speech and action. The principle of *natality* is twofold: the principle of "givenness" and the principle of "beginning" (*initium*) (Birmingham, 2006, pp. 104). The principle of givenness is based upon Heidegger's notion of *Geworfenheit* (Heidegger, 1962, pp. 174); that we as human beings always are "thrown" into a web of circumstances which we as born creatures did not have any influence on. We did not choose our parents, our sex, or our culture ourselves: it is simply something that is *given*. The given is however nothing static or unalterable: the givenness of a people is a web of appearances that always is in *flux* with the birth of newcomers (Birmingham, 2006, pp. 102-103). The second principle of *natality*—the principle of beginning—refers to the miracle that new human beings are born into the world. In this miracle of birth, the human faculty of action, that is, the possibility of the beginning of something completely new, is founded too (Arendt, 1998, pp. 9). Together with the faculty of speech, action constitutes the human possibility of expressing, not only something, but oneself (Arendt, 1998, pp. 176). In speech and action we find the possibility of appearing to one another, not *qua* objects, but *qua* men (Ibid.); in speech and action we create the possibility of political life, which in Arendt's perspective is the only dignified form of human life. The double principle of *natality* (givenness and beginning) is the foundation for Arendt's

rethinking the Right of Man, as the right to have rights, that is, the right to belong to a political community: “The miracle that saves the world, the realm of human affairs, from its normal ‘natural ruin’ is ultimately the fact of natality, in which the faculty of action is ontologically rooted. It is, in other words, the birth of new men and the new beginnings, the actions they are capable of by virtue of being born” (Arendt, 1998. pp. 247).

On the basis of this new ontology of the human as a person, Birmingham argues, Arendt wishes to advance the right to have rights—the right for each of us and every one among us to be born into a given political community where we can appear as dignified human beings—as the new “law of the earth,” and the true basis for actionable human rights claims. But to what does Arendt allude when she argues that this new political principle “must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities”? (Arendt, 1998, pp. ix) The first part of the claim is easy enough to understand; the right to have rights applies universally; all human beings have to be included in a political community. What at first sight is puzzling is that this universal principle needs to be limited and controlled by new “territorial entities.” The institutional framework of the right to have rights ought to be nation-states that are totally deprived of nationalism (according to Birmingham that is what Arendt alludes to by “newly defined territorial entities”). For Arendt, on Birmingham’s view, the task of political theory today is “to find a political principle which would prevent nations from developing nationalism and would thereby lay the fundamentals of an international community capable of presenting and protecting the civilization of the modern world” (Birmingham, 2006, pp. 135). Nation-states without nationalism is a counterintuitive formulation: how is it possible to have a nation-state not founded upon nationalism? What Arendt is challenging here is the trinity of state-people-territory (Arendt, 2009, pp. 282) that provides the basis for the nation-state. In Birmingham’s perspective, Arendt argues that nation-states without nationalism entail an “open society that recognizes only citizens, not nationalities, and whose legal order ‘is open to all who happen to live in the territory’” (Birmingham, 2006, pp. 140). Birmingham speculates that Arendt envisions nation-states with open borders where all people who live within the nation-states territory are granted citizenship (Birmingham, 2006, pp. 140-141). These newly defined territories would recognize no nationalities, only citizens, and they would include all human beings who happened to live within the territories (Birmingham,

2006, pp. 140). By including all human beings in some political community or other, the refugee *qua* political category is totally exterminated because the right to have rights is universally valid and implemented. Just how this meaningfully differs from Benhabib's proposal, rejected above, will be discussed in a moment.

According to Birmingham, Arendt argues for the necessity of a federal juridical structure to provide international justice as a supplement to these new non-nationalistic nation-states. Birmingham engages in Arendt's numerous discussions of the Israel-Palestine conflict to explain what this might mean in practice. According to Birmingham, Arendt envisions that Israel-Palestine is governed by numerous local self-governments on a small scale (2006, pp. 139) (each of which do not distinguish between Jews and Arabs in granting citizenships) in combination with a federated structure. This same federated structure ought, in Arendt's view, be introduced in Europe as well: "In the long run, the only alternative to Balkanization is a regional federation which Magnes...proposed as long ago as 1943" (Birmingham, 2006, pp. 1389.

In her interpretation of *Eichmann in Jerusalem*, Birmingham suggests that the role of this federal structure is to establish an international criminal court. Birmingham refers to Arendt's discussion of Jaspers' proposal (originally framed in a letter to Arendt)<sup>[11]</sup> that Israel—after a thorough investigation and presentation of the fact in a trial—waives its right to pass judgement on Eichmann and appeals to humanity as such to establish an international criminal court. However, I disagree with this part of Birmingham's interpretation: where Arendt is in agreement with Jaspers that the Nazi genocide was a crime against humanity (an attack upon human plurality as such, that is, upon a characteristic of the "human status" without which the very words "mankind" and "humanity" would be devoid of meaning") (Arendt, 1992, pp. 268), she does not, in my opinion, agree with Jaspers that it is necessary to form an international criminal court. The main problem with Jaspers' proposals, in Arendt's perspective, seems to be their unrealistic nature: "They were indeed quite unrealistic in view of the fact that the U.N. General Assembly had 'twice rejected proposals to consider the establishment of a permanent international criminal court'" (1992, pp. 271). Furthermore,

Arendt seems to disagree with Jaspers in the sense that she believes it possible for Israel to provide a competent court for trying Eichmann in accordance with the Genocide Convention either by an extension of the territorial principle (according to Arendt that could easily have been done by defining “territory” not merely geographically but also as a political and legal concept: Israel as a body of the cultural community of the Jewish people)[12] or, by setting up an international court in Jerusalem (1992, pp. 271). According to Arendt, the last option was neglected because the trial against Eichmann in the eyes of Israel was a historical event: for the first time in history “Jews were able to sit in judgment on crimes committed against their own people, that, for the first time, they did not need to appeal to others for protection and justice” (Ibid.).

That Arendt suggests that Israel could be competent to judge Eichmann on the basis of a reformulation of the territorial principle as the body of the Jewish people, points towards an interesting aspect of how Arendt rethinks the old trinity of state-people-territory. Arendt believes that—with the new conception of the nation-state—it will be possible to think of the people independently of the state. This principle is also the foundation of Arendt’s complicated commitment to Zionism. Arendt believed that the true commitment of Zionism is the constitution of a Jewish homeland in Palestine—not a “pseudo-sovereignty of a Jewish state” (Birmingham, 2006, pp. 139). This Jewish homeland ought to be structured around the Hebrew University, and it is in this way Arendt envisions the possibility of a non-nationalistic conception of Zionism (Ibid.). This is in Birmingham’s perspective also the reason why Arendt broke with Zionism herself when she saw what the state of Israel became centred around Israel as a sovereign state founded upon the old trinity of people-state-territory, with the exclusion of, and unequal status for, the Arab population as the predictable result (Birmingham, 2006, pp. 138-139).

According to Birmingham’s interpretation of Arendt, the right to have rights ought to be the “new law of the earth.” This new universal principle ought to be enforced by new territorial entities, meaning, open-bordered non-nationalistic nation-states based upon local self-governments. In this way it seems possible to argue for a fundamental questioning of the

nation-state's trinity of state-nation-territory without abandoning the possibility of political organization and political action: on the contrary, political action and political organization would be the very fundament of this new "law of the earth."

Birmingham's proposal is in one sense quite similar to Benhabib's proposal of porous borders and universal hospitality. The difference, I propose, emerges from attention to Arendt's diagnosis of the problem of the refugee. Where both Benhabib and Birmingham adhere to Arendt's principle of the right to have rights, the right to membership, only Birmingham accepts Arendt's warning that it is not possible to guarantee this new "law of the earth" within the system of nation-states. Benhabib, as far as I can see, does not take Arendt's warning that the problem of the refugee signals a crisis of both human rights and the nation-state sufficiently seriously. Where Benhabib argues that it will be possible for the nation-states to include the unspecified "others" through a strong adherence to the democratic principle of reconstitution of the *demos* through democratic iterations, Birmingham argues that it is only possible to include the stateless through a restructuring of the very fundament of the nation-states. Benhabib's proposal of "universal hospitality" presupposes that the "others" are already citizens somewhere else: what Benhabib does not see is that the condition for being treated as a guest exactly is that the guests go home at some point and that the stateless no longer have a home to return to. Birmingham's proposal, heavily indebted to Arendt's writings, takes its point of departure in the insight that the nation-state cannot solve the problem of the refugee because the nation-states *are* the root of the problem of the refugee. Contrary to Benhabib, who argues that it is sufficient to adjust the framework of the nation-states, Birmingham argues that the problem of the refugee only can be solved by going beyond the framework of nation-states by constructing direct democracy on a small scale in non-nationalistic open-bordered nation-states.

## Conclusion

In spite of the great differences between Arendt and these three thinkers following in her wake, they all are in agreement that the problem of the refugee points towards the state-people-territory trinity as integral to the modern nation-state, and thus a fundamental problem for life within pluralist democracies today. They agree that the challenge of the refugee is so serious that we must reconceptualise the very ground of the nation-state, if not try to move beyond the nation-state altogether. The nation-state is fundamentally problematic because of the singular way in which it identifies both polity, people, sovereign self-determination and nationalism. The basis of the nation-state is, as the very name suggest, double: nation and state. This means that the nation-state is build upon the Westphalian conception of sovereignty that states absolute sovereignty within a defined territory and the idea of a unified people belonging to this state. Only the nationals (i.e. those who are citizens by birthright) are citizens of the nation-state. This is what it means to say that the nation-state is founded upon the trinity of state-people-territory: the state enjoys absolute sovereignty over one people who lives within a demarcated territory. The problem of the refugee shows the fundamental problem of this system: what is to be done with the people who no longer belong to any nation, or, the people who belong to nations that do not have a state? The refugees could not be accepted anywhere because they either were not nationals, whereby they could not become citizens, or, they belonged to a nation that did not have a state (such as the Jews).

This is why Arendt, Agamben, Benhabib and Birmingham all find it necessary to challenge the nation-state's trinity of state-people-territory. Benhabib understands the EU as such an attempt: the EU creates subcategories of citizenship to all citizens of the EU regardless of which nation they belong to within the region. Benhabib understands this as a shift towards a conception of political membership which is based upon where people live and not what nations they belong to. The problem of this solution is of course that it still only includes people who are nationals and citizens of their own country within the EU, and that therefore it does not present a solution of the problem of the refugee. Furthermore, Benhabib argues that the challenge that lies ahead is the construction of an international regime where the right to have rights, the right to belong to a political community, is independent of nationality.

Whereas Benhabib fundamentally believes that this will be possible within the framework of the nation-states, if they subscribe to deliberative democracy; Agamben and Birmingham suggest that it is necessary to go beyond the nation-states, if the trinity of state-people-territory is to be challenged. Agamben suggests that it is necessary to create a-territorial states where all inhabitants are to become reciprocal aliens: no one belongs there and in that sense no one belongs there more than the refugee. For him, the only solution to the problem of the refugee is that we all become refugees, and only then will it become possible to re-establish a notion of a people which is independent from the idea of state sovereignty (Agamben, 2000, pp. 23-24). It is not at all obvious that such a state of reciprocal aterritoriality is a desirable form of political organization: it might just make the situation worse by depriving all people in the world of their status as full-fledged citizens. This is however not a valid critique within Agamben's theory since all people in the world already are deprived of their rights as citizens: according to Agamben we are all *homini sacri*. It is however hard to see how this change of political organization is to be accomplished, because Agamben's theory excludes the possibility of political action and political organization: political action must come from the scarce ground of the inmates in the camp or the Bartlebyian gesture of "I would prefer not to."

It is an interesting question where Arendt stands in relation to the challenge of the trinity of state-people-territory, because she is claimed it possible to solve the problem of the refugee within the framework of the nation-state (in this essay represented by Benhabib) and the theorizations that find it necessary to go beyond the nation-states, if the problem of the refugee is to be solved (in this essay represented by Agamben). I have engaged in Birmingham's interpretation of Arendt in this essay, which lies in-between Benhabib's and Agamben's, but possibly closer to Agamben's. Birmingham argues (in closest conversation with the widest survey of Arendt's own writings) that it is possible to argue for a new universal principle of the right to have rights—the right to belong to a political community where one can speak and act among equals—which is to be guaranteed by non-nationalistic open-bordered states that will grant membership, not on the basis of nationality, but to all the people who happen to live, and come to live, within the territory. Needless to say, this is a revolutionary thought that would revolutionize fundamentally the political organization of the whole world; at the same time, however, it is structured around the democratic ideal,



which also Benhabib adheres to, namely that of local democratic self-governance.

Within Arendt's theory, in contrast with Agamben's theory, political agency is not only possible—it is the core of human existence as such. Action rests within human beings as a permanent immanence and political change is therefore always a possibility where human beings share a common life. What makes wilful political change, such as a revolutionary restructuring of sovereign power, harder to conceive of is exactly the miraculous status of human actions. The results of actions are always totally unpredictable and it is therefore hard, if not impossible, to plan for the future. This is the reason why Arendt writes that it is a great mistake to believe that revolutions are made (Arendt, 1970, pp. 48): revolutions and change happen, but it is impossible to plan them because of the unpredictability of human actions. Furthermore, exactly because the ends of human actions are unpredictable, the means used to reach political ends are therefore of more importance than the goals themselves (Arendt, 1970, pp. 4). The prospect of political change is for Arendt something that is utterly impossible to plan and wilfully construct. However the potentiality of political change rests within human existence also in the most desperate situations as a permanent immanence and in that sense Arendt's philosophy bears a kindle of hope within.

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[1] This view is held by Jürgen Habermas, Axel Honneth, Nancy Fraser, and Seyla Benhabib amongst others.

[2] This view is held by Judith Butler, Alain Badiou, and Giorgio Agamben amongst others.

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[3] It ought to be mentioned here that it is not self-evident that the “attributes” Benhabib mentions are non-elective. Attributes such as religion (or sexuality or even sex) might by other scholars be understood as an “elective” attribute.

[4] The literature of the subject of the “democratic illegitimacy” of EU is extensive and many different arguments for the problematic aspect of the democracy of EU have been put forward. The work of Daniele Archibugi is one insightful instance.

[5] Cf. <http://www.justice.gov/opa/pr/2011/February/11-crm-142.html>

[6] Cf. [http://www.msnbc.msn.com/id/6090637/ns/us\\_news-security#.T8-zldWdCGA](http://www.msnbc.msn.com/id/6090637/ns/us_news-security#.T8-zldWdCGA) and <http://www.washingtonpost.com/wp-dyn/articles/A45796-2004Sep23.html>

[7] Cf. <http://www.bbc.co.uk/news/world-europe-11027288>

[8] *The homo sacer project* consists of two books as yet: *Homo Sacer: Sovereign Power and Bare Life* and *State of Exception*.

[9] “Therein consist the essence of State sovereignty, which must therefore be properly juridically defined not as the monopoly to sanction or to rule but as the monopoly to decide where the word “monopoly” is used in a general sense” (Agamben, *Homo Sacer*, 16—quote from Schmitt’s *Politische Theology*).

[10] Agamben discusses Benjamin’s “Critique of Violence” extensively elsewhere: Agamben, *State of Exception*, 63 and Agamben, *Homo Sacer*, 63-67.

[11] Jaspers write to Arendt: “I still harbour a foolish yen for my idea: Israel does an exemplary job of historical investigation and documentation and then closes with this demand addressed to humanity, which is represented formally today by the UN: Here are the facts. It is a task for humanity, not for an individual nation state, to pass judgement in such a weighty case. We have the perpetrator of these crimes in our custody and place him at your disposal. What he did concerns all of you, not just us.” See Hannah Arendt and Karl Jaspers, *Correspondence; 1926-1969* (New York, San Diego and London: Harcourt Brace Jovanovich, 1992), 419. “Israel could easily have claimed territorial jurisdiction if she had only explained that ‘territory,’ as the law understands it, is a political and legal concept, and not merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws. Such relationships become spatially manifest insofar as they themselves constitute the space wherein the different members of a group relate to and have intercourse with each other. No State of Israel would ever have come into being if the Jewish people had not created and maintained its own specific in-between space throughout the long centuries of dispersion, that is, prior to the

seizure of its territory.” (Arendt, *Eichmann*, 262-263). In a letter to Arendt in December 1960 Jaspers argues against this view: “Israel didn’t even exist when the murders were committed. Israel is not the Jewish people. (...) The Jewish people are more than the state of Israel, not identical with it. If Israel were lost, the Jewish people would still not be lost. Israel does not have the right to speak for the Jewish people as a whole.” See Arendt and Jaspers, *Correspondence*, 410-411.