HannahArendt.net

Ausgabe 1, Band 9 – November 2018

In What Way Are Human Rights Abstract? Or how to turn exceptions into examples

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Structure

I. Arendt's human rights critique as a critique of abstraction

Hannah Arendt saw the abstractness of human rights as consequential for their justification as well as their validity. Hers is a dramatic description of their ineffectiveness as protection rights for refugees, who far from being protected were in fact outlawed. She contrasts this with the much quoted only human right, the right to have rights (das "Recht, Rechte zu haben", Arendt 2001a: 615)[1], the right to participate in a legal community, literally "auf Mitgliedschaft in einer politischen Gemeinschaft" (Arendt 1949: 766), the right to membership of a political community. The following explores the potential application of this actual and 'more concrete' human right, whose task it is to strengthen and enlarge the meaning and validity of human rights (with detailed evidence: Rosenmüller 2013).

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1 All Arendt sources mentioned in this text refer to German editions of her work.

a) The so-called *dual nature of human rights*

When it comes to the abstraction of human rights two aspects stand out and stem initially from the dual nature (cf. Alexy 2011) of human rights as both moral claim and positive right. Human rights are spoken of at different levels of validity. On the one hand, it is purely a matter of moral claims derived from the universal validity of human rights, while it refers, on the other hand, to these rights as international law, as European law, and in national constitutions such as the German constitution (Basic Law) in the form of fundamental rights. The dual nature of human rights refers to their existence as mere moral claims (first nature) and as rights (second nature) endowed in part with legal power and enforceability. This legal power is graded progressively, since national basic rights as constitutional law rather than international law are easier to enforce and more actionable. In other words, as positive law, human rights become more abstract, since their application demands enforceability. This notwithstanding, human rights are less 'abstract' than other ethical ideals and claims insofar as they are in possession of a certain amount of legal power. So much for the first aspect of abstraction, which is certainly an issue in Arendt's work.

Secondly, the content of human rights is abstracted from valid national law and its cultural and particularist context, and verbalizes universal claims. This, too, can be pilloried as abstraction from the concrete context. Thirdly, human rights can be interpreted as abstract principles that radiate onto the law but are themselves more than is manifest in the defensive function of the law (cf. Alexy 1992).

b) ‚Aporia' in Arendt

Arendt's work contains other aspects of the abstraction critique, all of which will be outlined here. Her chapter on "Die Aporien der Menschenrechte" ("The Perplexities of Human Rights") appears to suggest that even erroneous conceptions have a political impact. She states, for example, that human rights are aporetic but goes on to formulate a single human right, the now well-known right to have rights (das "Recht, Rechte zu haben", Arendt 2001a: 615). In my view this is not entirely a matter of aporia but rather of a confusion of categories and attitudes that could in fact be resolved. Referring to *aporia* in the sense of being confused places Arendt in her late work *Das Denken* (*Thinking*) in the Aristotelian and Platonic tradition of amazement at the very beginning of thinking and philosophy (Arendt 1989a: 142 f.). For Arendt, thinking begins when it shatters conventional rules. She is clearly concerned with a new way of thinking human rights through and of understanding them. Arendt wants to point out certain inconsistencies in the classic conceptions of human rights, for which the genuine human right – the right to have rights – offers a path of solution. She deducts this *ex negativo*, opening with a methodical instruction in which she makes clear that to discern this right it might be useful to first take a look at the legal situation of the lawless in order to ascertain the rights they have actually lost and precisely why loss of these rights has placed them in an utterly lawless situation; "um dieses Recht zu entdecken, mag es nützlich sein, sich erst einmal die legale Lage der Rechtlosen selbst anzusehen, um ausfindig zu machen, welche Rechte sie denn

eigentlich verloren und warum gerade der Verlust solcher Rechte sie in eine Situation absoluter Rechtlosigkeit gebracht hatte" (Arendt 2001a: 607).

This procedure gives an impression of positive law, according to which the effectiveness of a right is measured by its actual impact or more precisely its political manifestation rather than by its formal setting, a phenomenology clearly at odds with the validity criteria of today's legal theory of proper lawfulness, social effectiveness and substantive correctness (e.g., Alexy 1992: 29). For even the withdrawal of rights in Arendt's opinion has a real, i.e., a positive impact. Here Arendt contradicts the liberal theory of separation expressed in the notion of a dual nature of human rights: The separation theory distinguishes between de jure validity as a purely moral justification and de facto validity, that is, the enforceability and executability of the law (cf. Krawietz/Aarnio 1993: 53). The moral claim of human rights would then be made on the international stage in order to corroborate and enforce them more and more. Arendt, on the other hand, sees the moral claim of human rights and legal enforcement as political phenomena, as manifestations of the law, both of which require consent. Absence of this consent implies in both cases impotent violence that oppresses people with the tyranny of reason or the power of guns. In her work, Arendt ultimately calls for plurality, not merely in democratic action but likewise in thought. This is not unimportant for her political conception of the law.

c) The failure of human rights in the event of disenfranchisement by law

Arendt bases her idea of *aporia* in human rights on the stateless, who are beyond the legal protection pale of the state and consequently dependent on human rights. They are the real addressees of human rights. As she shows in her book on totalitarianism, human rights fail at the precise moment they are called upon to function, i.e., irrespective of the positive right to protection. Conceptual exclusion from the legal addressee group was followed by de facto exclusion from the political space and ultimately from the world of the living. Here Arendt describes disenfranchisement not simply as lack of protection, she outlines the idea of a positive anticipation of genocide *by virtue of* this disenfranchisement. Waltraud Meints aptly spoke of Arendt as a thinker of the social because she traced the production of superfluous humanity (cf. Meints-Stender 2004). Meints has also shown that Arendt's analysis of total domination in *Elemente und Ursprünge totaler Herrschaft* (*The Origins of Totalitarianism*) serves as "Spiegelschrift", as mirror writing for political theory (Meints 2011: 25). This systemizing theory also ties in with Arendt's concept of the law.

Arendt divides the loss of rights into a sequence of two, or three steps as Bernd Heiter once tellingly stated: (1) loss of a home through flight, which she equates with "Verlust des Raums und des Standes", loss of space and of status, and loss of a place in the world (Arendt 2001a: 607), (2) loss of legal protection by the government, which goes hand in hand with the withdrawal of citizenship and statelessness, and (3) "absoluten Rechtlosigkeit", total lawlessness (Arendt 2001a: 611) or "absoluten Unschuld", total innocence (Arendt 2001a: 610), which can be seen as a separate step or aggravation of the first step, since Arendt points here to the plight of the stateless as not even that of a crim-

inal, the target of criminal law, but as no longer addressees of the law in any form whatsoever.

Two functions of the law are described here: legal status grants a place among people, it gives protection and renders the person an addressee of the law. It is my belief that this order suggests a ranking in Arendt's work, which sees legal protection as secondary, since it presupposes legal status and involvement in the game and the rules of the game. This implies that Arendt not only credits the law with negative power and a protective function but would also suggest that it contains positive and unstoppable creative power (cf. Allen 2002: 132).

d) Abstraction as exclusion

Arendt thus demonstrates that a gradual descent into lawlessness signifies the loss of a place in the world, "des Standpunktes in der Welt" (Arendt 2001a: 613). When she defines the loss of a place in the world negatively as the status of not belonging to a community of any kind, "zu keiner irgendwie gearteten Gemeinschaft zu gehören" (Arendt 2001a: 612), she refers exclusively to a relationship with the fellow world, "Mitwelt" (Arendt 1981: 169) rather than the thing world, "Dingwelt" (Arendt 1981: 87). Arendt draws the conclusion, however, that the only genuine human right is the right to this place in the world, the right to have rights. This line of argument should also be understood as phenomenological evidence, if we are to take the concept of reality and appearance in Arendt's work seriously (cf. Schmitz 2001). For in the loss of rights is the implicit recognition that the human right in each de facto withdrawal of rights *appears* as a missing right. Unlike the classic liberal political theories, Arendt does not construct a fictitious sequence of steps from nature to civilization that guarantees and protects rights – that would simply be *one* concept of law, which she mostly refers to as *nomos* in *Was ist Politik?* (*The Promise of Politics*) and contrasts with the Roman *lex* (cf. Arendt 2003). Quite the contrary, in fact, lawlessness first arises with dehumanization or naturalization, and is immediately apparent as such. Arendt does not therefore assume that humans were originally natural beings – they are instead first and foremost political beings. This order is one of method rather than of ontology, albeit notoriously controversial due to its normative charge. In its defence it could be argued that the theory of an originally natural being is as normatively charged and difficult to justify as its opposite.

e) The abstract human being: three aspects of being human

Why then should the only human right escape the aporia Arendt perceives in human rights? Here Arendt uses several arguments in the direction of what can be summarized under the heading of abstraction (cf. Arendt 2001a: 623). The failure of human rights lies primarily in their abstractness, a critique of both their theoretical justification and their enforceability, i.e., their application. Arendt first attacks the justification for human rights in as much as it uses the reduced human image of an abstract being, "abstrakten Menschenwesen" (Arendt 2001a: 623), that is pre-political and thus ineffective.

A political justification for human rights, on the other hand, derives from a crucial distinction between three aspects of man (cf. Arendt 1998: 40f.) that tie in with the two basic conditions for plurality and natality (cf. Arendt 1981: 14ff.). Accordingly, human rights cannot be justified by human nature or reason, since both explanations consider the human being as such and only in the singular.

In Arendt's view, however, man as the human species (first aspect) is an abstract human being (cf. Arendt 2001a: 632) that, seen as a biological genus, finds itself in a state of abandonment, "Verlassenheit", because the natality principle has been ignored. Natality in Arendt's diction means that a human being is not obliged to tie in with the genus, "nicht anknüpfen muss an die Gattung" (Arendt 1981: 353, note 3) but can act spontaneously as a beginning being and start afresh. The natural law justification sees human beings merely as a genus placed in a pre-legal conceptual context. Arendt takes a similar view of the criticism of man as history's historical being, since progress in her work falls into the same category as reduction to a biological genus and is thus likewise at odds with human dignity (cf. Arendt 1998: 102). Even justifying human rights with human dignity of the individual is subject to the logic of reduction, which understands man as a singular being. Derived from a pre-legal conceptual context, such justifications are ineligible, since they have a tendency to conceptually promote lawlessness and barbarity, and ultimately render the law powerless. So much for the natality principle.

Similarly, contemplating man as an intelligible reasonable being (second aspect) refers for justification to the wrong category: Man as a reasonable being is lonely, "einsam", according to Arendt because despite his perception as a mentally spontaneous being he belongs to the spiritual realm, "Geisterreich", of intelligible beings and is thus abstracted from his plurality (Arendt 1998: 41). Loneliness in reflection is by no means a negative attribute (cf. Arendt 2006: 80ff.) since it describes the prerequisite for conscience as an inner dialogue. What it describes, however, is a mere self-reference. As a reasonable being in the Kantian sense, human beings are not plural but equal, that is, they are guided by universal reason. Hence the principle of plurality is either given too little consideration or human beings are abstracted from it.

Only Arendt's view of man (third aspect) as earthbound creatures, "Erdenwesen" (Arendt 1998: 41), seems to take into account the two vital principles of plural beings and beings that can start anew, i.e., the principle of *plurality* and the principle of *natality*. Arendt speaks here of humans as political beings, sociable, living in community. With common sense, not autonomous, but free, "gesellig, in Gemeinschaft lebend. Mit Gemeinsinn, nicht autonom, aber frei" (ibid.). If the right to rights as the only right refers to this aspect of people in the plural, it seems possible to avoid positions that Arendt regarded as the conventional misconception of morality and politics, and narrowed down to certain phrases – the tyranny of truth, will enforcement and the intelligible ego – since interpreting politics or the law should not be guided by principles emanating from monolithic and universalist ideas on the morally good.

Arendt's critique of the abstractness of human rights refers therefore to the assumption of false images of man because the biological or rational theory aspect was made absolute. If justifications of this kind contribute to the impotence of human rights, how then can

the third aspect of human rights strengthen them? In the following I present two correctives.

II. The consequence for an understanding of the law: game rules before defence rights

Following Arendt's critique, Etienne Balibar focused on human rights as a driver of legal and political inclusion and exclusion. From Arendt's line of argument Balibar concludes the existence of a so-called "Arendt theorem" (Balibar 2007: 264). Accordingly, human rights must be justified and anchored in civil rights because a right without a reciprocal character, i.e., a lonely natural right, would be bereft of any legal character (cf. Balibar 2007: 265f.). In a similar vein, Sigrid Graumann discusses the inclusiveness of human rights protection (cf. Graumann 2011: 93). Democracy in Balibar does not act as a counterweight , but as a prerequisite, as a guarantor, and as a medium (cf. Menke/Pollmann 2007: 179) for human rights. For Arendt favours their political justification, based not on sovereign violence, as in the case of Carl Schmitt (see below), but on power. In fact, her concept of the political is indeed normatively charged: in Arendt's work both democratic processes of consent and the legal implementation of human rights are based on plural consent. In order for consent to be factual as well as qualified, I suggest that the principles of plurality and natality be taken into account and used as correctives in the interpretation of the law.

How can this be spun further for the interpretation of basic rights? In the ordinary way, individual types of human rights are distinguished and understood as representing different functions of the law. Liberal theories interpret them primarily as defence rights against the state; participatory approaches perceive them for the most part as political and economic participation rights (cf. Mührel/Röh 2008: 50; in depth Marshall 1975). Similarly, constitutional law asks whether basic rights are mere principles or first and foremost defence rights (cf. Poscher 2003).

Arendt interprets the freedom bestowed by human rights not as a negative freedom safeguarded by a protective right from attack by others, but sees it above all as the positive freedom to shape political life in the company of others. This would imply that Arendt prioritizes participation rights. Here she remains foreign to the German legal tradition, and not only in this case. The nineteenth century witnessed two diametrically opposed views in this context, von Savigny's theory of *will* and von Jherings's theory of *interest*, whose legal provisions still predominate in the combination theory that prevails today (cf. Stephanians 2008: 1068); Arendt, on the other hand, would reject both (cf. Rosenmüller 2013, 343ff.). According to Savigny, a right was an individual exercise of power in the area where the will prevails. Apolitical is Arendt's summary of this theory, which focuses on the sovereign exercise of will by the legal entity, since it fails to see the power to act as an individual assertion of will (cf. Arendt 1989b: 160; Förster 2009). Arendt would also reject von Jhering's position, which sees the law determined first and foremost by a conflict of interest. She consistently distinguishes between justifiable violence and legitimizing power (cf. Arendt 2000b). She justifies the law solely with the power of plural consent, which she sees anchored in political opinions rather than in economic interests. Hence in

Arendt's thinking, political action and political judgement would have to be born not of will power or advantage but of the freedom of imagination (cf. Arendt 2000c: 126).

For although free will is vital to initiating causal laws in the material world, it can also be an antidote to violence when it comes to rebellion and resistance (cf. Förster 2009). Nevertheless, individual free will remains pre-political and monological, and cannot therefore be considered the decisive freedom. It is my opinion that freedom of willpower is now protected, notably in the liberal rights of defence (cf. Rosenmüller 2013: 437ff.). This freedom in individual sovereignty from the interference of others is, according to Arendt, a necessary aspect of the law but plays a subordinate role. Genuine political freedom is the freedom of political opinions. In other words, it is not independence *from* others, but freedom among fellow human beings, *with* others, i.e., a positive definition of freedom. Arendt's political freedom is based on freedom of the imagination or the capacity for enlarged thought, "erweiterten Denkungsart", that allows as many opinions as possible to be embraced (cf. Arendt 1998): the more this kind of thinking, the freer it is. This plural freedom also emerges in *phronesis* as the ability to have a sense of the world (cf. Arendt 2000a: 267). Such freedom of thought and of action underscores the political right to participate, and the right to rights as the right to participate in the political designing of processes of judgement.

What does this mean in concrete terms? Whenever a person's negative defence rights and free will are violated – when voting rights, freedom of opinion or life forms are excluded – it restricts the imagination of everyone else, since the excluded position is now no longer visible, perceived or recognized in the public space. It diminishes the enlarged thought of everyone else and consequently encroaches on their human rights. In this sense, protection in the form of a human right is at the same time always about the human rights of everyone else.

Arendt accordingly regards rights neither as properties of independent individuals worthy of protection (cf. Balibar 2007: 265; Arendt 1999: 766) nor as justifiable sanctions, but rather as valid rules of the game, "Spielregeln" (Arendt 2000b: 96, Note 8: Arendt 2001a: 615: Arendt 1999: 761, Volk 2010: 22, 266). As such, constitutional rights would have to be interpreted to mean that the primary task of the law is to enable and enlarge the political space.

III. Application: human rights as positive freedom of the imagination

What does this mean for the practical application of human rights? And what role should human rights play in the practical judgement of situations? To this end, it will first be explained how differently the powers of judgement proceed in assessing situations.

a) Three judgement models

For the purpose of practical judgement, Arendt combines three models of judgement, which she borrows from Kant and Aristotle; I suggest these be understood as a sequence of three separate ways in which judgement works, all of which can be performed in everyday situations. The first method is referred to in jurisprudence as subsumtion and described by Kant as determinant judgement, whereby a case is subsumed under a rule. The second method Kant speaks of is reflective judgement (cf. *B XXVIf., A XXIVf.*), which functions more independently than determinant judgement because it decides on the rule at issue and has the potential to generate new rules from examples, i.e., from individual cases; this is key when no rule exists. Kant admitted that although judgement may be exercised, it does not entail erudition such as perhaps memory skills or intellectual knowledge (Kant's *Critique of Pure Reason*, B172). The opposite can also happen, as in the case of people who are well read but whose judgement skills leave much to be desired. It may even be the other way round and the talent for independent judgement will radiate onto the ability to practise determinant judgement. This corresponds to Arendt's reading of Kant (cf. Kurbacher 2003) and implies that the real ability to judge is not based on the application of rules but on being articulate about them.

Arendt appears to link Kant's judgement models to the capacity of Aristotle's *phronesis* (cf. Rosenmüller 2013: 209). *Phronesis* can be seen as the ability to judge (cf. Wolf 2007). In her late text fragment *Lectures on Kant's Political Philosophy, Das Urteilen* (Arendt 1998), Arendt worked on how to confront the challenges of political judgement in post-traditional times. Imagination, that is, the ability to perceive differently from the intellect, plays a major role as it remains connected to experience and sensual perception.

The heart of the matter here is the inadequacy of merely carrying out rules. Subsumtion under rules, be they legal, moral or technical, is always implicit, of course, and also necessary. It should, nonetheless, undergo correction by the two other judgement activities, leaving the result neither unfair nor cruel to the individual case. Judgement is guided by common sense, which acts both as a corrective and a principle (cf. Rosenmüller 2013). As a counterpoint to the selfishness, *sensus privatus,* "Selbst-Sinn", of reason, which comes from the I-think, "Vernunft, die aus dem Ich-denke lebt", Arendt describes this common sense and its basic function of perception and orientation with the metaphor of a sense of the world, "Weltsinn", which survives on common sense (passive) and imagination (active), "der als Gemeinsinn (passiv) und als Einbildungskraft (aktiv) von dem anderen lebt" (Arendt 2002: 570). It is not self-centred reason, "selbst-gebundenen Vernunft", but common sense and the power of imagination that creates a bond between people, "die Einbildungskraft, die das Band zwischen den Menschen bildet" (ibid.). Meints has demonstrated in great detail that common sense (Gemeinsinn) is the constitutional achievement of world- and self-relations by actor and spectator alike (cf. Meints 2011). But to what extent does this counteract the abstractness of human rights? And why does determinant judgement call for correction? General rules pursue a certain form of justice. This is not enough. The well-known example of Olympia winner Caster Semenya is a good illustration. I argue that this model can be applied to ordinary examples of judgement and the interpretation of rules.

In 2009, Caster Semenya won the women's 800 metres in Berlin and was the origin of a dispute involving her physique, which raised the question of whether she was female or indeed intersexual. After lengthy attempts to establish what constitutes 'female' from a hormone and phenotype perspective, it was decided in 2011 that she should take androgen-reducing drugs because her physical constitution gave her an unfair advantage. Human rights groups voiced strong criticism of the decision (cf. Knuth 2016). Let us now look at the meaning of this ruling from the perspective of Arendt's critique of the abstractness of human rights, and the corrections she might have suggested.

b) The dangers of subsumtion

This example fits in perfectly with Arendt's warning: her critique of subsuming judgement targets the cruel effects of a bureaucracy of pure legal positivism and the tyranny of reason, as it makes an ideology of general rules and loses sight of reality in the process. Imagination in the sense of a living outlook is ultimately drowned in a pseudo-reality that is both monological and totalitarian.

Arendt claims that the seeds of the tyranny of reason can be traced back to Plato, who had a desire for philosophical rulers with uniform laws. She holds that in modern times so-called common sense, the conventional counter-concept to theoretical reason, is powerless against this tyranny. It can no longer be of assistance because it is based on traditions that are now obsolete (cf. Arendt 2000c: 110-127). In addition, history has shown that so-called common sense was also used to tailor interpretations of the law to the needs of the Nazi regime; the idea of a 'sense of decency in all right and proper thinking individuals' ('Anstandsgefühl aller billig und gerecht Denkenden', Reichsgericht since 1901) was perverted to mean a healthy national attitude, 'gesundes Volksempfinden'. Arendt ultimately uses Kant's construction of aesthetic judgement for the political implications of every judgement. Common sense in this case represents an idea of humanity that symbolizes plural rather than abstract people.

c) Phronesis as a subsumtion corrective

In her writings, Arendt links a second component of common sense to Aristotle's *phronesis*. She describes the two components as a collaboration of inner sensor and practical sense (cf. Rosenmüller 2013: 234ff.). In doing so she resorts to a different meaning of common sense. In addition to the Latin root of *sensus communis*, which has more resemblance to Cicero's community spirit, there is a Greek root, a common sense of perception called *koine aisthesis*, the so-called sixth sense that in the Antiquity was the inner sense that coordinated all five senses (cf. Grünepütt 1995). Arendt links this interpretation of common sense as the common perception of all five senses to common sense as a sense of community. What does that mean?

Arendt clearly wants to show that perception is not pre-political, but rooted in our societal and social conditions (cf. Arendt 2002: 335f.; Arendt 1989a: 59f.; Rosenmüller 2013: 246ff.). This is her attempt to explain how it was possible under Nazi rule to manipulate

the perception of reality to such an extent that the deportation of human beings was obliterated and perceived as the transportation of worthless objects. Arendt refers to this cruel form of unscrupulousness as 'thoughtlessness', "Gedankenlosigkeit" (Arendt 2001b: 371), a hideout for lack of thought: monological thinking in clichés instead of critical dialogue. Added to this is lack of judgement, whereby perception of the world in relation to others breaks down. *Phronesis* or practical sense safeguards this reference to the world. According to Arendt, world-related action is a sensible activity, "eine vernünftige Tätigkeit" (Arendt 1989a: 11), guided not by theoretical reason but by *phronesis*, a form of world wisdom, "Weltweisheit" (Arendt 2000a: 267).

Phronesis in the Arendtian literature is understood as actor's judgement (since Beiner 1998, in Arendt 1998: 118ff.). Stateswomen and statesmen need it, as do civil society actors. This is future- and action-oriented judgement where the uniqueness of a situation meets with a general principle in order to successfully resolve a situation. It calls for experience. Aristotle uses the metaphor of the archer with his eye on the target as an illustration. Unlike the mere application of rules, it is vital to constantly enhance this principle with meaning, allowing it to change – whereas a rule will always remain a rule. It would be wise to use this ability when applying rules and to adhere to the principles employed by archers when they perform. In civil law this refers, for example, to ideas of good faith, 'Treu und Glauben' and in social law to the principle of social justice in the Social Code, the German *Sozialgesetzbuch*. These are principles that enrich the interpretation of ordinary rules for action, enlarging and correcting their application.

In the Caster Semenya case, the dispute continued until a further legal ruling by the Court of Arbitration for Sport CAS decided in 2015 that hormone-reducing drugs were hostile to human rights. It argued that Caster Semenya's physical make-up was her natural state and that to all intents and purposes doping had not occurred (cf. Knuth 2016).

If seen as a result of the *phronesis* corrective in the sense presented here, the concept of 'female' runners or of 'natural state' would have been interpreted more broadly than was conventionally the case since a normative orientation towards plural human rights corrects the narrow understanding of a highly specific femaleness. Now that the concept of female runner has become more plural, at least more examples can be subsumed under Olympic regulations than before. Consequently, interpretation of the concept of humanity has become more plural.

It should be added, however, that Caster Semenya would have had no opportunity in the entire procedure to present herself as other than 'female' – if she wished to avoid the risk of being excluded from the Olympic world.

But does participation in the Olympic Games really count as a human right? It could be argued that participation in the Olympics cannot be a universal claim, but is simply a competition that presupposes certain performance standards, which CAS understood in the sense of natural privileges. The crucial question here is whether non-performance-related criteria creep into performance benchmarks unnoticed, leading to a violation of the principle of equality in international competition. Adherence to a specific notion of femaleness led to the impossibility of demonstrating Semenya's physical running talent, whereas the particular length, for example, of American swimmer Michael Phelps's hands and feet, which were advantageous to an outstanding swimming performance, in no way

led to his exclusion from the competition or even to the demand for a medical intervention.

d) Correction through reflective judgement

The *phronesis* corrective should therefore have been supplemented by correction through reflective judgement. The reflective power of judgement is even more independent and in Arendt's idiosyncratic reading of Kant takes two steps: it judges retrospectively according to the following three maxims of *sensus communis*. First maxim: Think for oneself (the maxim of enlightenment) – this means thinking dialogically and mainstream free; second maxim: Put oneself in thought in the place of everyone else (the maxim of enlarged mentality) – this means visiting as many perspectives as possible, at least those of all concerned, such as in a team discussion; third maxim: Be in agreement with oneself (the maxim of consistency) (cf. Arendt 1998: 49 ff.) – this means combining the first two maxims to reach a general point of view, not an objective view, but one that has undergone intersubjective scrutiny. This corrective works against clichés, stereotypes and cruel 'thoughtlessness' by allowing judgement to include the perceptions of as many people as possible.

Reflective judgement is also capable of something else: where no rule exists, it creates a new one from the example. In the case of Caster Semenya, this was quite clearly an excessive demand. Caster Semenya was initially stigmatized as an exception, an exception between female and male that had to be corrected and 'de-androgenized' to ensure that the binary rules of the Olympic Games were upheld. Those concerned could have contemplated new rules, be it for weight class or performance in preliminary rounds. A basic Olympic subdivision would have been called into question and extended. The failure to reinvent rules shows the extent to which this example cast doubts on traditional concepts of humanity.

Some of these new rules, however, give cause for serious objection. Weight classes could exclude other groups or women could find themselves at a notorious disadvantage compared to men. This is not to deny the need for correction, but rather to concede that new rules call for a period of development, political debate and inventiveness.

This would at least correspond to the purpose of Arendt's critique, which is to show that human being should not be made superfluous (cf. Meints-Stender 2004) or become exceptions, but should instead be seen as (counter-)examples and examples of something new, as people in a position to start anew and to forge new beginnings. In cases like this human rights are no longer abstract but given substance and made a reality as interpreted by the enlargement of legal protection.

A fundamental objection to the principal meaning of the power of judgement has yet to be considered. Would the primacy of judgement itself not lead to arbitrary judgements? In terms of interpreting rights, it would certainly be a rule-free act of judgement and virtually carte blanche for the ideological implications of judgement, something that Arendt wanted to confront in the Eichmann report. This should be taken into account when distinguishing between disputes in the political arena, on the one hand, and the political implications of interpreting the law, on the other.

I argue therefore that the proposed order of applying the three activities of judgement is procedurally relevant, the task being to correct the typical pitfalls of legal interpretation in a consecutive and gradual process of mutual correction. Subsumtion under general rules allows determinant judgement to initially counteract the danger of arbitrary judgement that pursues self-interest or merely follows a whim. The task of *phronesis* is to guide legal interpretation with legal principles, and particularly to work against bureaucratic restrictions. Reflective judgement should then investigate the possible exclusion of perspectives and consequently compliance with the plurality criterion. It should only invent new rules in an emergency and as such do justice to the radically disruptive criterion of natality.

e) Once an exception, now an example

This less restricted method of judgement seeks a different form of generality than the generality of rules: generality in place of universality. The motto implied could read: Once an exception, now an example! In Arendt's following of Kant, the reflective judgement is always an exemplary judgement (cf. Ferrara 2003). The actual judgement occurs when the new can be taken as an example. All other forms of judgement, notably determinant judgement, are based on this prototype of free judgement (cf. Kurbacher 2003). It can therefore be stated for the interpretation of the rule of law that Arendt represents an utterly different concept of law than that of Carl Schmitt in his theory of sovereignty.

In Schmitt the sovereign is whoever decides on the state of emergency, "wer den Ausnahmezustand bestimmt" (Schmitt 1934: 11); according to Schmitt the sovereign is simultaneously a constitutional figure of the law. It could now be argued that Schmitt's thinking contains a judgement theory premise that can be impugned by Arendt. For Schmitt sees the validity of the rule of law in permanent opposition to the exception. This binarity, however, is typical only of determinant judgement, which in the case of legal subsumtion must at all times observe whether a case falls under a certain rule or not (cf. Ginsborg 2008). If we assume with Arendt that the basic form of judgement is reflective and not determinant, then the exception cannot be the key figure of thought for constitution of the law, law based on the power of judgement (cf. Volk 2010, Förster 2009). It must be the example.

The example and the exception behave differently towards the rule: in extreme cases valid rules are diametrically opposed to the radical, uncontrollable exception. Examples, on the other hand, first of all confirm, explain and illustrate the rule. According to Kant they are the "go-cart of judgement", "Gängelwagen" (KrV B173). As a counter-example, however, it can extend the rule, it is not in binary opposition to it. Judgement does not always have to suspend the rule, it can enlarge and reinvent rules and thus gradually enlarge human rights.

This relatively imagined generality of the rule is more comprehensive than the idea of a universal rule, since it has the potential to gradually catch up on all of the counter-examples. Democracy theorist Balibar refers to these ideas in Arendt as extensive universalizing (cf. Menke/Pollmann 2007), whereby human rights encompass greater numbers of addressees instead of being doomed to failure due to their erroneous conception as mere rules of exception. The idea of the primacy of reflective judgement could serve to

perceive former exceptions as new examples of plural life forms (cf. Zerilli 2005). This would mean taking apparent exceptions and new life forms as an opportunity to rethink, expand and invent new rules that will enable rather than abstract from the implementation of human rights by all human beings.

Literature

Arendt, Hannah (1949): Es gibt nur ein einziges Menschenrecht. In: Die Wandlung 4/1949, 754ff.

Arendt, Hannah (1981) [1967]: Vita activa. München: Piper.

Arendt, Hannah (1989a) [1979]: Vom Leben des Geistes. Band 1. Das Denken. München: Piper.

Arendt, Hannah (1989b) [1979]: Vom Leben des Geistes. Band 2. Das Wollen. München: Piper.

Arendt, Hannah (1998) [1985]: Das Urteilen. Texte zu Kants Politischer Philosophie. München: Piper.

Arendt, Hannah (2000a) [1965]: Über die Revolution. München: Piper.

Arendt, Hannah (2000b) [1970]: Macht und Gewalt. München: Piper.

Arendt, Hannah (2000c) [1994]: Zwischen Vergangenheit und Zukunft. Übungen im politischen Denken I. München: Piper.

Arendt, Hannah (2001a) [1955]: Elemente und Ursprünge totaler Herrschaft. München: Piper.

Arendt, Hannah (2001b) [1964]: Eichmann in Jerusalem. Ein Bericht von der Banalität des Bösen. Erw. Aufl. mit einem einleitenden Essay von Hans Mommsen. München: Piper.

Arendt, Hannah (2002): Denktagebuch, Erster und Zweiter Band, hrsg. von Ursula Ludz/ Ingeborg Nordmann. München: Piper.

Arendt, Hannah (2003): Was ist Politik. Fragmente aus dem Nachlass, hrsg. Von Ursula Ludz. München: Piper.

Arendt, Hannah, (2006): Über das Böse. Eine Vorlesung zu Fragen der Ethik. München: Piper.

Allen, Amy (2002): Power, Subjectivity, and Agency. Between Arendt and Foucault. In: International Journal of Philosophical Studies. Vol. 10, Issue 2, 131–149.

Alexy, Robert (1992): Begriff und Geltung des Rechts. Freiburg i.Br., München: Herder.

Alexy, Robert (2011): Die Doppelnatur des Rechts. In: Der Staat, Vol. 50, No. 3, S.389-S. 404.

Balibar, Etienne (2007): (De)constructing the Human as Human Institution. A Reflection on the Coherence of Hannah Arendt's Practical Philosophy. In: Heinrich-Böll-Stiftung (Hrsg.): Hannah Arendt. Verborgene Tradition – Unzeitgemäße Aktualität. Berlin, S. 261–268.

Förster, Jürgen (2009): Die Sorge um die Welt und die Freiheit des Handelns. Zur institutionellen Verfassung der Freiheit im politischen Denken Hannah Arendts. Würzburg: Königshausen & Neumann.

Graumann, Sigrid (2011): Assistierte Freiheit: Von einer Behindertenpolitik der Wohltätigkeit zu einer Politik der Menschenrechte. Frankfurt a.M.: Campus.

Grünepütt, Katrin (1995): Sensus communis, Teil IV 1-2, 4. In: Joachim Ritter, Karlfried Gründer (Hrsg.) Historisches Wörterbuch der Philosophie. Bd. 9. Basel, Darmstadt: Schwabe Verlag, S. 661–669; S. 673–675.

Knuth, Johannes (2016): Caster Semenya - der komplizierteste Fall der Leichtathletik. http://www.sueddeutsche.de/sport/olympia-caster-semenya-der-komplizierteste-fall-der-leichtathletik-1.3127927.

Krawietz, Werner/ Aarnio, Aulis (1993): Rechtsnorm und Rechtswirklichkeit. Berlin: Duncker und Humblot.

Kurbacher, Frauke Annegret (2003): Urteilskraft als Prototyp. Überlegungen im Anschluß an Kants 'ästhetisch reflektierende Urteilskraft'. In: Frithjof Rodi (Hrsg.): Urteilskraft und Heuristik in den Wissenschaften. Beiträge zur Entstehung des Neuen. Weilerswist: Velbrück Wissenschaft, S. 185-195.

Marshall, Thomas H. (1975): Social Policy in the Twentieth Century. 4. ed., London: Hutchinson.

Meints-Stender, Waltraud (2004): Wie Menschen überflüssig gemacht werden. In: Waltraud Meints, Katherine Klinger (Hrsg.): Politik und Verantwortung. Zur Aktualität von Hannah Arendt. Hannover: Offizin, S. 105–121.

Meints, Waltraud (2011): Partei ergreifen im Interesse der Welt, Eine Studie zur politischen Urteilskraft im Denken Hannah Arendts. Bielefeld: Transcript.

Menke, Christoph/Pollmann, Arnd (2007): Philosophie der Menschenrechte zur Einführung. Hamburg: Junius.

Mührel, Eric/Röh, Dieter (2008): Menschenrechte als Bezugsrahmen in der Sozialen Arbeit. In: Widersprüche 2008, 28 (1), S. 47-63, [50].

Poscher, Ralf (2003) Grundrechte als Abwehrrechte. Reflexive Regelung rechtlich geordneter Freiheit. Mohr Siebeck: Tübingen.

Rosenmüller, Stefanie (2013): Der Ort des Rechts. Gemeinsinn und richterliches Urteilen nach Hannah Arendt. Baden-Baden: Nomos.

Schmitt, Carl (1934): Politische Theologie. Vier Kapitel zur Lehre von der Souveränität. München, Leipzig: Duncker & Humblot.

Schmitz, Hans-Gerd (2001): Die perspektivische Konstitution des Politischen. Überlegungen zu Hannah Arendts Wirklichkeitsbegriff. In: Karl Graf Ballestrem, Volker Gerhardt, Henning Ottmann, Martyn P. Thompson (Hg.) Politisches Denken. Jahrbuch 2001, S. 18–31.

Stepanians, Markus (2008): Rechte/Grundrechte. In: Stefan Gosepath/ Wilfried Hinsch, Beate Rössler (Hrsg.): Handbuch der Politischen Philosophie und Sozialphilosophie, Bd. 2. Berlin: De Gruyter, S. 1067-1074.

Volk, Christian (2010): Die Ordnung der Freiheit. Recht und Politik im Denken Hannah Arendts. Baden-Baden: Nomos.

Wolf, Ursula (2007): Aristoteles‘ „Nikomachische Ethik“, Darmstadt: Wissenschaftliche Buchgesellschaft.

Zerilli, Linda M. G. (2005): ‘Wir fühlen unsere Freiheit’. Einbildungskraft und Urteil im Denken Hannah Arendts. In: Gerald Raunig, Ulf Wuggenig (Hg.): Publicum. Theorien der

Öffentlichkeit (republicart. Bd. 5). Wien, S. 56-65. Online (2004):http://www.republicart.-net/disc/publicum/zerilli01_de. pdf (Seiten 1-7)