

The “right to have rights” as the right to a place of one's own. On refugees and “We, the people”

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MARIEKE BORREN

THE 'RIGHT TO HAVE RIGHTS' AS THE RIGHT TO A PLACE OF ONE'S OWN. ON REFUGEES AND 'WE, THE PEOPLE'

Review of: Nanda Oudejans (2011) *Asylum. A Philosophical Inquiry into the International Protection of Refugees*. Oisterwijk: BOXPress BV, 252 pp.

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The refugee problem and its solution are riddled with perplexities, as Hannah Arendt demonstrated in a detailed account of the emergence of statelessness as a mass-phenomenon in Europe after WWI in her 1951 study *The Origins of Totalitarianism*.¹ The disintegration of the great multinational and multiethnic states forced millions of people to leave their country and move elsewhere. The legally recognized solutions to the refugee problem – integration and repatriation – were of no avail any longer. Nationalization procedures broke down and repatriation turned out to be impossible, because countries of origin usually refused to take back refugees, which made them 'undeportable'.² Since they had nowhere and nobody to turn to, they became stateless. The key to the refugee's predicament, Arendt argued, is the loss of 'his place in a community', which amounts to a loss of the 'right to have rights'.³ As a consequence, he is thrown back on his 'natural givenness'⁴ and reduced to a mere member of the species *homo sapiens*. Arendt ends on a dark note, arguing that

the masses of the stateless revealed the collapse and legitimacy crisis of all the main political and legal institutions in Europe, most prominently of the discourse of human rights and the nation state. Shortly after the publication of *Origins*, the UN adopted the Geneva Convention Relating to the Status of Refugees, which established the two pillars of the international refugee protection regime: negatively, the protection against *refoulement* (return to unsafe countries), and positively, the warrant of 'the widest possible exercise of their [refugees'] fundamental rights and freedoms'.⁵ However, Nanda Oudejans argues in her excellent dissertation, in the sixty years following this event, perplexities have only grown further. It has become ever more difficult for refugees to get protection and enjoy the rights the Refugee Convention provides, as refugee protection is watered down to non-*refoulement*. Oudejans takes her cue from Arendt's work in analyzing the conceptual presuppositions (or 'pre-understandings' as she calls it (43), emphasizing their implicit nature) underlying the prevailing understanding of the refugee problem. Unlike her, however, Oudejans carefully seeks to avoid pessimism.

In addressing issues and questions concerning asylum, Oudejans' dissertation is highly relevant, and has perhaps even become more so after her dissertation defense in 2011. Especially since the beginning of 2012, the current Dutch asylum policy (including detention and return) became the focus of heated political and public debates between its proponents and opponents. The debates are related to an explosion of collective action by protractedly undeportable failed asylum seekers, ranging from self-established tent camps in Ter Apel, The Hague, the Notweg (Amsterdam), the Vluchtkerk (subsequently Vluchtflat, Vluchtkantoor/Vluchtschans and Vluchtgevangenis) and the campaign 'Wij zijn hier', to collective hunger- and thirst strikes in detention centers. The suicide of the unjustly detained Russian asylum seeker Dolmatov in the beginning of 2013 caused a scandal which only added to the polarized public debate.

Oudejans' aim is ambitious: to provide a radical rethinking of the conceptual grounds of the refugee protection regime which is true to the spirit of the Refugee Convention. To this aim, she poses two deceptively simple questions, first, 'what is asylum?' – i.e. what does the refugee lose upon fleeing her country of origin and what does she actually claim in claiming

asylum; – and, second, ‘why would we as members of a democratic polities care?’ (4) The ensuing brilliant account (comprising an introduction, five chapters and a ‘conclusive summary’) is certainly provocative. It is critical both with respect to present European asylum policies, and to particular political theorists and activists opposing these policies on the basis of ideals of cosmopolitanism and moral universalism, including those advocating ‘open borders’.

Oudejans’ critique of the current refugee protection regime and asylum policies takes shape in chapters 1 and 2. She makes the bewildering observation that to this day the international community has not reached agreement on the concept of asylum. And while refugees first present themselves to the receiving community as asylum seekers, no consensus exists on the concept of the refugee either. This lack of agreement does not refer to states’ explicit political intentions and is not just simply a sign of moral failure, although states are indeed also increasingly unwilling to take refugees in. Rather, it is the inevitable or tragic outcome of particular conceptual presuppositions. Oudejans identifies the concept of *de facto* statelessness as the root of the perplexities concerning asylum. I believe this is the first major achievement and innovation of her book. Unlike the ‘real’ (i.e. *de jure*) stateless, the refugee’s lack of state protection is considered of a factual, hence temporary, rather than legal nature. As a consequence, it is presupposed that refugees ‘at the end of the day’ ought to be ‘there’ (e.g. in his or her country of origin) rather than ‘here’ (e.g. the receiving country) (44). This presupposition has led to a favoring of return to the country of origin (repatriation) as the solution to the refugee problem. Moreover, it has brought a new ‘hidden’ solution into being in addition to the legally recognized durable solutions – repatriation, resettlement in a third country, and integration in the receiving country – namely encampment.

Oudejans’ identification of the assumption that the refugee problem is fundamentally a problem of *de facto* statelessness is indeed extremely helpful for making sense of the coherence of seemingly divergent phenomena relating to asylum, such as states’ fixation on return and their reluctance to integrate refugees, and the recent explosion of the variety and amount of camps and numbers of refugees staying in them world-

wide (including regional refugee camps and detention facilities). It helps see why so-called ‘humane’ return policies and detention or ‘alternatives’ to detention – as prominent NGO’s have called for recently – are merely palliatives. Despite good intentions, they remain trapped in the same logic that refugees ought to be there, not here. It also provides insight to the emergence of a wide variety of policies which prevent the very entry of refugees on states’ territories, thus impeding their lodging asylum claims. Examples include the discourse and practice of ‘regional protection’ (extraterritorial temporary reception in refugee camps ‘in the region’), border detention and ‘proactive human rights strategies’ that aim to attack the root causes that force people to flee in the first place. Additionally, the confusion of refugee law and immigration law explains why an atmosphere of abuse, suspicion and hostility has taken hold of issues of asylum, resulting amongst other things in increased border control and securitization.

However, the distinction between the *de jure* stateless and refugees as *de facto* stateless is misguided, Oudejans argues. It obscures the fundamental similarity between the predicament of the refugee and the (*de jure*) stateless, because he or she, no less than the stateless, is fundamentally uprooted or displaced. Oudejans’ deconstruction of the strict distinction between *de jure* and *de facto* statelessness allows her to take the notion of place into account in the concept of asylum. She invests the notion of displacement with a quite literal and strong, rather than formal, legal sense. The philosophical reflection on place, i.e. the spatiality of belonging and the legal and political order, is a second major achievement of Oudejans’ dissertation, for it makes intelligible what the refugee loses upon fleeing and hence what his asylum claim amounts to: the loss of ‘a place of one’s own’ which is legally warranted. Following Hans Lindahl and Bernhard Waldenfels, Oudejans argues that being displaced means being ‘nowhere’ at home in this world, that is: having no qualified and determined place to go to or to return to. The refugee is an ‘anomaly’ or ‘apatride’⁶ who is beyond the usual distribution of places among citizens along the axes of inside-outside, own-foreign and legal-illegal.

This condition of displacement causes a fundamental asymmetry between the refugee and ‘we, the people’, which is exactly what Arendt’s notion of

‘the right to have rights’ points to, Oudejans argues (chapter 3). For this ‘right’ only comes to the fore when people turn up at the borders of nation states who exactly lack such a right. Oudejans asserts the fundamental dilemma that is at stake in the right to have rights: how is the refugee to claim the right to have rights, when she, being by definition excluded from the right that give ‘us’ the right to draw boundaries, is unable to stand up for her rights in the first place? This dilemma gives rise to the paradox that the right to have rights is only a right for those who have no right at all. By identifying this dilemma and paradox, Oudejans indeed provides a major contribution to the by now extensive scholarship on the right to have rights; her third achievement. Oudejans shows that both Seyla Benhabib and Bonnie Honig, two prominent Arendt scholars, however different their interpretations of Arendt’s notion, confuse the refugee with the migrant – a national of a foreign state. Consequentially, they miss out on the gulf that separates refugees from ‘us’. The ideal of cosmopolitan citizenship is besides the point in relation to the refugee problem, as it is rooted in Kantian norms of moral and political universalism and reciprocity which impels us to grant ‘others’ membership because of our common humanity.

Oudejans’ emphasis on place makes her defend the bounded nature of political communities and, concomitantly, the sovereign right of the democratic people to decide upon its boundaries, as a part of the sovereign right to determine and rule itself. This is where her argument may turn provocative for those political theorists and activists who advocate ‘open borders’ as a solution to the refugee problem (or rather, to prevent this problem from occurring in the first place). Because Oudejans takes popular sovereignty as the essence of democracy, while eschewing moral universalism, the question arises of why a democratic people would grant refugees asylum at all; the second question guiding this dissertation. In order to answer this question, Oudejans in chapters 4 and 5 turns to Martin Heidegger’s ontology of selfhood in *Sein und Zeit* (1927). Drawing on the key notions of ‘facticity’ and ‘finitude’, Oudejans extends Heidegger’s account of the ‘I’ to the ‘We’ – the ‘plural self’ of the people – in order to elucidate the nature of popular sovereignty. She shows that this plural self is always unstable, for it can as a principle never fully legitimize itself, because democracy cannot democratically decide upon its own very exist-

ence and its limits. The refugee reminds the people of the radical historical contingency (‘facticity’) and instability (‘finitude’) of its very existence which is usually concealed: ‘we’ could as well not have existed at all as a people. As a consequence, the refugee time and again challenges the legitimacy of the people and hence the decision regarding who belongs and who does not.

From a moral universalistic point of view, the normative consequences of the contingency and groundlessness of the people are indeterminate. It could both lead to violent exclusion and hostility towards ‘others’, or not. However, Oudejans argues, to treat the refugee with violence, hostility, or distrust amounts to a betrayal of *ourselves*, e.g. our finitude as a people. Not because ‘we are all human beings’, but because we are concerned about ourselves should we cultivate an ethos of generosity and magnanimity, thereby giving those who cannot claim a right to be here the benefit of the doubt. Paradoxically then, this is an ethos of care of the (plural) *self*. This ethos saves Oudejans’ project from Arendt’s pessimism, which is the fourth major achievement.

Pulling together the preceding arguments, chapter 5 reverts to the right to have rights once again, and finally makes the case for a right to a ‘place of one’s own’, ‘the anticipated possibility of becoming rooted again’ (196). Potential integration in the receiving community redresses the refugee’s radical displacement. Asylum should not be limited to protection against refoulement (negative) but should include the notion of ‘*place* of protection’ (positive) as well. The thoughtful rephrasing of the concept of asylum is Oudejans’ fifth achievement.

While Oudejans is indebted to Arendt’s analysis of the conceptual grounds of the refugee problem in the first three chapters, her argument takes a decisively though unacknowledged un-Arendtian turn in the last part by turning to popular sovereignty and the care of the collective self of the people. As such, she leaves out Arendt’s strong and, in my view, no less relevant criticism of the foundations of the nation state. Indeed, Arendt’s incisive analysis of the refugee problem does not just challenge the concept of human rights, as Oudejans argues (78-79), but equally takes issue with the conceptual pre-understandings underlying the nation state sys-

tem. The refugee issue can never be solved within the framework of the nation state, she thought, because like human rights it is part of the problem rather than the solution. Oudejans rightly points out the interdependency between the human rights regime and the nation state system – that human rights are realized in and through the nation state. Yet, she leaves aside Arendt’s insistence that the principles underlying them – that is, the liberal principle of legal equality and the democratic principle of popular sovereignty or self-determination⁷ – are simultaneously also contradictory. In fact, this makes the refugee problem even more intractable.⁸ Indeed, Arendt’s objections against the nation state have been a thread running through her work ever since her essays on Zionism of the early 1940s. For instance, she considered the foundation of the state of Israel right after WW II highly unfortunate, not because she opposed the establishment of a ‘Jewish home’ (which she, on the contrary, considered a necessity after the Holocaust), but because it adopted the European concept of the nation state as its political form. Arendt increasingly became convinced that the relationship with the Palestinian Arabs constituted the true moral and political scandal of Zionist politics. Already prior to 1947 Arendt foresaw the violence of the current Jewish-Palestinian conflict. The foundation of Israel as a solution to the ‘Jewish question’ had only brought about a new problem and a new form of rightlessness: the ‘Arab question’. Hundreds of thousands of Palestinian refugees emerged who became dependent upon international protection in refugee camps. As an alternative, she tried to imagine a solution to this conflict beyond the nation state. An Arab-Jewish federation seemed to her the best candidate, since a federation, unlike the nation state, does justice to the plurality of people coexisting on a particular territory.


Among the conceptual pre-understandings underlying the nation state system which are particularly harmful for refugees according to Arendt, are its naturalism, the concept of the people as a plural self, and the principle of popular sovereignty itself. Political belonging is premised on the conditions of one’s birth, either within a particular territory (*ius soli*) or to particular parents (*ius sanguinis*). Either way, as Arendt showed in *Origins*, nationality is exclusive, arbitrary and restrictive as a matter of course, for it is grounded in the natural, immutable accidental conditions of one’s birth, *natio*, which are subsequently naturalized into nationality. Next,

Arendt would consider the notion of a ‘plural self’ a *contradictio in adiecto*. To consider the people a collective self (traditionally represented as the body politic) is to deny human plurality. The political is not about care for the self, least of all the collective self, but about care for the world, *amor mundi*. And in her later philosophical work, Arendt voiced a deep skepticism regarding any mode of sovereignty, including popular sovereignty, as being grounded in the confusion of the political with ruling.⁹ To her mind, the political, as the realm of freedom, does not allow for sovereignty. Sovereignty is an anti-political principle. It is not only an ‘illusion’, but even completely alien to political action which is always contingent. For on account of the condition of plurality, we are never the masters of our actions. As a consequence, sovereignty invites violence and is destructive of political freedom, which is predicated on this very contingency. ‘If men wish to be free, it is precisely sovereignty they must renounce’, she wrote, because ‘in the realm of human affairs sovereignty and tyranny are the same’.¹⁰ To Arendt, the contingency of the political realm does not refer to the facticity and finitude of the people, but to the human conditions, in particular plurality and natality. Some interpreters have pointed to the condition of natality (rather than mortality or finitude that is!), the human capacity to make a new beginning, as an opening to the right to have rights.¹¹ Unfortunately, Oudejans does not explore this alternative.

Having said all that, Oudejans has written an unusually original study, which is both carefully argued and provocative, incisive and acute. It is admirably well and clearly written. By investigating the fundamental, implicit conceptual presuppositions underlying the concepts of asylum, rather than the formal legal status of refugees, it is without a doubt a work of philosophy. Yet she demonstrates that philosophical reflection can have great social, political, ethical and juridical relevance. She does not shy away from empirical work in the social sciences and testifies both to a thorough training in the field of refugee law and to a keen eye for current affairs. Therefore, she easily escapes the ‘philosopher’s disease’ (8). As I have tried to point out, Oudejans’ book is both a contribution to the philosophical scholarship on refugees and asylum, in particular on the ‘right to have rights’, and to the public debate. To be sure, all of these qualities are very rare among academic philosophers. Last but certainly not least: Oudejans’ arguments are undoubtedly informed by great personal com-

mitment to the refugee problem, but she succeeds in keeping a philosophical distance that makes critical reflection possible and even, I believe, increases its potential impact.

Marieke Borren teaches philosophical anthropology, political philosophy, legal philosophy, philosophy of culture, and gender studies at the Universities of Nijmegen, Groningen and Amsterdam. Her expertise lies in the areas of political philosophy, feminist theory, and philosophical anthropology. Her research focuses on political phenomenology, a perspective she developed in her dissertation, *Amor Mundi. Hannah Arendt's Political Phenomenology of World* (University of Amsterdam, 2010). She applied political phenomenology to contemporary cases, such as debates on national identity, irregular migrants, social movements and identity politics. Her present research further develops political phenomenology, by investigating the fundamental conditions of civic engagement and disengagement.

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¹ Arendt (1973 [1951]) *The Origins of Totalitarianism*, New York: Harcourt, in particular chapter 9, 'The Decline of the Nation-State and the End of the Rights of Man'. Hereafter cited as *Origins*.

² *Origins*, 276.

³ *Origins*, 296-99.

⁴ *Origins*, 302.

⁵ Preamble to the Refugee Convention, consideration 2.

⁶ *Origins* 278, 283.

⁷ See amongst others: Benhabib, S. (2004) *The Rights of Others. Aliens, Residents, and Citizens*, Cambridge: Cambridge University Press; Benhabib, S. and R. Post (eds.) (2006) *Another Cosmopolitanism*, Oxford: Oxford University Press; Canovan, M. (2005) *The People*, Cambridge: Polity; Christodoulidis, E. (2001) 'The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse', *The King's College Law Journal* 12 (1): 111-33; Habermas, J. (2001) 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory* 29 (6): 766-81; Honig, B. (2009) *Emergency Politics: Paradox, Law, Democracy*, Princeton: Princeton University Press; idem (2001) *Democracy and the Foreigner*. Princeton: Princeton University Press; Mouffe, Ch. (2000) *The Democratic Paradox*, London: Verso; idem (2005) *On the Political*, London: Routledge; Schaap, A. (2009) 'Aboriginal Sovereignty and the Democratic Paradox', in: Little, A. and M. Lloyd (eds.) *The Politics of Radical Democracy*, Edinburgh: Edinburgh University Press: 52-72; etc.

⁸ Borren, Marieke (2012) 'Wie en waar is de onuitzetbare? Een Arendtiaans perspectief', *Tijdschrift voor Humanistiek*, 12 (50/51), 62-77.

⁹ Arendt (1958) *The Human Condition*, Chicago: University of Chicago Press.

¹⁰ Arendt (1961) 'What is Freedom?', *Between Past and Future*, New York: Penguin, 164-65.

¹¹ See for example Birmingham, Peg (2006) *Hannah Arendt and Human Rights. The Predicament of Common Responsibility*, Bloomington: Indiana University Press.