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Rights, exceptions, and the spirit of human rights

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In 2013, there were 20 cases in which the UK government stripped a dual national of British citizenship. This represents a vast increase of the power, granted to the Home Secretary under the Royal Prerogative to protect the interests of British national security. The TPIM regime, an updated version of Control Orders, appears to be unpopular with the Security Services – in March it was reported that no TPIMs were in effect. Exclusion, an updated form of medieval banishment, seems now to be the preferred preventive mode of the UK's counter-terrorism strategy.

The Home Secretary has long had the power to exclude non-nationals from entering the UK for the protection of the public. The difference is that it is now being utilized against people who have lived here for their whole lives, and even citizens. At the moment, the government is attempting to introduce a provision in the Immigration Bill to allow British nationality to be stripped from a citizen even where it would render them stateless. Currently this is not legally possible. Making a person stateless would contradict Britain's treaty obligations under international law. Nonetheless, the provision seems set to pass into domestic legislation.

Being rendered stateless means losing the right to have rights. Everything that we take for granted in a modern functional society is first and foremost conditional on our legal status as a subject, from the right to physically be present in a territory, to the right to work, to the right to medical treatment, even to the right to family life. As such, statelessness is a taboo in modern democracies. Citizenship in the modern world is the very condition of inclusion. It is no coincidence that the Nazis ensured all "non-Aryans" were first stripped of citizenship before everything else was taken from them. And yet today, in the era of a highly developed human rights legal culture, it is being seriously considered as a rational response to concerns about national security.

The contingent relationship between the legal right to have rights – let's say human rights – and national security exposes the relationship between sovereign power and life itself, according to the Italian philosopher Giorgio Agamben. Drawing on Carl Schmitt's concept of the 'state of exception', in which ordinary rights under the law are suspended by the sovereign in order to deal with a purported emergency situation, Agamben relates this liminal and indistinct category of legality to the figure of homo sacer, a Roman legal concept describing the paradoxical figure of 'he who can be killed but not sacrificed'. Agamben thus argues that the fundamental operation of law in the modern world is to give personhood to the 'bare life' of embodied individuals.

It seems Agamben's thesis has found resonances in recent history. Thanks to the work of the Bureau of Investigative Journalism, we know that US drones in Somalia subsequently killed at least two individuals who were stripped of UK citizenship, Bilal al-Berjawi and Mohamed Sakr. A third, Mahdi Hashi, is in solitary confinement in a prison in New York, having been rendered there from Djbouti. He faces charges of involvement in terrorism that could result in a sentence of 30 years to life if he is found guilty.

But it would be a mistake to understand this problem only in terms of sovereign power vs. human rights. Human rights, as rights, are enacted as a legal paradigm and thus operationalized through the legal system. The term 'rights' is, after all, a legal category. Thus they can never fully escape the possibility of the 'state of exception', to adopt that phrase. As legal categories, they cannot oppose the sovereign power that can constitutes rights while retaining the potential to abandon them.

Indeed human rights norms today fully inflect the legally-coded operation of political power. For instance, rights considerations are incorporated into the reasoning behind decisions to exclude individuals under national security powers, whilst it was the European Court of Human Rights that first legitimated the use of 'closed material' in courts reviewing national security decisions. Covered by this normative approval from the European Court, the mechanism for holding secret courts has subsequently proliferated in the UK. Perhaps it is the movement and success of human right law that has unexpectedly led to the present situation in which the fragile link between life and law is finally exposed.

Some will say, of course, so what? These exceptions are only applicable to dangerous men, bad men, radical Islamists who ultimately want to destroy human rights. We've all heard that argument before. The problem is that such arguments leave open the door to the other classic argument beloved by tyrants: that they've suspended your rights for your own good. This is playing out at the moment, for example, in the question of effectively limiting and reviewing the secret operations of government surveillance. Perhaps GCHQ knows you're reading this post.

At this point, having laid out the problem, the author of a blog piece is normally expected to suggest a relatively straightforward solution as the 'best way forward'. Unfortunately, I suggest there are no easy solutions on offer. More norms, more rights, more law? For some, that is enough, but then we would have to accept that the human rights movement is really just a call for people to 'obey the law' – as though that were a radical solution. The space for radical politics seems much smaller than at any point in the past. Perhaps the task for those who believe in the spirit of human rights, if there is such a thing, is to start re-thinking the problem.

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