Dangerous rights: of citizens and humans

Kate Nash

Arendt famously criticised 'the efforts of well-meaning idealists who stubbornly insist on regarding as "inalienable" those human rights... which are enjoyed only by citizens of the most prosperous and civilized countries' (Arendt 1968: 279). This paper explores, from a sociological perspective, the relationship between citizens and humans in the light of the ongoing legalisation of human rights. Cosmopolitan law-in-the-making is contributing to the creation of different statuses along the oppositional fault-line between citizens and those who are 'barely human' and, paradoxically, to a situation in which human rights actually become dangerous for those who are ambiguously positioned in this way. This paradox is nowhere more evident than in the case of the 'Belmarsh detainees', detained without charge (in clear violation of their fundamental human rights) because they could not be returned to the states of which they were nationals (to respect for their human rights). The paper explores the legal and political meanings of this case in order to consider the relationship between citizenship and human rights today and to assess the value of Arendt's scepticism today.

Barely human or global citizen?

Writing of the treatment of stateless persons, refugees and minorities without powerful governments to protect them between the two World Wars, which culminated in the genocide of Armenians and Jews, Hannah Arendt famously criticised 'the efforts of well-meaning idealists who stubbornly insist on regarding as "inalienable" those human rights… which are enjoyed only by citizens of the most prosperous and civilized countries' (Arendt 1968: 279). Arendt saw human rights as untenable because they are based on the abstraction of humanity rather than on any possibility of participation, whether democratic or revolutionary, in a concrete political community. She noted that:

'The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to

believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except they were still human. The world found nothing sacred in the abstract nakedness of being human' (Arendt 1968: 299).

When Arendt wrote these words in the late 1940s she was looking back to what she saw as the making of a new world of chaos and catastrophe as a result of the disintegration of empires with the First World War. In terms of human rights, however, at the time she was writing the world was at another beginning, that of the global regime of human rights which started with the Universal Declaration of Human Rights on December 10th 1948. Arendt's reading of historical evidence led her to scepticism regarding the future of human rights. We are now in a position to reflect on how far the potential of this new global regime has been realised.

In more recent times, Arendt's understanding has inspired Georgio Agamben's critique of human rights. He argues that human rights are impossible because the 'bare life' (bios) of humanity, where it does not vanish into the figure of the national citizen, is the constitutive Other on which national political community is founded: the bare life of humanity is precisely what must be excluded from the political life (zoe) of citizens (Agamben 1995, 1996). It is unclear whether this exclusion is, for Agamben, historically, or logically - even metaphysically - necessary. Agamben maintains that the gap between citizens and non-citizens is opening still more widely under the pressure of what he (like Arendt in her time), sees as the symptomatic element of contemporary politics: the fact of growing numbers of refugees which puts pressure on the structure of national sovereignty. However, Agamben does not reflect on the progressive potential of UN regime of human rights – not to mention that of Europe which is derived from it – focussing rather on what was already evident, according to his analysis, at the time of the French Revolution.

Since the great national declarations of human rights in the C18th, the French and the American, and since Arendt wrote in the 1940s, there has been a major shift in human rights: the increasing legalisation of international human rights which cross, contest, and even reconfigure jurisdictional borders (1). By 'legalisation' I mean the way in which international human rights agreements are becoming more detailed, precise and

binding; and the way in which law that draws on and invokes human rights is increasingly being used and applied in both national and international courts (see Abbot and Keohane 2001). The legalisation of international human rights treaties and conventions is precisely aimed at effectively abolishing the distinction between citizens and 'barely human' non-citizens.

Traditionally international law concerned only relations between sovereign states. After World War Two, liberal internationalism began more systematically to challenge the distinction between citizens and non-citizens on which state sovereignty was based. These changes to international law are sometimes known as the 'Nuremberg principles' because they were initially developed in the Nuremberg trials that followed World War Two. Two major changes in international law came together in the legal aftermath of this war. Firstly, individuals became criminally accountable for violations of the laws of war ('just obeying orders' was no longer a legitimate legal defence, however lowly a position the accused held in the military or state hierarchy). Secondly, principles of human rights began to be developed, which prescribed limits to a government's conduct towards its own citizens, to apply in times of peace and war (Ratner and Abrams 2001: 4; see also Held 1995: 101-2). This second principle was carried forward and extended with the UDHR, beginning international human rights law in the UN human rights system. According to the UDHR, and subsequent international human rights law based on it, individuals have human rights, and also the responsibility to uphold human rights, regardless of citizenship status or residency. As Article 2 of the UDHR has it:

> 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty' (2).

However, with the partial exception of the European system of human rights, the balance of powers until the end of the Cold War meant that international law

effectively maintained classic state sovereignty, being overwhelmingly concerned with keeping the peace between states (Held 2002).

Since the Cold War, however, some argue that we are now seeing the beginning of cosmopolitan law. In contrast to international law, and building on the 'Nuremberg principles', cosmopolitan law reaches inside states, piercing nominal state sovereignty and enforcing claims against human rights violators (see Held 2002; Hirsh 2003). Undoubtedly the best example of cosmopolitan law is European human rights law: the European Court of Human Rights is effectively 'the constitutional court for civil and political rights' in Europe, hearing complaints from individuals, who may be citizens or non-citizens, as well as from member states (Buergenthal 2002: 172; Dembour 2006). Another good example of cosmopolitan law is customary international law, defined as established state practice, which states understand to be followed 'from a sense of legal obligation' (Steiner and Alston 2000: 70). The sources used to establish customary international law include such a diverse array as 'newspaper reports of actions taken by states… statements made by government spokesmen [sic] to Parliament, to the press, at international conferences… a state's laws and judicial decisions' and multilateral treaties (Steiner and Alston 2000: 73). They also include judicial decisions and the teachings of highly qualified legal experts, and the resolutions and declarations of international governmental organisations like the General Assembly of the UN (Charlesworth and Chinkin 2000). Customary international law is increasingly drawn upon in national as well as international courts; celebrated examples include the extradition case against General Pinochet and cases that use the Alien Tort Claims Act in the US (see Nash *forthcoming*).

The aim of human rights activists and legal innovators who support and extend cosmopolitan law is that each and every individual should become legally responsible for the rights of each and every other individual, regardless of nationality or residency, and regardless of internal domestic politics, even where there are clashes between international human rights norms and national law. In this respect, cosmopolitan law is intended to create a new political community to replace nations organised around states, a global community that is set up to abolish the distinction between citizen and non-citizen on which national states are founded. Global citizens happen to be resident in particular states, because there is no world-state, but,

according to this vision, we all have rights and responsibilities created by cosmopolitan law.

In this chapter I will explore the discrepancy between Arendt's and Agamben's pessimism concerning human rights, and the determined optimism of 'well-meaning idealists'. I will explore the cosmopolitan project to abolish the distinction between citizens and non-citizens through human rights from a sociological perspective. As sociologists we are well-equipped to study how the legalisation of human rights works in practice. In the following section I consider how the legalisation of human rights is working in terms of what sociologists have traditionally seen as the three dimensions of citizenship within national states: civil, political and social rights. I will then go on to consider in more detail a critical example concerning the civil rights of non-citizens, looking at the relationship between national civil liberties and human rights in the case of terrorist suspects detained without charge or trial in the UK. I conclude by considering the dangers and the potentialities of human rights today.

<u>Citizenship and human rights: a question of status</u>
I follow T. H. Marshall's classic definition of citizenship as according civil rights of individual freedom, political rights of participation and social rights to basic levels of provision for education, housing, health-care and welfare (Marshall 1992: 8). Although Marshall's model of citizenship is undoubtedly flawed, it is still the common reference point for sociologists working in this area (Turner 2002). In order to explore the relationship between citizenship and human rights, David Lockwood's work on civic stratification is a useful starting point (see Morris 2006). Lockwood argues that the actual enjoyment of rights depends on two interlinked axes of inequality: the presence or absence of legal, bureaucratic rights; and the possession of moral or material resources, which generally operate informally.

From a sociological perspective, then, the enjoyment of rights is never simply a matter of legal entitlement; it also depends on social structures through which power, material resources, and meanings are created and circulated. As we shall see, in relation to non-citizens, citizenship, as membership of a national political community, is itself a material and a moral resource as well as permitting individual citizens legal entitlements. The interplay of the two axes of legal entitlement and material and moral

resources means that legal claims to human rights that are intended to 'humanise' states are actually tending to produce new types of formally and substantively unequal status. An analysis of different types of status produced with respect to citizenship and human rights would have to include at least the following five distinctions.

Firstly, within the legal status of 'full citizenship' there is a marked difference between what we might call 'super-citizens' and 'marginal citizens' in relation to human rights. Super-citizens have all the rights of citizens but increasingly, in a globalizing, de-regulated political economy, citizenship does not tie them to states, because they own the means of production or are in possession of secure employment or marketable skills which enable mobility across borders. Super-citizens are Craig Calhoun's 'frequent flier' elite cosmopolitans (Calhoun 2003). This group has very little material interest as a group in human rights except insofar as human rights policies succeed in making the world generally more stable and profitable. Their protected mobility comes from their citizenship status as well as from their wealth and/or skills. When faced with unstable or dangerous political conditions, super-citizens are more likely to fly home or appeal to the authorities of the states to which they belong to intervene on their behalf than they are to claim human rights. As individuals, members of this group may be involved in the extension of human rights as professionals – especially as lawyers, leaders of INGOs, or researchers – but they would not generally expect to see themselves as the subjects of human rights claims.

Super-citizens can be compared with a second status group, 'marginal citizens', who have full citizenship rights but who either do not have paid work, or who have insecure, low paid or partial participation in the labour market. This group enjoys full citizenship rights to a variable degree, according to different dimensions of inequality and subordination. As a category these people have civil rights to protect them from state force in a reasonably functioning multi-party democracy. However, young black and Muslim men and women, for example, are more likely to be discriminated against if they need to positively exercise those rights than are others. Moreover, it is increasingly the case that the social and economic benefits of citizenship to which marginal citizens have been entitled are under attack as the regulation of capitalism is altered through globalization (see Turner 2001). The growth of the global human rights

regime is, of course, an aspect of gobalization, but in terms of deteriorating social citizenship, human rights are of little interest to marginal citizens.

The history of social and economic rights has been very different from that of civil rights in terms of legalisation. In principle, social and economic rights have been part of the core schedule of international human rights since the UDHR. Article 22 of the UDHR, for example, which is just one of many that specify core welfare rights, states that everyone is entitled to realization 'through national effort and international co-operation' of his economic, social and cultural rights. What this should mean in practice was spelled out in still more detail in the International Covenant of Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976, signed and ratified by most states (with the notable exception of the US). Nevertheless, a clear distinction was drawn between social and economic rights and civil and political rights from the very beginning of the global human rights regime, with socialists and liberals opposed over which set of rights should be ideologically and strategically prioritised (Forsythe 2000). Since the end of the Cold War, economic and social rights are often compared to civil rights in respect of the logical possibilities of legalisation: it is hard to specify clear, detailed state obligations to meet social needs (especially where resources are lacking) in comparison with the the specific obligations on the part of specific agents to <u>stop</u> acting in certain ways that characterise civil rights (Donnelly 1989: 33-4; see also Dembour 2006). This argument has become somewhat less compelling since social and economic rights were made justiciable in the South African constitution, where the state has been called to account in its national courts for violations of the social and economic rights of people under its jurisdiction (Olivier and Jansen van Ransburg 2006). In the North, however, the term 'human rights' is still used almost exclusively in the mainstream mediated public to mean the civil rights covered by the International Covenant of Civil and Political Rights (ICCPR). (3) Claims to economic and social human rights have been effective for some migrants within existing, deteriorating state regimes of welfare – as we shall see in the case of quasi-citizens below - but human rights language has not been developed to address issues of welfare more generally. There is, for example, no provision in the system of European human rights law for economic and social rights. The European Social Charter of the Council of Europe is policy-oriented, relying on the supervision of practices through scrutiny of reports and

complaints submitted to the European Committee of Social Rights, which may recommend that states should bring national law and practice into conformity with the Charter. It does not allow for adjudication in the European Court of Human Rights. Despite the apparent importance of economic and social human rights in terms of international agreements, then, they have not become cosmopolitan law in the same way as civil rights, and they do not provide protection for marginal citizens in the North. They appear rather, to be irrelevant to the welfare of these citizens.

Thirdly, outside these unequally positioned citizens, there are 'quasi-citizens'. Quasi-citizens are denizens, or long-term residents in a state who have access to employment and who have gained social and even economic rights as a result of relatively secure employment, long-term residence, and political mobilisation. They have organised politically to put pressure on states to recognise their human rights in order to gain access to education, health-care, housing and other welfare rights on the same basis as citizens (Soysal 1994). Quasi-citizens do not, however, have political rights to vote in the national elections of states in which they are resident, though they may, in some cases, have rights to vote in local elections (Balibar 2004; Benhabib 2007).

The category of quasi-citizens contains a diverse group of people. It includes some EU citizens - those from less powerful states who are employed in unskilled work - guest-workers, and also those who have been granted refugee status. Whilst, as Soysal has argued, what she calls 'postnational citizenship' has been an important advance for migrants in terms of institutionalising their human rights, the relative instability of their legal status (as they are 'not-citizens') and the dangers it creates for securing other fundamental human rights on which they may need to depend is becoming clearer. An excellent example of the dangers of quasi-citizenship for human rights in this respect comes from the UK state's treatment of those who have been granted asylum because of well-founded fears of persecution in the states of which they are nationals, and who have subsequently been arrested and detained without charge on suspicion of terrorist activities. We will examine these cases more closely in the following section.

If quasi-citizens are in a precarious position with regard to their fundamental human rights, sub-citizens routinely face even greater difficulties. Sub-citizens are those who do not have paid employment in the country in which they are resident, nor any

entitlement to state benefits there. This category includes those who are waiting to have asylum cases heard and who may be detained indefinitely in camps whilst that process is going on. It also includes those considered to be adult dependents of quasi-citizens – wives and other family members - who have no independent right to residence and who are, therefore, potentially subject to violence and abuse within the home (without real possibility of redress), as well from their home states. The category of 'sub-citizens' is literally <u>created</u> by international human rights law as it is administered through state-specific policies. The status of refugees in the country in which they are detained or resident is based on international law concerning the human rights of refugees, derived from the 1951 UN Convention Relating to the Status of Refugees, and on national regulations concerning the administration of that law. Sub-citizens who are the dependents of quasi-citizens have virtually no legal status in international law as individuals, but only that which has been won through national political mobilisation, usually by women's groups. In the UK, for example, it was as a result of such campaigning that the government finally lifted the rule which meant that a wife could not leave a husband who abused her during their first year of residence without being immediately removed from the country – though the type of evidence of abuse that is admitted in these cases is still unacceptably restricted ('Campaigns' www.southallblacksisters.org.uk, consulted 27/11/07).

Finally, even sub-citizens are in a better position than un-citizens. This group includes undocumented migrants who have no recognised status in receiving countries and who may, therefore, be immediately deported, unless they are permitted to apply for asylum. It also now includes people detained in the 'war on terror' in newly created 'non-places' which are outside national territories and therefore somehow also outside the jurisdiction of sovereign states, whilst being under their administration. The most famous example here is Guantanamo Bay, though there are also other such camps containing suspected terrorists in Bagram, Kandahar and elsewhere. These un-citizens are in a legal 'black hole' because of the special status they have been assigned as 'illegal combatants' and the extraordinary lengths to which the US executive has gone to deny them access to lawyers and to keep them out of US courts (Steyn 2004). Interestingly, with regard to Arendt's suspicions concerning human rights, it is citizenship status, combined with diplomatic relations between allies, and not claims for human rights, which has enabled relief for some of the detainees in Guantanamo Bay.

For example, all those holding British passports were sent back to Britain and released without charge in 2005, but it was not until 2007 that the UK government, under legal pressure from the detainees' families and following changes in US policy with regard to Guantanamo, requested the return of non-citizens resident in the UK. At the time of writing there are still British residents in Guantanamo who have not been released.

For quasi-citizens, sub-citizens and uncitizens, then, what we see is not so much the unfolding achievement of global citizenship, but rather a paradox: gross violations of fundamental human rights may be perpetuated because of the legal enforcement of other human rights. Human rights which are ideally inviolable, universal, indivisible and protective of all human beings, citizens and non-citizens alike, are actually creating groups of persons whose rights are extremely fragile and insecure. The insecure position of these people with regard to their legal status and also their access to material and moral resources is, on occasion, resulting in violations of the dignity, freedom and bodily integrity of those who have nothing but their human rights. The increasing legalisation of human rights has led, then, neither to guarantees of human rights commitments, nor an end to human rights violations. It has, however, led to a great deal of legal and political creativity.

Citizens *vs* humans

In this section we will look more closely at one particular situation of quasi-citizens in the UK, in order to explore in detail exactly how and why the legalisation of human rights is failing to secure the abolition of the distinction between citizens and humans. We will look more closely at the cases of the Belmarsh detainees. These cases are critical as an example of the paradoxes of legalisation because they concern human rights law which is very well-established internationally and which covers fundamental civil rights. In addition, we are dealing here with European human rights law, which is the most thoroughly institutionalised human rights system in the world. If legalisation leads to paradoxes in securing human rights in the European system, it is unlikely to have a happy outcome elsewhere.

What this example shows is the way in which, when cosmopolitan law is relatively successful in abolishing the distinction between citizens and non-citizens in controversial cases, human rights come under increased political pressure. In the case

of the arbitrary detention of terrorist suspects with which we are concerned here, there has been a political struggle, played out between politicians, the judiciary, human rights activists and journalists, in both formal and informal political spaces. This struggle has concerned how human rights figure, and should figure, in imagining the political community. In concrete terms it has been fought out over the meaning of the terms 'human rights' and 'civil liberties' as they are used by the judiciary, human rights activists and politicians.

Cosmopolitan human rights law was relatively effective in abolishing the distinction between citizens and humans in the Belmarsh detainees' case. In order to detain suspected terrorists without charge, the UK Executive declared 'a public emergency facing the nation' to derogate from Article 5 of the European Convention on Human Rights. Article 5 forbids arbitrary detention, requiring that proper procedures of law should be followed if a person is detained, including telling them the reasons for their detention, charging them and bringing them 'speedily' before a judge. The details of who has been held under the subsequent Anti-Terrorism, Crime and Security Act (ATCSA) are secret but it seems that, according to the categories outlined above, most are quasi-citizens, granted leave to remain in Britain as refugees from persecution in the states of which they are nationals – which is why they can not be returned to those countries; and un-citizens, failed asylum-seekers who have not left the country or been deported but who presumably also can not be returned because they face persecution in the countries of which they are nationals.

In December 2004 the Law Lords heard the 'Belmarsh detainees' case' on appeal against the decision of a lower court that their detention was lawful, despite the fact that none had been charged or had any prospect of being tried (*A* v *Home Secretary* 2004). Although they refused to judge the declaration of public emergency as such in *A v Home Secretary* – citing 'traditional deference' of the courts to an Executive decision to declare a public emergency - the Law Lords (the UK Supreme Court) nevertheless ruled that the detentions were unlawful. They found that ATCSA was disproportionate – arbitrary detention was a poor solution to the threat posed by the suspected terrorists; and discriminatory because it targeted only non-citizens. In this sense, the logic of human rights was effective: all the judges agreed that it was not legal for the Executive to treat non-citizens differently from citizens even under the

exceptional circumstances of an officially declared, and legally sanctioned, state of emergency. In response to the Lords' ruling, parliament passed the Prevention of Terrorism Act (PTA) which granted the Executive the power to keep suspected terrorists under 'control orders' if the authorities had 'reasonable suspicion' about their activities based on secret evidence (which neither they nor their lawyers were allowed to see). The PTA put an end to discrimination against non-citizens by sanctioning the violation of the fundamental rights of citizens too: all are potentially equally subject to a range of punitive measures without ever having been charged with a crime or having had the chance to defend themselves in court (5).

The case was highly politicised. 'Human rights' was used to refer to and to make sense of the law regulating arbitrary detention in technical terms. However, from the very beginning of debates over the suspension of fundamental rights, it was not the term 'human rights' but rather 'civil liberties', sometimes qualified as 'British civil liberties' or 'centuries old liberties', that mobilised political passions. Opposition to the Executive decision to suspend rights was very frequently made, across the political spectrum, in terms of the glorious history of British freedoms. Such sentiments were resoundingly invoked in arguments by both major political parties, by the leader of Liberty (e.g. Chakrabarti 2003) and most notably, and at some length, by Lord Hoffman in 'the Belmarsh detainees' case'. In what one commentator (Poole 2005) has described as 'tabloid history', Lord Hoffman constructed the European Convention as a modern-day protection of ancient British liberties, arguing that:

> 'Freedom from arbitrary arrest is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law' (*A* v *Home Secretary* 2004: 50).

We see here a strategy on the part of human rights supporters to join human rights and British traditions together in an appeal to national pride. This strategy can be understood as an attempt to translate human rights into the vernacular of British political life. Sally Engle Merry has shown how cultural politics are necessary to

bring human rights from the transnational sphere of global elites into local, everyday life. In order for human rights to make sense to ordinary people in a society, they must be translated into terms that enable them to judge their situation in human rights terms, to see it as unjust and to take action against that injustice. Merry calls this process of translation and framing, 'making human rights vernacular' (Merry 2006).

The strategy to make human rights vernacular through an appeal to national pride was not successful. On the contrary, rather than sharing in, or borrowing from, the passion aroused by commitment to fundamental 'civil liberties', the meaning of 'human rights' became all the more clearly separated and even opposed to 'civil liberties' in many sections of the media. Outside liberal and legal circles, in fact, European human rights were increasingly understood as <u>threatening</u> the ancient civil liberties of British citizens. On the one hand human rights were seen as responsible for letting terrorist suspects loose in the country because the government was not allowed to deport them; on the other, human rights were seen as responsible for overturning centuries of entrenched liberties for British citizens.

Political opposition to human rights came from all quarters. It came, for example, from the Prime Minister responsible for the Human Rights Act which incorporated the ECHR into British law in 1998. In a speech following the terrorist attacks of 7/7, in which Tony Blair declared that 'the rules of the game have changed', he stated that human rights were creating obstacles to safeguarding national security (PM's press conference August 5th 2005 www.number10.gov.uk/output/Page8041.asp). He proposed that foreigners suspected of terrorism should simply be deported. It is in contravention of European human rights law to send a person to a state where they are at risk of torture (*Chahal* v *UK* 1996). Blair's suggestion in this speech that human rights law must be altered so that government measures to deal with terrorist threats are not to be judged to be in violation of human rights has been widely taken up. Reforming or 'scrapping' the Human Rights Act, which incorporates the ECHR into British law and which was passed by the Labour government in 1998, became part of the Conservative Party's election manifesto in 2005. <u>The Sun</u>, the newspaper with the widest circulation of any paper in the UK, went so far as to run a campaign soliciting readers' votes to demand that the HRA should be repealed (see <u>The Sun</u> 'Time to stop the madness' 12/5/06).

Although parliament can, in principle, repeal or alter the HRA, the UK must still comply with the ECHR, from which the HRA is derived. To avoid European censure for not complying, the UK would have to leave the 47 states of the Council of Europe and also the European Union (because signing the ECHR is a condition of joining). The UK would effectively become a pariah state in Europe (Bognador 2006; see also Klug 2007). This seems a very unlikely course of action for any government. What the newly revived, and oft-repeated, opposition between 'our' security and 'their' rights does mean, however, is that although human rights are embedded in law in the UK, they are far from becoming part of the vernacular of political life. Human rights are themselves now in need of defence, as well as those unpopular non-citizens accused of terrorist activities which human rights are supposed to protect.

Conclusion

Human rights are dangerous. Human rights innovators and activists try to abolish the distinction between citizens and others, but in practice the legal extension of human rights is, paradoxically, producing categories of people who are vulnerable to human rights abuses precisely because of their insecure status in countries – or sometimes in specially designed 'non-places' - in which they live or are detained as non-citizens. This does not mean that the legalisation of human rights as such is problematic. On the contrary, as it is the situation seems rather to require that the reach of cosmopolitan law should be extended and deepened. The creation of a genuinely global citizenship of duties and entitlements would seem to be necessary in an unevenly globalizing world in which people are increasingly mobile, whether they are forced to move countries to escape poverty or persecution, or whether they are simply taking opportunities to change their lives that present themselves as a result of increased flows of communication and possibilities of transportation across borders.

It is important, therefore, that we take heed of Arendt's scepticism concerning human rights. As we have seen, legalisation is only partially achieved, even when, on the face of it, the law itself seems to be quite clearly established. Once human rights law is put into practice in controversial cases, it is contested precisely around safeguarding the opposition between citizens and humans. Human rights were designed, in principle, to protect vulnerable people faced with the most difficult circumstances, whether of state

persecution or of poverty. As we have seen in the example discussed here of the Belmarsh detainees, however, it is precisely when fundamental civil rights are most needed that they are most highly politicised.

It is clear, then, that cosmopolitan law as a project can only advance as a result of political mobilisation. It is necessary to find a way to build support for human rights within what have historically been constituted as national political communities. The legalisation of human rights is not a technical matter; it is not a matter of simply applying the letter of the law as it already exists in international agreements, or even extending it through national legislation. Cosmopolitan law will only progress as a result of politics, and it is closely tied to the formation of political community transformed by human rights. Agamben is wrong: though states have historically been formed around the opposition between citizens and non-citizens, there appears to be nothing in the logic of state formation to prevent cosmopolitan law; if the distinction between citizens and non-citizens were fundamentally necessary to state formation, how is it that statuses that complicate and confound this opposition have proliferated in recent times as a result of cosmopolitan law?

Of course, the difficulties of mobilising politically in order to extend cosmopolitan law towards achieving global citizenship are considerable. In this chapter I have explored nationalism as one of the main obstacles to gaining popular consent for the abolition of the distinction between citizens and non-citizens. In the case of the Belmarsh detainees, as a response to violations of human rights by state elites, human rights innovators in the judiciary and human rights activists tried to build pride in human rights into nationalism itself; they tried to turn sentiments concerning the exclusivity of national citizenship into sentiments of pride in the inclusivity of the political community, into pride in the nation because it upholds universal norms of human rights. While it seems likely that at least some super-citizens will be attracted to the cosmopolitan idealism of this project, it is difficult to imagine that it would gain popular support from marginal citizens who may fear losing not only the material benefits of citizenship, including the security that is supposed to be assured by a well-functioning state, but also its relative moral status in comparison with quasi- sub- and un-citizens. The moral status of citizenship was at least as much in question in this case as were legal entitlements to human rights; the government was unwilling,

initially, to extend measures to detain citizens without charge that it did not hesitate to apply to non-citizens. I have suggested that as human rights are currently conceived in the North, in terms of the civil rights that most citizens feel they already enjoy quite securely, citizens apparently have little to gain from the extension of human rights. Indeed, as we have seen, in ruling discrimination between citizens and non-citizens illegal in the Belmarsh case, a judgement which was correct in terms of cosmopolitan law paved the way for the government to remove fundamental civil rights from citizens.

In order to construct popular support for human rights, which is the only way to achieve their secure legalisation in the most difficult political circumstances, it is necessary to show how human rights are relevant and necessary to <u>citizens</u>. The energies of the cosmopolitan project have been put, quite reasonably, into extending the law and building support for the human rights of vulnerable non-citizens in order to 'protect the human'. In order to break down the dichotomy between citizen and non-citizen, it may, however, be necessary also to foreground how human rights can be used to protect the freedom and well-being of citizens <u>as well as</u> non-citizens. This most certainly will not be easy. It is very doubtful that it can be achieved through an appeal to nationalism which, by definition, divides the world into 'insiders' and 'outsiders'. As there is, however, no going back to a world of closed borders, in a globalizing world, the 'well-meaning idealism' of human rights innovators and activists has become absolutely necessary.

<u>Notes</u>
1. I focus on legalisation here for reasons of space, but elsewhere I have analysed how human rights are becoming 'intermestic' along a number of other dimensions too. The legalisation of human rights complicates the international/domestic division assumed by conventional legal scholarship; in addition, political use of the language of human rights is increasingly important in the rhetoric both of state elites and of NGOs (which themselves cross borders, often having ambiguous status in relation to the international/domestic distinction) to justify action at home and abroad; and – as we will see later in this chapter – human rights are contested in the cultural politics of the mediated public sphere in popular terms as well (see Nash 2007; *forthcoming*).

2. The UN system replaced the failed Minorities Treaties of the League of Nations, which Arendt writes of in terms of human rights. In contrast to the protection of minorities afforded by the League of Nations, the UN system was designed as formally universalist, set up to protect the rights of all individuals (not some groups) in all states (not just those selected for the patronage of the Great Powers) (Mazower 2004).

3. For example, the Make Poverty History campaign that was so popular in 2005, and that continues today, never used the term 'human rights' (see Nash *forthcoming*).

4. The UK remained bound by the ECHR, even as it opted out of certain key Articles of the Convention. When the UK incorporated the ECHR into domestic law as the Human Rights Act in 1998, the Law Lords (the UK Supreme Court) became legally bound to judge whether the Executive decision to declare a state of exception was justified. Derogation from the ECHR must be lawful according to the ECHR itself: the measures that are put in place to deal with the dangers presented must be <u>proportionate</u> to the situation; and they must be <u>compatible</u> with other human rights obligations under international law (Article 15 ECHR). The Law Lords are also legally bound to judge whether the exceptional measures the UK government put in place in ATCSA were proportionate and consistent with the UK's other human rights obligations.

5. The government has appealed various High Court rulings that control orders are not compatible with human rights, depriving individuals of liberty and of rights to due process that require derogation from the ECHR (Joint Committee on Human Rights Eighth Report 2007). On October 31st 2007, the Law Lords basically endorsed the control order regime, though they set limits to the curfews that could be imposed and ruled that suspects should have access to 'key evidence' against them (case reference). There will undoubtedly be further legal challenges to that ruling.

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