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The Community of Rights

Human Rights and the Concept of Nature in the Context of the French Revolution and the Terror

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In the twentieth century it became increasingly clear that the distinction between man and citizen in the *Déclaration des droits de l'homme et du citoyen* (1789) is a decisive one. Human rights seem to apply only to people living within a community that is able to enforce the rights of its members. In the words of Hannah Arendt, "we became aware of the existence of a right to have rights…and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation" (Arendt 1976, 296f.). According to Arendt, the rights of safety, freedom of speech, liberty, and so on are one thing, but a basic "right to have rights" is even more fundamental – and yet this basic right remains the privilege of only some. Werner Hamacher puts it this way:

> In distinction to such rights [the human rights of the 1948-charter], the right to have rights is a *privi-legium* in the strictest sense, a prelegal premise, a protoright, in which it is left open, *what* a human may be, *who* a human may be, and which rights may be granted to him aside from this unique one of belonging to humanity and of formulating his rights correspondingly (Hamacher 2004, 353).

The crux of this quote is the way the question of what a human is or how the human is defined becomes directly related to having or not having human rights. In the twentieth century the nation-state has been the leading authority when it comes to determining who is included in and excluded from what I will call the community of rights. The nation-state, however, was only in its adolescence in the age of the French Revolution when the human rights were drafted for the first time, but the question of who had a right to have rights was nonetheless heavily debated inside and outside of the National Assembly. This article is about the negotiation of the limits of the community of rights in the age of the French Revolution and the Reign of Terror, and it has a special emphasis on the question of women's rights.

A crucial notion in the establishment of a legal and normative framework surrounding the community of rights in revolutionary France 1789-1794 is that of nature or the idea of the natural. Not least because of the huge influence of the nature-based writings of Rousseau, the ideas of nature and the natural gained enormous moral and rhetorical authority during the eighteenth century; however, these ideas were defined, understood and operationalized in exceedingly different ways. My claim is that in order to have rights it is vital to be and act in accordance with a concept of nature or an idea of the natural, a concept or an idea that is fundamentally unstable. I distinguish between i) the idea of *human nature* inherent in the Declaration of the Rights of Man and Citizen and ii) the *state of nature* important to the thinking of Maximilien de Robespierre (1758-1794) and the legality of the Reign of Terror. The former is an inclusive understanding of humanity in the sense that everyone, independent of sex, race, and religion, is as a matter of principle included in the human community of rights. To Robespierre, contrarily, humankind is a delimited group existing in a state of nature, implying that the Republic has a right to defend itself to the death against its enemies. It is an exclusive concept of man because it operates with the idea of an inside and an outside of the community of rights. Consequently, while sharing their nature-based argumentation, the Declaration of the Rights of Man and Citizen on the one hand and the law of the Terror on the other define and operationalize nature and the natural in different ways.

My starting point is the relatively unknown author and political activist Olympe de Gouges (1748-1793), who was born in the city of Montauban in southern France, the child of Anne-Olympe Mouisset and the butcher Pierre Gouze. Within the last twenty years she has gained some prominence especially in gender-oriented research on the French Revolution, primarily because of her pamphlet *Les droits de la femme* (1791), which includes a re-written version of the Declaration of the Rights of Man and Citizen, a contract proposal that equal men and women can sign when agreeing upon marriage and a critique of the handling of the slaves in the French colonies. Here is a radical voice that criticizes man – "the dumbest animal from Paris to Peru, from Japan to Rome" (de Gouges 1791, 5) – and that sees through the sexual and racial discrimination that the revolutionaries' ideal of equality was unable to bring to an end. The fraternal equality of the revolutionaries was a challenge to the hierarchical and corporate state order of *l'ancien* régime, but women were not, as de Gouges points out, included in the revolutionary band of equals. Contrary to what these egalitarian impulses in her political thought might lead one to believe, her pamphlet also contains a respectful dedication to the queen Marie-Antoinette, who in September 1791 was less popular than ever because of her involvement in King Louis XVI's flight from Paris to Varennes.[1] While de Gouges radicalizes the idea of equality in the Declaration of the Rights of Man and Citizen by including women and slaves in the community of rights, she also defends a patriarchal monarchy in which responsibility rests upon the shoulders of the citizens to help the king "as a father whose affairs have been thrown into disorder" (de Gouges 1993, [I] 41). During the stressful period of The French Revolution, this was no way to make friends.

The focus of this article will be the radical and egalitarian part of her thinking. Not because her royalist and even patriarchal writings are unimportant, but because her more radical reflections show some of the far-reaching consequences of declaring universal human rights on the basis of an inclusive idea of human nature. More-

1 See Hunt (1992, 89ff) for a historical account of the hatred towards Marie Antoinette culminating in her execution in 1793 but before that already manifest in pamphlets and pornographic material. See Cole (2011, 45ff). for a good description of just how problematical a dedication to Marie Antoinette would be conceived in Paris in September 1791.

over, these thoughts are based on a conception of nature that she brings to bear upon key issues of the revolutionary age such as the question of women and – when she was beheaded in 1793 – the law of the Terror. Her radical political writings, then, will be used as a way to interrogate the concept of nature and its key role in the establishment of the community of rights. Or, closer to the wording of Arendt and Hamacher, gaining a better understand of her nature-based argumentation is a way to interrogate the negotiation of *who* has the right to have rights in the age of the French Revolution.

The Political Operationalization of Human Nature

A recurring theme in the works of de Gouges is the illegitimate child, and because she consistently uses the term *enfant naturel*, I will consider this theme as a way of engaging with the idea of human nature.[2] It is evident already from the title of an article in the *Encyclopédie* –"Batard ou enfant naturel" (*Encyclopédie* 2,138) – that it is normal to speak of non-marital children in different ways in this period. Hence, in connection with horticulture, the bastard designates a kind of weed or a "wild plant that has not been grown" (*Encyclopédia* 2, 139), while her more positive term "natural child" has associations with someone untouched by civilization's institutions or with an unspoiled example of the nature of man. Defending the rights of natural children might seem like an unambitious political agenda and given that de Gouges apparently considered herself to be the illegitimate child of the archbishop Jean Georges Lefranc de Pompignan, it might even be considered a selfish struggle for her own rights. Such a critique would, none the less, be mistaken because she manages to turn the natural child into explosive political material. In her pamphlet *Les droits de la femme*, she uses the defense of the natural child as an attack upon the most important document of the revolutionary republicans: the Declaration of the Rights of Man and Citizen.

In the original version of the *Declaration*, article XI is about freedom of speech: "The free communication of thoughts and opinions is one of the most precious of the rights of man. Every citizen may

2 The illegitimate child appears in the play *Zamore et Mirza* (1788) – which is the original title to the play *L'esclavage des noirs* – and in the epistolary novel *Mémoire de Madame de Valmont* (1788), in the pamphlet *Séance Royale. Motion de Mgr le duc d'Orléans, ou Les songes patriotiques* (1789) and in *Les droits de la femme* (1791).

therefore speak, write and print freely, if he accepts his own responsibility for any abuse of this liberty in the cases set by the law" (in Hunt 2008, 222). In de Gouges' version, article XI is still about freedom of speech; however, while she keeps the original rhetorical framing, her version uses a surprising, concrete example – the right of the mother to appoint the biological father of her child – to advocate freedom of speech:

> The free communication of thoughts and opinions is one of the most precious rights of woman, because that liberty ensures the legitimacy of children with respect to their fathers. Therefore, without a barbarous prejudice forcing her to disguise the truth, every female Citizen may freely say, "I am the mother of a child who belongs to you", although she must answer for her abuses of this liberty in cases determined by the Law (de Gouges 1791, 9f [in Cole 2011, 33]).

These lines are de Gouges' way of pointing out that the abstract principles of equality and freedom of speech do not really apply to women. She argues that a "barbarous prejudice" or an implicit moral law has put up a barrier between equality in principle and equality in praxis, meaning that it is one thing to speak in favor of the idea of equality but a completely different thing to practice equality in everyday interactions between men and women. Her argument relies on a radical and inclusive idea of human nature and of universal human rights because only this universal idea makes the distinction between principle and praxis possible. Her version of article XI is explosive material not only because women revealing the infidelity of husbands would challenge the traditional orderliness of society's established gender roles, but also, and perhaps even more importantly, because it would have far-reaching effects on hereditary law if freedom of speech were used to loosen the tie between marriage and paternity.

In the perspective of the history of law, marriage law and the right to divorce only really became important issues in the National Assembly in 1792 and especially in the weeks leading up to 20 September, when both men and women got the right to dissolve a

marriage.[3] But already before that – in August 1791, just before de Gouges published her pamphlet in September – the member of Parliament M. Bouehotte proposed a list of laws under the heading "On the Conditions of People". He underscored that some of his proposals – regarding the relation between children and their parents – "do not seem to be anything but moral principles" but then adds the rhetorical question, "[S]houldn't good morals form the foundation of laws?" (*Archieves Parlementaires* 1867, [29] 220). What is interesting about his proposal is that it reveals some of the concrete hereditary consequences an attack such as de Gouges's upon the institution of family would entail.

To Bouehotte, marriage is a natural moral alliance between a man and a woman. While repeating a formulation from the *Declaration of the Rights of Man and Citizen*, he writes, "no property, no profession, and no official standing or function can take away the natural and inalienable right [le droit naturel et inaliénable] of a citizen to engage in marriage" (*Archieves Parlementaires* 1867, 219). He is also interested in equality, but by the fifth article of his proposal it becomes clear that the equality characterizing the natural condition of marriage is a questionable one. "In our laws the condition 2of women shall be equal to men's as far as it is allowed by the difference between the sexes. The last part of the sentence is deemed necessary in order "not to disturb the natural law according to which the husband is the head of the family." While de Gouges used the concept of nature as a way to recognize children born outside of marriage, Bouehotte uses it differently as a way to preserve the patriarchal institutionalization of marriage. When the natural can serve as part of the argument both for and against the preservation of the traditional marriage, it becomes apparent how "the natural" was operationalized politically in different ways in this period. In other words, here we begin to see how the idea of nature can function both as a principle of inclusion (women and illegitimate children should enter the community of rights) and of exclusion (in marriage, women should not disturb the natural authority of men). And it is no surprise that Bouehotte's naturalization of marriage has consequences as to who is appointed father to the family's children. He says, "the lawfully engaged

3 Cf. Cole (2011, 148).

marriages attest to who is the father of children brought to this world while the marriage exists."

It is precisely this institutionalization of paternity that de Gouges attacks, because infidelity and sex before marriage is a fact that causes some women and children to be left without rights outside the natural family. Bouehotte draws the hereditary consequences of his proposal when he says, "the legitimate children are equal among them and the heritage of the father and the mother can only be distributed in different sizes according to the laws dealing with lapse of inheritance, marriage after widowhood, and marriage after divorce" (*Archieves Parlementaires* 1867, [29] 220). Equality, then, is something existing between the "legitimate children" and it is *their* inheritance that is legally formalized.

The illegitimate or natural child, in the thought of de Gouges, serves the purpose of carrying through a change of political perspective from a perspective of social standing to one of gender. By addressing inequality through the lens of gender, she got enemies among the conservatives as well as among the revolutionaries of her time – a somewhat surprising fact that can be explained by understanding the French Revolution as a rebellion of brothers against the paternal authority of King Louis XVI.[4] Obviously, there is a great difference between the revolutionary idea of equality on the one hand and the hierarchical structure of the monarchy on the other but no matter whether power lies among the brothers or with the father, the women and children are left outside. This exclusion of women from the political domain is what de Gouges sees and understands. With the idea of universal human rights as her point of departure, she tries to redirect the political discussion in such a way that the fronts are no longer between the *equality of brothers* and the *patriarchal authority*. Instead, there is a confrontation between men and women, those entitled to and those not entitled to inheritance, and in the end between those with the right to have rights and those without the right to have rights.

So far, de Gouges has been considered as a representative of the idea of universal human rights for everyone and not just for the rev-

4 In *The Family Romance of the French Revolution* Lynn Hunt uses Freud's narrative from *Totem und Tabu* (1913) about the brothers killing the *Ur-father* in order to gain access to his privileges as a model for the French Revolution. Cf. especially Hunt (1992, 6ff).

olutionary brothers. The foundation for de Gouges and her demand to broaden out and include more people in the community of rights has been an idea of universal, individually based *natural* rights. But as Bouehotte's legal proposal demonstrated, the idea of the natural can be used differently to carry out other kinds of political and juridical arguments. In the following analysis of the trial and death sentencing of de Gouges this other kind of usage of a natural argumentation will take on further relevance as the idea of a *state of nature* and its importance to the legal thinking of Robespierre and the Reign of Terror takes centre stage. Here too, it will be an open question who has the right to have rights and who will be excluded from the community of rights.

The Terror Legislation and its Usage of the Concept of Nature

Olympe de Gouges was arrested in July 1793 primarily because of her pamphlet *Les trois urnes, ou le salut de la patrie, par un voyageur aérien*, which was published on July 19. In it, she rebuked the supposedly inevitable authority of the Republic by arguing that all domestic and foreign fighting should be brought to a halt for one month in order for the French people to decide whether they wanted a republic, federative or monarchic government (de Gouges, 1993, II: 247). There was a hearing on 1 November that year and she was executed two days later on 3 November.[5] In March that very year the National Assembly had passed many of the laws that would legalize the most violent acts of terror in 1793-94. It is one of these laws that is used to pass sentence on de Gouges. "Whoever is convicted of having composed or printed works or writings which provoke the dissolution of the national representation, the reestablishment of royalty, or of any other power attacking the sovereignty of the people, will be brought before the Revolutionary Tribunal and punished by death" (in Levy et. al. 1979, 259). According to Pierre-Joseph Lamarque, who originally proposed this law on behalf of the General Safety Committee, the law was motivated by the growing amount of royal and anti-revolutionary printed matter, which he considered "the most dangerous weapon" in the hands of "suspect citizens" (*Archieves Parlementaires* 1867, [29] 699).

5 I have only been able to locate the charge against de Gouges in an English translation. It is translated in Levy et. al. (1979, 254ff).

The legal problem in connection with passing this law is that freedom of speech and freedom of the press were inscribed in the *Declaration of the Rights of Man and Citizen*, which the members of the National Assembly under no circumstances wished to compromise even if they did not mind reinterpreting it along the lines of the interests of the Republic. In the discussions leading up to the execution of King Louis XVI in January 1793 some of the radical *jacobins* had realized, however, that certain criminals should not be sentenced by way of the existing positive law of society but instead according to the principles of natural law. In natural law, self-defence – even when it results in death – is a given. These criminals could be termed *ennemi du genre humain* or *hors la loi*, whereby they would be excluded from human society and its civil laws.[6] Thus, the legal manoeuvre consisted in judging certain criminals according to the law of nature, a manoeuvre made possible by categorizing criminals as either enemies of mankind or, literally, *outlaws*. To be considered outside the law and regarded as an enemy of humanity equals an exclusion from the human community and the rules applying there.

To exclude someone from the community of rights is exactly what Robespierre proposed to do to certain criminals in his suggestion for an alternative Declaration of the Rights of Man and Citizen in 1793. He writes that "those conducting war on a people in order to stop the progress of liberty and in order to exterminate the human rights must be persecuted everywhere. Not as ordinary enemies but as murderers and as rebellious brigands" (Robespierre 1793, 7). In this version of natural law, the idea of a state of nature plays a central ideological part. Human rights have become something the Republic has to defend with violence against its enemies. It is because society is understood as a perpetual struggle between opposing interests that penalty of death comes to seem a just way of dealing with political adversaries. Contrary to Olympe de Gouges and her inclusive idea of a universal human nature, humanity here is a closed and exclusive community that has to fight off "murderers" and "rebellious brigands". During the Reign of Terror, such a version of natural law was on the one hand turned into positive law – it could be used to convict felonies – and on the other hand, the

6 See Edelstein (2010/2009, especially 127ff) for a more thorough account of the natural rights theories that were developed during the trial against Louis XVI and that were brought to use repeatedly under the Terror.

Republic was included as a subject of natural rights because it was, obviously, the Republic that gained the right to defend itself, a euphemism for killing political adversaries.

When Lamarque proposed the law that would later be used to pass judgement on de Gouges, he carried out this exact manoeuvre.

> On my own behalf, citizens, I declare loud and clear that I would consider myself guilty from the moment I should spare these terrible people that treat humanity as a herd of cattle only being held in order for them to consume it.

We must unite in a feeling of disgust for these tigers that do not deserve the name of men, in a feeling of loyalty among us and in sacrifice of all of our capacities in the fight to the death against them (*Archieves Parlementaires* 1867, [29] 698).

The rhetoric of the quotation stems from a register of natural rights in which political opponents are reduced to something inhuman or, stronger put, to wild animals trying to consume all of mankind as if they were a herd of cattle. The death penalty is justified by categorizing felonies as enemies of humankind, enemies that everyone has an obligation to fight to the death. Here the concept of nature has an excluding function contrary to the inclusive idea of human nature in the radical thought of de Gouges. The state of nature is something dangerous that calls for extreme measures and something that necessitates a firm and deadly response to outside challenges. It is also, clearly, an understanding of nature that includes some in the community of rights while others are excluded.

The Lamarque-quotation is a concrete example of a policy that operationalizes natural rights and the idea of the natural in a specific way. With this lamarquian perspective as a point of departure, it is easy to criticize the natural rights tradition on which the Declaration of the Rights of Man and Citizen is founded. And in the light of historical developments it is just as easy to see the tragic element in the fact that exactly de Gouges wanted a law closer to nature and the principles of natural rights. But there is another argument too: Nature, natural law and human rights can be used to question some of the norms, structures and positive laws that are otherwise incredibly hard to get a grasp of. De Gouges's challenge to a normative understanding of sexual differences and her defense of wom-

en's and illegitimate children's rights are examples of how the rhetoric of human rights and the idea of the natural has been operationalized in a way that made it possible to see and criticize the fact that women were excluded from the political sphere as long as equality among brothers was the sole alternative to the paternal authority of the king.

De Gouges actualizes the tension between an excluding and an including political operationalization of the concept of nature, and her work raises the question of who is included in the community of rights. Hereby, she points towards a line drawn between those with and without the right to have rights, a line between those in accordance with and not in accordance with the concept of nature. In the eighteenth century, the idea of nature is characterized by its moral persuasiveness but also by its ambiguity, and the combination of these two features makes it a problematical but also privileged rhetorical means in the development and continued negotiation of a human community of rights. The concept of nature might not have the same rhetorical impact in today's political discourse, but the question of who have the right to have human rights is just as relevant today as it was in late eighteenth century France.

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