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# The Existential Dimension of Right

Individuality, Plurality and Right in Fichte and Arendt\*

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*ABSTRACT.* The following article paves out the theoretical ground for a phenomenological discussion of the existential dimension of right. This refers to a dimension of right that is not captured in standard treatments of right, namely the question of whether – or how the concept of rights relates to the ontological and existential question of how we come to express ourselves as individuals in a plural world. While this question is phenomenological in nature, it is not treated within the otherwise diverse field of phenomenology of law. The author therefore looks outside this tradition and develops a framework for discussing the existential dimension of right by bringing central parts of Fichte’s and Arendt’s work into dialogue. By facilitating this – admittedly unusual – dialogue between Fichte and Arendt the author explicates how, for both Fichte and Arendt, the concept of right can only be adequately understood as referring to the existential condition of plurality and uses this insight to draw up a theoretical ground for further phenomenological analysis of right.

*KEYWORDS.* Fichte; Arendt; Right; Plurality; Individuality.

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*Action, the only activity that goes on directly between men without the intermediary of things or matter, corresponds to the human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world*

Hannah Arendt, *The Human Condition*

*The human being ... becomes a human being only among human beings; and since the human being can be nothing other than a human being and would not exist at all if it were not – it follows that, if there are to be human beings at all, there must be more than one*  
Fichte, *Foundations of Natural Right*

## 1. Introduction

In the following article I explore a topic that has received little attention in recent phenomenological discussions of intersubjectivity namely the topic of *right*. I argue that we cannot adequately understand the concept of right without explicating the existential dimensions of right. The existential dimension of right refers to a dimension of right that is not captured in standard legal or philosophical discussions on the nature of right, namely the question of whether – or how the concept of rights relates to the ontological and existential question of how we come to express ourselves as individuals in a plural world.

One might expect to find relevant discussions of the existential dimension of right in the field of phenomenology of law. However, the diverse field of phenomenology of law<sup>1</sup> can instead be characterized roughly by the general questions of how law appears *for a*

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1 LOIDOLT 2010.

consciousness<sup>2</sup> or how legal entities are generated by social acts<sup>3</sup>. In order to map out the theoretical terrain for a phenomenological investigation of the existential dimension of right we therefore have to look outside the field of phenomenology of law. In the following I suggest a vantage point for doing so by bringing Fichte's transcendental deduction of right, as presented in the *Foundations of Natural Right*, into dialogue with Hannah Arendt's phenomenological analysis of intersubjectivity, plurality and self in *The Human Condition* and her discussion of a right to have rights in *The Origins of Totalitarianism*.<sup>4</sup> By bringing Fichte's analysis of right into dialogue with Arendt's work I hope to pave the ground for further phenomenological analysis of the existential dimension of right.

I am aware that reading Arendt with Fichte is not just unusual but also controversial since their engagement with the notion of right seems to point in opposite political directions. The two thinkers might come together in their emphasis on the importance of laws "which protect and make possible it's [a people's] political existence".<sup>5</sup> But Fichte's unreserved celebration of the necessity of the rights pertaining to a modern *Rechtsstaat* sits uneasily with Arendt's emphasis on the "frailty of human institutions and laws" in general and the contingency of any such set of laws in particular.<sup>6</sup> Importantly this difference cannot just be set aside as a superficial difference of emphasis. Instead, it seems to be an inherent consequence of their

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2 HUSSERL 1973; SCHÜTZ 1932.

3 REINACH 1983. Hirvonen and Maihofer's Heidegger-inspired discussions of law constitute two important but rare exceptions to this general tendency: HIRVONEN 2015, MAIHOFFER 1954.

4 In the following, I will refer to these three works as FNR (*Foundations of Natural Right*), HC (*The Human Condition*) and OT (*The Origins of Totalitarianism*).

References to FNR are to the English translation by Michael Baur (Cambridge University Press). In square brackets are added references to the I. H. Fichte edition published in *Johan Gottlieb Fichtes sämtliche Werke*, vol. 3, ed. I.H. Fichte (Berlin: Veit & Comp., 1845/46), and reprinted in *Fichtes Werke*, vol. 3, ed. I.H. Fichte (Berlin: Walter de Gruyter & Co., 1971).

5 HC, 191.

6 HC, 191.

different methodological strategies. In Fichte's *Foundations of Natural Right* [*Grundlage des Naturrechts* 1796] he explicitly investigates the formal structure of right in the modern *Rechtsstaat* as a transcendental condition for realizing the kind of human relations that conditions our very existence as self-conscious beings. This bold commitment to the necessity of the modern *Rechtsstaat* stands in stark contrast to Arendt's phenomenological investigation of the right to have rights which explores the vulnerability of any system of rights and is motivated by the shocking impotency of rights – both at the national and international level – to provide any kind of meaningful protection to the massive numbers of stateless refugees after the Second World War. The present attempt to read Arendt with Fichte might therefore be accused of misunderstanding the very tenor of Arendt's project.

When I venture into this attempt in spite of such important cautions it is because Fichte's account of how the analysis of the self translates into a conception of right constitutes one of the most systematic attempt at explicating the existential meaning of right.<sup>7</sup> Therefore this analysis constitutes an important heuristic tool that can be used to bring certain important – but mostly overlooked – phenomenological and existential aspects of Arendt's analysis of the right to have rights into focus. The point of reading Arendt through Fichte is therefore not that the political and legal thinking of Fichte and Arendt can – or should ever be – reconciled, but that Fichte's theory of right helps explicate the existential dimensions at stake in Arendt's treatment of rights. It also helps clarify important connections between her phenomenological discussion of the human condition in *The Human Condition*, on the one hand, and her political discussion of the importance of a right to have rights in *The Origins of Totalitarianism*, on

7 When I venture to look at Fichte's rather than Hegel's discussion of recognition and right it is because Fichte initially links recognition and right in a more direct way than does Hegel. However, Fichte and Hegel's discussion of recognition and right have much in common and a first analysis of the phenomenological thematic in Fichte's theory of right could pave the way for also integrating Hegelian analysis of recognition in a phenomenological analysis of right (HEGEL 2013). For an introduction to Hegel's discussion of right that focuses on relating Hegel's discussion to current discussions of subjectivity see HARTZ & NIELSEN 2014.

the other hand.

To make this argument, I first (1) explicate the central steps in Fichte's transcendental deduction of the concept of right. I then (2) proceed to argue that there are important (and unnoticed) structural similarities between Fichte's and Arendt's inter-subjective understanding of the ontology of the self. Finally (3) I argue that these similarities can be engaged to reveal structural relations between Arendt's existential analysis of the self in *The Human condition*, on the one hand, and her discussion of rightlessness in *The Origins of Totalitarianism*, on the other hand. This paves the ground for integrating discussions of the existential dimensions of right in phenomenological investigations of intersubjectivity.

## 2. Fichte's Transcendental Deduction of Right

Fichte's aim in the *Foundations of Natural Rights* is to perform a deduction of the transcendental conditions of self-consciousness and reveal the concept of right as such a condition. He claims that at the end of the text he will have "derived and determined" this concept of right as well as guaranteed its application in accordance with the principles of a real science.<sup>8</sup>

This, of course, is no little mouthful to swallow for the average reader who might have a hard time reconciling the investigation of human consciousness – as such consciousness appears to itself – with Fichte's commitment to mapping out in painstaking details the necessary structure of the modern *Rechtstaat*, including property-rights of single women<sup>9</sup>, the design of identity cards<sup>10</sup> and rules for the earmarking of cows<sup>11</sup>. Before delving into Fichte's argument, we need therefore to contemplate the possible meaning and purpose of such

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8 FNR, 12 [11].

9 FNR, 301 [348].

10 FNR, 257 [295].

11 FNR, 197 [225].

transcendental deduction.<sup>12</sup>

In the introduction to the *Foundations of Natural Rights*, Fichte explains the meaning of a transcendental deduction of right noting «that a certain determinate concept [i.e. ‘right’] is originally contained in reason and given through it, can mean nothing other than that the rational being, just as certainly as it is a rational being, acts necessarily in a certain way».<sup>13</sup> He goes on to explicate that: «The philosopher’s task is to show that this determinate action is a condition of self-consciousness, and showing this, constitutes the deduction of that concept».<sup>14</sup> Fichte therefore makes clear from the beginning that the purpose of the work is to deduce right as a transcendental condition of self-consciousness. This purpose seems to advance an understanding of the I as the self-explanatory ground of everything that there is, thereby giving the I an elevated position as the ground from which everything else can be derived, a position that is often ascribed to Fichte.<sup>15</sup>

This interpretation of the meaning of the transcendental deduction is certainly legitimate. However, in order to bring Fichte’s analysis of right into dialogue with the phenomenological tradition it is more constructive to investigate a slightly different and equally warranted interpretation of the meaning of Fichte’s transcendental deduction.<sup>16</sup> This second interpretation gives heed to Fichte’s repeated claim that the I *finds* itself (rather than claiming that the I is constituted).<sup>17</sup> The emphasis on the I’s finding of itself relates intimately to phenomenological investigations of self-consciousness. Both focus on the question of how, when and why the I comes to appear to itself as an I.

According to this second interpretation, the purpose of the

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12 For a thorough discussion of Fichte’s method in this work, I recommend BREAZEALE 2006.

13 FNR, 8 [7].

14 FNR, 9 [8].

15 HENRICH 2003, 10.

16 This account follows Allen W. Wood’s interpretation of *Foundations of Natural Rights* (WOOD 2006).

17 See e.g. FNR, 9 [9].

transcendental deduction is not so much to prove the necessity of a certain concept (e.g. right) but instead to investigate the conditions for self-conscious itself with the purpose of revealing *what needs to be thought* in order to think the concept of self-consciousness.

Fichte's emphasis on the I's finding itself underscores the need to abstain from thinking self-consciousness as an entity. Instead, Fichte argues, we are to think of self-consciousness as "pure activity" and similarly the concept of right is to be thought of as a necessary condition for this activity to take place and hence for an I to think itself as an I: «The transcendental philosopher derives – and thereby "proves" – his "concepts" by grounding them in pure observations (intuitions) of something that is not a concept at all: the series of those necessary acts by means of which the I constitutes itself *as* and I, for itself». <sup>18</sup>

While the two interpretations of the transcendental deduction are in many ways similar, they are different in at least one important way. On the second interpretation, self-consciousness is not elevated as the ground of everything that there is. Instead, self-consciousness is revealed as necessarily grounded in and dependent on the I's immersion in a material and intersubjective world. This implies that the purpose of the transcendental deduction cannot be to derive everything from the I, but instead to reveal the self-conscious I as fundamentally determined and conditioned by an external and intersubjective world.

The difference between the two interpretations can also be explicated in another way: While the first interpretation presents the transcendental deduction as an answer to skepticism, the second interpretation understands the transcendental deduction as a more humble investigation of self-consciousness which is captured by the question «What else does any rational subject (that is, any finite I) – have to think in order to "think the I?"». <sup>19</sup> As Wood argues: «For transcendental philosophy the real point was never merely to have an

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18 BREAZEALE 2006, 118.

19 BREAZEALE 2006, 120.

answer to skepticism, but rather to use this way of answering skepticism in order to provide insight into the nature of the fundamental concepts about which we are inquiring, and developing a new and revolutionary theory of the relationships between them». <sup>20</sup> It is this understanding of the transcendental deduction that will guide the following interpretation of Fichte's analysis of the concept of right.

The *Foundations of Natural Right* is divided into two main parts. The first part deals with theoretical questions regarding the foundation of natural right. The second part deals with the practical dimension of developing positive law in accordance with the principles of natural right that have been deduced in the first part. The second part constitutes a detailed discussion of the laws needed to regulate the modern state in accordance with the principle of right. This second part leads Fichte to develop concrete suggestions for the regulation of all kinds of aspects of the modern state. For the purpose of this article, the first part is the most interesting, because this is where he articulates the existential dimensions of right and thereby (or so I will argue) paves the ground for the future integration of phenomenological discussions of this dimension of right. However, the fact that Fichte presents this first part together with such detailed analysis of concrete legal regulation illustrates the extent to which Fichte is committed to an understanding of right as something that is mediated in concrete and empirically given institutionalized structures.

As it has been pointed out by many commentators, the details in the first part of the work are extremely difficult to follow and «it is not clear whether the concept of self-consciousness invoked in the beginning of the deduction is precisely the same concept at work in its conclusion». <sup>21</sup> However, what is interesting about Fichte's transcendental deduction of right in relation to phenomenological discussions of intersubjectivity is not whether or not he actually manages to deduce right as a necessary condition of (some form of)

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<sup>20</sup> WOOD 2006, 68.

<sup>21</sup> NEUHUSER 2000, xvi.

self-consciousness. What is interesting is his reflection on *what needs to be thought* in order to think the concept of self-consciousness. That is, his reflection on what is implicit in the very concept of self-consciousness. This reflection leads him to an understanding of self-consciousness as something that is never simply given, but something that must be *realized*. He further argues that such realization of self-consciousness presupposes relations of recognition that structures an inter-subjectively shared world. Thus, the enduring significance of Fichte's theory lies in the move towards intersubjectivity that defines the development of his argument.

Fichte flags this move towards intersubjectivity from the beginning of the work where he makes clear that the concept of right «acquires necessity through the fact that the rational being cannot posit itself as a rational being with self-consciousness without positing itself as an *individual*, as one among several rational beings that it assumes to exist outside itself, just as it takes itself to exist».<sup>22</sup> Several points are at stake in this dense remark. First of all, Fichte makes clear that his deduction is aimed at explicating the conditions for finding oneself as an *individual*. For Fichte, the term “individual” signifies not just a numerical quality, but a spatiotemporal existence in the empirical world. Thus, with the term “individual” Fichte explicates that the deduction of right is about explicating the conditions for a finite, empirical self-consciousness. Furthermore, Fichte links individuality to plurality, that is, he points out that what needs to be proven is that a rational being can only become aware of herself as a rational being (posit herself) if she becomes aware of herself as one among several rational beings. To prove this point, he undertakes a deduction of the concept of right by providing the proof of a number of successive theorems.

The first theorem Fichte sets out to prove is that «A finite rational being cannot posit itself without ascribing a free efficacy to itself».<sup>23</sup> What this theorem says is that a finite rational being cannot reflect

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22 FNR, 9 [8].

23 FNR, 18 [17].

upon itself (posit itself) without reflecting upon itself as a practical being.

It is of crucial importance to note that the self-consciousness at issue in Fichte's analysis is a *finite* self-consciousness. What Fichte is interested in here is not the conditions for the notion of consciousness as such or the development of a concept of absolute consciousness. What he is interested in is instead «the genetic conditions under which a real subject with a spatiotemporal existence first comes to an awareness of itself as a self-positing subject».<sup>24</sup> It is this ambition that guides Fichte's formulation of the problem to be solved in order to prove the deduction's first theorem:

The activity [consciousness] we are seeking can be posited [reflected on] by the rational being in opposition to the world, which would then limit the activity; and the rational being can produce this activity in order to be able to posit it in opposition to the world; and if such an activity is the sole condition of the possibility of self-consciousness (and self-consciousness must necessarily be ascribed to the rational being, in accordance with its very concept), then what is required for such self-consciousness must occur.<sup>25</sup>

The meaning of Fichte's – admittedly cryptic – formulation becomes clearer if we think about it as an attempt to explicate the problem of self-consciousness in terms of a finite or worldly self-consciousness. What Fichte expresses in the first part of the sentence is that we must seek a consciousness that can be reflected upon *in opposition* to the world, that is, as *limited and determined by* the external world. However, limitation in and by itself is not enough for consciousness to become aware of itself *as* consciousness, that is as a free or self-positing activity. This is why Fichte goes on to emphasize that the rational being must be able to *posit its activity* in opposition to the world. Thus,

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<sup>24</sup> NEUHOUSER 2001, 45.

<sup>25</sup> FNR, 19 [18].

it is not enough that the rational being experiences the world as limitation (as it does in theoretical intuition). What is to be intuited by consciousness is instead it-self, that is a self-positing (and therefore unlimited) activity. In other words, the problem to be solved «is how the subject can be aware of itself as both finite (constituted by its relation to something other) and self-determining (constituted by nothing other than its own activity)».<sup>26</sup>

Once we understand that this is the problem to be solved, the first theorem follows more or less immediately: what the theorem says is that we first become aware of ourselves as simultaneously limited *and* free in *action*. And Fichte's point in the first theorem is exactly that it is only in action that we perceive of ourselves immediately as both free and bound.

He explicates this through the notion of the concept of an *end*, which describes as «the *act of forming* the concept of an intended efficacy outside us»<sup>27</sup> and argues that the act of forming an end is «an efficacy directed at objects» and therefore limited, while – at the same time – it is also «an efficacy that follows immediately from the concept of an end». This means that the I is both limited (by the object at which it is directed) and unlimited (in that it has its ground purely in consciousness itself).<sup>28</sup> In this way, according to Fichte, we become conscious of ourselves in and through our actions.

According to Fichte, we could not reach such self-consciousness through a purely theoretical conception of the world since «by its very concept, [...] it [theoretical intuition] is not supposed to have the intuiter as its object, but rather something outside and opposed to the intuiter; namely, a world».<sup>29</sup> Therefore Fichte's first theorem is also another way of saying that practical reason has primacy over theoretical.<sup>30</sup> As noted by Wood: «For me, my individuality consists not merely, and not fundamentally, in *facts* that distinguish me from

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26 NEUHOUSER 2001, 44.

27 FNR, 20 [19].

28 FNR, 20 [19].

29 FNR, 19 [18].

30 NEUHOUSER 2000, xiv.

others but in *possibilities of acting* through which I actively determine who I am. In other words, the awareness of my individuality must be fundamentally *normative*.<sup>31</sup>

Fichte confirms this in the first corollary to this theorem where he directly states that:

What is being claimed [in the first theorem] is that the practical I is the I of original self-consciousness; that a rational being perceives itself immediately only in willing, and would not perceive itself and thus would not perceive the world (and therefore would not even be an intelligence), if it were not a practical being.<sup>32</sup>

Thus, while Fichte initially emphasizes that the finite consciousness is to be posited in opposition to the world and therefore seems to articulate an understanding of such consciousness as something fundamentally different and unrelated to the world, his argument ultimately aims to reveal that such opposition and limitation expresses instead a fundamental *relation* to the world. This relation comes to expression in the insight that the limitation of consciousness is also what *delimits* consciousness and enables consciousness to articulate itself as a spatiotemporal existence: as an individual self in the empirical world.

The truly groundbreaking move in this first step of Fichte's transcendental deduction of right is the development of an understanding of consciousness that reconciles subject and object by explicating consciousness not as something that is mysteriously and problematically *projected* into an external world, but as something that realizes itself as activity *in* the world. In other words, Fichte articulates a notion of the self that is crucially tied to the world, not only in the negative sense that such consciousness is fundamentally limited by its

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<sup>31</sup> WOOD 2006, 72, emphasis in original.

<sup>32</sup> FNR, 21 [20].

worldly existence, but also in the more affirmative sense that this limitation constitutes the conditions for the articulation of consciousness as a free being.<sup>33</sup>

With this description of the self as an activity *in* the world Fichte can be said to anticipate later phenomenological analysis of the self in terms of *existence* or *enactment* (*Vollzug*). This becomes even clearer in a later passage where he explicitly explains the idea of consciousness as a kind of substratum as the product of our imagination:

As soon as we hear of the *I* as active, we do not hesitate to imagine a substratum that is supposed to contain this activity as a bare capacity. This is not the *I*, but rather a product of our own imagination, which we construct in response to the demand to think the *I*. The *I* is not something *that has capacities*, it is not a capacity at all, but rather is *active*; it is what it does, and when it does nothing, it is nothing.<sup>34</sup>

Many years later Sartre poetically captures the same point by noting:

If, impossible though it would be, you could enter “into” consciousness you would be seized by a whirlwind and thrown back outside, in the thick of the dust near the tree, for consciousness has no “inside”. It is just this being beyond itself, this absolute flight, this refusal to be a substance which makes it a consciousness.<sup>35</sup>

What is essential in Sartre’s, Arendt’s as well as other phenomenological understanding of the self as enactment is that the self must be understood as a being that is *realized* or *happens* in the world rather than something that simply *is*.<sup>36</sup> The initial move that

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33 DE KOCK 2016, 12.

34 FNR, 23 [22].

35 SARTRE 1970, 5.

36 LOIDOLT 2017, 87; see also HEIDEGGER 1967; SARTRE 2012; ARENDT 1998.

Fichte makes in his deduction of right seems to be driven by the same kind of intuition, namely that the self cannot be understood as something static that can exist in isolation from an external world in which it is constantly realized, it must instead be understood as an activity that is directed *at* the world and that reverts into itself *through* the world.

The second theorem Fichte sets out to prove is the theorem that: «The finite rational being cannot ascribe to itself a free efficacy in the sensible world without also ascribing such efficacy to others, and thus without also presupposing the existence of other finite rational beings outside itself».<sup>37</sup>

The claim Fichte is making here is that «ascribing to oneself free efficacy (or agency) in the sensible world requires ascribing the same capacity to other rational beings».<sup>38</sup> From the first theorem we know that (according to Fichte) the finite rational being perceives itself first in action. However, this leads to a new problem for Fichte: How should it be possible that an individual spontaneously decides to exercise its efficacy when it is not yet aware of itself as self-determining and free? And even if it were thinkable that the individual was able to spontaneously exercise efficacy on the external world, how would it then recognize this efficacy as spontaneous and free? Would the results of its efficacy not appear to it with the same kind of determinate existence as any other external object in the world?<sup>39</sup> Thus, it seems, there is no way we could be able to realize our capacity for freedom and, therefore, no way we could come to initiate action in the first place.<sup>40</sup>

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37 FNR, 29 [30] original emphasis omitted.

38 NEUHOUSER 2000, xv.

39 HONNETH 2001, 68–69.

40 Note that the problem arises in this way only because the individual is to become aware of herself as a finite individual; that is as a consciousness that is limited and determined by an outside world. This is why consciousness cannot find itself as determining itself to be self-active. Such pure self-determination would evade any kind of relation to an external world; it would posit consciousness as a pure or absolute inwardness. But this is not what is at issue in Fichte's deduction of right. He is specifically after the conditions for becoming conscious of ourselves as finite individuals. Thus, what he is after is a

To solve this problem, Fichte argues, we must determine a way in which the rational being's free efficacy can *itself* become an object for the rational being.<sup>41</sup> This is possible «only if it is assumed that *the subject's efficacy* is synthetically unified with the *object* in one and the same moment, that the subject's efficacy is itself the object that is perceived and comprehended, and that the object is nothing other than the subject's efficacy (and thus that the two are the same)».<sup>42</sup>

What is demanded is that the subject's free efficacy becomes an object for the subject itself. Thus, somehow, the subject must become aware of itself as being in one and the same moment constrained (object) and absolutely free and self-determining (subject).

Fichte's solution to this seeming antinomy is to propose that external evidence of one subject's agency is provided by another free subject who summons us to exercise our freedom.<sup>43</sup> Thus, Fichte argues, the subjective and objective nature of consciousness can only be synthesized «if we think of the subject's being determined as its *being-determined to be self-determining*, i.e. as a summons [*eine Aufforderung*] to the subject, calling it to exercise its efficacy».<sup>44</sup>

The move that Fichte is describing here is a move where *I come to be an object for myself by being an object for another rational being*. Thus, my awareness of myself as free is conditioned on this freedom being given as an object to someone other than myself. In Fichte's terms this means that my freedom must be experienced as a limit on the freedom of another. It turns out to be exactly this limitation that is confirmed in the summons.

To understand the complexity of this reciprocal relation we must first understand what it means to say that I am an object for another rational being. The summons is supposed to be directed at me, as a rational being. That is another way of saying that I am the intended object of the summons. Thus, through the summons, I am first posited

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consciousness that reveals ourselves as free beings *in* an external world.

41 FNR, 31 [32].

42 FNR, 31 [32].

43 NEUHOUSER 2000, xv.

44 FNR, 31 [32].

as an object. To be posited as an object for another thus means that the other perceives me as a *limitation* on her being.<sup>45</sup> In other words: in order for the other rational being to have *me* (the conscious, free *I*) as the intended object of such a summons, the other must perceive me as something that poses a limitation on her freedom, otherwise I would not constitute an object for the other. Thus, I come to appear for myself and for another not first and foremost through my physical appearance, but through the other's positing of my freedom as something that limits the freedom of the other. What Fichte describes here is the structure of recognition in terms of a radical duality of self-consciousness: self-consciousness and freedom is realized through a reciprocal relation where we become conscious of ourselves by realizing the objective reality of our own freedom.

An important objection could be raised against Fichte's argument at this point. One might argue that what he has proven is that we need to stand in some relation of recognition in order to *first* become conscious of ourselves as consciousness and realize ourselves as free beings, but he does not seem to have proven that we necessarily need to continue to be in such relations once we have come to realize our own freedom. Thus, it might seem that Fichte has neither provided sufficient proof for the move from one specific instance of recognition to a full-blown *structure* of recognition, nor for the move from the duality of recognition to the plurality of a shared inter-subjective world. However, this objection flows from a specific interpretation of Fichte's transcendental project. If we grant that what Fichte has shown is not *how* self-consciousness comes into being, but *what needs to be thought* in order to think ourselves as conscious the objection can easily be refuted. Then, Fichte's point appears not to be that we come into being as self-conscious *I*s by being summoned, but instead that we always *find* ourselves *as* summoned, or – to use a much later expression – we find ourselves as always already summoned. In this sense, Fichte is arguing that we cannot become aware of ourselves as conscious beings outside the structure of the summons. When we experience another

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45 FNR, 31 [32].

conscious being's normative demand on us, we are always already summoned. No specific instance of normative demand could in and by itself produce that structure. On the contrary, we become aware of such normative demand as a limitation on our I only as already embedded in the structure of the summons.

Fichte's transcendental deduction of other conscious beings is parallel to his transcendental deduction of the material body in connection with which he states that «experience could not teach us that we have a body. That we have a body and that it is ours is something we have to know in advance, as a condition for the possibility of experience». <sup>46</sup> Just like no particular experience could teach us that we have a body, no particular summoning could make us aware of ourselves as conscious and free beings and as answerable to such summons. Once we find ourselves, we always find ourselves *as* summoned. In Wood's words: «The recognition that a summons is necessary for individual self-consciousness means that the mental states of others, as perceived by someone other than the I whose states they are, are as transcendently necessary to the self-consciousness of an I as are its own states». <sup>47</sup>

This is why Fichte is able to conclude that: «If there is any human being at all, then there is necessarily a world as well, and certainly a world such as ours, one that contains both non-rational objects and rational beings within it». <sup>48</sup> This also explains the move from the dual structure of recognition to the plural structure of intersubjectivity that emerges from the summons. Any dual instance of being summoned by a concrete other presupposes the transcendental condition of the summoning, which is nothing but the condition of being always already immersed in a shared world.

Importantly, this does not imply that the question of *how* we are integrated into such a shared world becomes irrelevant, but it means that the transcendental deduction of intersubjectivity is not dependent

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46 Fichte cited in WOOD 2006, 70.

47 WOOD 2006, 73.

48 FNR, 38 [40].

on any explanation of how this happens. Fichte's answer to this other question, the question of how we come to be immersed in a shared world, is "up-bringing": «The summons to engage in free self-activity is what we call upbringing. All individuals must be brought up to be human beings, otherwise they would not be human beings».<sup>49</sup>

Fichte notes that, by tying the summons, to upbringing he raises a problem of an infinite regress: the question arises: «who brought up the first human couple?».<sup>50</sup> Fichte solves this problem by arguing that «a spirit must have taken them [the first human beings] into its care» and by referring to «an old, venerable document [*Genesis*] that generally contains the deepest and most sublime wisdom and presents results that all philosophy must return to in the end».<sup>51</sup> While this solution will probably sit rather uneasily with most readers today, phenomenological discussions of selfhood have long since made us accustomed to accept the structure of the "always-already" without having to enquire into a first beginning. Further, it is important to note that even if the notion of a summons did create a problem of regress, it would not alter the fact that when we find ourselves as conscious beings we find ourselves as already part of a common world, that is, as always already summoned.

A consequence of Fichte's view on self-consciousness is that we can never understand the I as something that simply *is*, the I is realized through a summons that *calls it to act*.<sup>52</sup> As a consequence, a rational being «acquires the concept of its own free efficacy, not as something that *exists* in the present moment, [...] but rather as something that *ought* to exist in the future».<sup>53</sup> Fichte moves on to conclude that «all

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49 FNR, 38 [39].

50 FNR, 38 [39].

51 FNR, 38 [39].

52 As noted by Honneth, the summons is not to be understood only in terms of a direct request of another, every address that is directed at another person has the structure of a summons in so far that it implicitly presupposes the other as a free being capable of answering the address. We do not address stones or benches, we only address other people and an address is always also a summons calling the other to respond as a free being (HONNETH 2000, 76).

53 FNR, 32 [33].

animals are complete and finished; the human being is only intimated and projected [*angedeutet und entworfen*]» and «every animal is what it is: only the human being is originally nothing at all. He must become what he is to be: and, since he is to be a being for himself, he must become this through himself».<sup>54</sup>

What Fichte describes is a self that is radically given over to the other in the sense that our first-hand perspective on ourselves is mediated through the perspective of the other: what we become aware of, when we become aware of ourselves, is ourselves as constituting an object for the other, but an object whose objective reality consists in its complete self-determination. Thus Fichte's conclusion is that the other is always implicit in our self-consciousness: finite rational beings can only become aware of themselves as given over to – or responding to the other. This, it turns out, is the full meaning of Fichte's corollary cited above. To say that «the human being [...] becomes a human being only among human beings»<sup>55</sup> is to say that the first-hand perspective we have on ourselves is an inter-subjective perspective: we become aware of ourselves not just *by being summoned*, but *as summoned*.

The third and final claim that Fichte sets out to prove in his transcendental deduction of the concept of right is that: «The finite rational being cannot assume the existence of other finite beings outside it without positing itself as standing with these beings in a particular relation, called a relation of right».<sup>56</sup>

It is this final theorem that completes Fichte's deduction of right by revealing relations of right as «an original concept of pure reason»<sup>57</sup> that is, as a transcendental condition of the possibility of the I. The work that goes into proving this third and final theorem is carried out first and foremost through explicating what it means to posit other

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54 FNR, 74 [79], again Fichte's notion of a summons leads to an understanding of the *I* that strongly anticipates later existentialist descriptions of the self in terms of enactment *Vollzug* see supra p. 9.

55 FNR, 37 [39].

56 FNR, 39 [41].

57 FNR, 9 [9].

free beings outside ourselves. Fichte ends up explicating this meaning in terms of the structure of recognition arguing that «one [free being] cannot recognize the other if both do not mutually recognize each other; and one cannot treat the other as a free being, if both do not mutually treat each other as free».<sup>58</sup>

Fichte's point here is that if I am to become aware of myself as a free being through the other's summoning of me, then I can only become aware of myself as free by responding to the summons *as* a summons, that is, as a demand on me expressed by another free being. Implicit in the understanding of the summons is therefore a recognition of the other as a free being like myself. As a consequence, the relation of right that Fichte sets out to establish in this third theorem turns out to be implicit in the intersubjective conception of self-consciousness that he develops in order to prove the second theorem: positing another free being outside myself implies positing the other as free, which means that «*I must limit my freedom through the concept of the possibility of his freedom*» and this, Fichte argues, is what is to be called «a relation of right».<sup>59</sup>

It is important to note is that this understanding of right cannot be reduced to the abstract recognition of the other's freedom. We cannot understand the concept of right simply as a question of perceiving or thinking about the other in a certain way. What is required by the concept of right is instead that that I recognize the other in «a manner that is valid for both *him* and *me*».<sup>60</sup> This, Fichte argues, implies that I actually *treat* the other as a rational being «*for only in action does there exist such a recognition valid for both*».<sup>61</sup>

What, according to Fichte, is at stake in relations of right is not a moral understanding of our duties towards the other but instead the demand implicit in the concept of right namely «that my free agency acquire a real and protected existence in the external world».<sup>62</sup> Fichte

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58 FNR, 42 [43].

59 FNR, 49 [52].

60 FNR, 44 [47].

61 FNR, 44 [47].

62 NEUHOUSER 2000, xvi.

underscores this point repeatedly noting:

Rational beings enter into reciprocal interaction with one another only through actions, expressions of their freedom, in the sensible world: thus the concept of right concerns only what is expressed in the sensible world: whatever has no causality in the sensible world – but remains inside the mind instead – belongs before another tribunal, the tribunal of morality.<sup>63</sup>

Thus, Fichte's point is that we cannot find ourselves as finite self-conscious beings if we do not find ourselves within a relation of right, and this relation of right must be actual and real. It is at this point in the argument, that the radicality of Fichte's thesis becomes most explicit and probably also difficult to accept. What he claims to be doing is nothing less than deducing the existence of a (more or less specific) formal system of right as a transcendental condition for self-consciousness.

The idea of deducing a formal system of right from self-consciousness is obviously a lot to swallow for the average reader who is accustomed to think of any legal system as an archetypical example of a contingent empirical fact. However, before dismissing Fichte's point as outrageous it is worthwhile to try to understand the meaning of Fichte's claim. What he is saying is *firstly* that for a conscious being to find itself as conscious and free it must be able to realize its actions in the empirical world, and *secondly*, that outside an empirically realized formal system of right, the actions of a conscious being cannot be realized *as* actions. This claim might seem counter-intuitive, but once one starts to contemplate what an action actually means, Fichte's suggestion is not as far-fetched as it appears at first.

Recall that Fichte defines the actions of conscious beings as «expressions of their freedom, in the sensible world».<sup>64</sup> Intuitively we

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63 FNR, 51 [56].

64 FNR, 51 [56].

tend to think of such actions in terms of those manipulations on the external world that I can perform immediately by using my physical body. But it is worth noting that the actions that actually come to define who we take ourselves to be are in fact mostly actions that can only be realized through formal legal categories. While I might be able to pass the salt without depending on a formal legal category, I would not be able to undertake actions such as marrying, adopting, selling, buying or entering into any kind of contract outside the framework of a shared formal system of legal norms.

The point of this observation is not simply a practical one, namely that if there was no legal system, there would be no physical force to hold me to the promise inherent in all these different types of action. On the contrary, the point is not practical at all but *ontological*: outside a formal system of norms there is simply no *form* which such actions could take. Outside a formal system of norms there is no shared space within which my actions can acquire any real existence *as* actions. That does not mean that I cannot perform the measures that are expected to belong to certain formal categories. For instance, I might be such a person, who keeps my promises and am true to the person I love. But this moral behavior does not, indeed *cannot*, make the act of marrying real. If there is no shared formal space where such a promise can be recognized as the act of marrying, the act of marriage itself is not possible to perform. In that case, the act of marriage is not part of an external world and does not constitute a shared reality. Thus, once I am outside any relationship of right, I cannot find myself as summoned to anything particular, because there is simply no *form* such action could take.

To be outside of a formal relation of right therefore, for Fichte, amounts to be outside the structure of a summons. While I might arguably still find myself as summoned in a very limited sense (e.g. to pass the salt), I could not find myself as summoned in any significant way (e.g. to manifest my freedom as meaningful and significant actions in a shared world), since there are no shape that these actions could take. Therefore, whether or not we accept all the steps in Fichte's

transcendental deduction, Fichte's analysis of right draws attention to an important and often overlooked dimension of right, namely the inherent existential dimension of any formal system of law.

However, even if we grant Fichte that there seems to be an existential dimension to any formal system of right, it seems that such existential understanding is still vulnerable to a very simple and straightforward objection: there are indeed many empirical examples of individuals who have been deprived of access to rights and such individuals are undeniably still conscious beings. Thus, it seems, there must be something fundamentally wrong with Fichte's existential approach. However, while there is no empirical evidence to support the extreme claim that the loss of rights results in a complete loss of self-consciousness, there are many empirical studies documenting how individuals in vulnerable situations perceive deprivations of formal rights not just on a material level, as obstacles to fulfilling basic needs, but also on an existential level as an experience of radical exclusion and loss of meaning.<sup>65</sup> No one has expressed this better than Arendt: a deprivation of rights manifests itself «first and above all in the deprivation of a place in the world which makes opinions significant and actions effective».<sup>66</sup> The critical question that arises out of Fichte's transcendental deduction is therefore the question of what happens to the self in conditions of rightlessness where individuals have no access to realize themselves through a shared normative framework constituted by law.

Fichte does not take up this critical discussion in the remaining part of the *Foundations of Natural Right*. Instead the further development of his analysis of right leads him away from the existential issues and deep into a detailed planning of «how the empirical world is to be ordered if the concept of right is to be realized within it».<sup>67</sup> While the first part of his work opens up towards a reflection upon the vulnerable condition of the individual in the modern state, the second

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65 GÜNDOĞDU 2015; OLSEN 2013; PRINTZLAU 2012, SARAT 1990.

66 OT.

67 NEUHOUSER 2000, xix.

part ends up closing this opportunity and instead reads like an unqualified celebration of the modern *Rechtstaat*. Therefore, if we want to develop the existential understanding of right further we must look elsewhere for a theoretical framework that can elucidate the existential meaning of right in terms of the fundamental vulnerability inherent in any system of right. This is what I intend to do in the remaining part of this article where I draw on Arendt's discussion of rightlessness in order to explore the potential for developing Fichte's ontological and existential understanding of right into a phenomenology of right that is able to capture this fundamental vulnerability.<sup>68</sup>

### 3. From Fichte to Arendt

In order to bring Fichte's transcendental deduction of right into dialogue with Arendt's analysis of plurality and right it must first be established that Fichte's and Arendt's conception of the constitutive relation between individuality and intersubjectivity can reasonably be compared.<sup>69</sup> While such comparison of Fichte and Arendt has rarely – if ever – been suggested in the existing literature the structural relations between the two thinkers' approaches are actually quite striking.

First of all, Arendt is committed to an understanding of the individual conscious being which takes seriously the appearance of this being in a common world as an ontological fact. Thus the I – or the *who* which is Arendt's preferred term – is not to be understood as an isolated subjective reality that is then somehow projected into a common world. On the contrary, the *who* emerges *in* and *through* its

<sup>68</sup> Importantly I do *not* intend to argue that Arendt was in any way inspired by Fichte's conception of individuality or personhood. She developed her phenomenology of plurality quite independently from any influence from German Idealism. The only point I aim to argue is that, in spite of the independent developments of both Fichte's and Arendt's conceptions of the self, there are quite striking similarities between them.

<sup>69</sup> Please note that I will be focusing on Arendt's concept of *right* and not on Arendt's understanding of law in general. For a thorough assessment of Arendt's understanding of law in general see BREEN 2012.

engagement with the world and cannot be thought in isolation from it.<sup>70</sup>

This emphasis on appearance as an active realization of the self is also central to Fichte's understanding of the self. Thus, in the *Foundations of Natural Right*, he argues that it is in and through its concrete engagement with the world, that the I comes to be what it is. For Fichte, like Arendt, any thought of an I that exists prior to or behind its activity is a meaningless abstraction.<sup>71</sup>

Unlike Fichte, Arendt's claim is not that subjective consciousness itself is conditioned upon this worldly appearance of the *who*. Her claim is that this worldly *who* cannot be understood as a function of the isolated subjective experience of consciousness.<sup>72</sup> This is why Arendt emphasizes the worldly character of the self, underscoring that «we are of the world and not merely in it».<sup>73</sup> Thus, for Arendt, being a self not only includes a narrative dimension – a thesis that has often been underscored by Arendt scholars – but fundamentally «our *immediate, non-reflective, non-objective worldly self-appearance*».<sup>74</sup> This appearance of the *who* in the world is not first and foremost an appearance *for myself* but instead an appearance *to others*. And this appearance to others «is what makes myself “real,” not as an object in space and time alone, but as “appearing mineness”».<sup>75</sup>

Arendt's concept of “appearing mineness” arguably resembles Fichte's concept of individuality in important ways.<sup>76</sup> For both Fichte and Arendt, the appearance of the individual (Fichte) or the *who* (Arendt) in the world is always a *plural* event, that is, it is an event conditioned on an intersubjective shared world. To explain the ontological meaning of plurality Arendt distinguishes between “distinctness” and “otherness” and uses this distinction to explicate

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70 HC, 9.

71 FNR, 23 [22].

72 FNR, 280 ff.

73 LM, 22.

74 LOIDOLT 2017, 75 internal references omitted.

75 LOIDOLT 2017, 70.

76 See *supra* p. 6 ff.

the difference between multiplicity and plurality:

Otherness in its most abstract form is found only in sheer multiplication of inorganic objects, whereas all organic life already shows variations and distinctions [...]. But only man can express this distinction and distinguish himself, and only he can communicate himself and not merely something – thirst or hunger, affection or hostility or fear.<sup>77</sup>

Plurality cannot be reduced to the numerical fact of there being more than one human being; the condition of plurality is a *relational* condition which has «the twofold character of equality and distinction».<sup>78</sup> “Equality” corresponds to the recognition of the other as a rational and free being like myself; “distinction” corresponds to the fact that I distinguish myself in plurality by communicating myself, that is by being seen and heard by others not simply as a physical appearance but as a *who*.<sup>79</sup> This is why «plurality is not something that simply is, but essentially something we have to take up and do»<sup>80</sup>: through our actions we do not only distinguish ourselves as selves but also in the same move confirm the others as human beings like ourselves. Thus, for Arendt, as for Fichte, the I cannot find itself unless it finds itself already in a shared world (Arendt) summoned to act (Fichte). For both, this means that the self comes to appear for itself through its appearance for others. This is the ontological meaning of Arendt’s strange claim that:

It is more likely that the “who,” which appears so clearly and unmistakably to others, remains hidden from the person himself, like the *daimōn* in Greek religion which accompanies each man throughout his life, always looking over his shoulder from behind and thus visible only to

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<sup>77</sup> HC, 176.

<sup>78</sup> HC, 175.

<sup>79</sup> HC, 176.

<sup>80</sup> LOIDOLT 2017, 2.

those he encounters.<sup>81</sup>

While this quote is often interpreted in the secondary literature on Arendt, standard interpretations often fail to capture «the radicality of Arendt's ontological commitment to plurality» which implies that the self cannot be thought in isolation, that the self is ultimately a worldly self, a *who* in a shared world.<sup>82</sup> Thus, like Fichte's individual I, Arendt's *who* turns out to be a radically inter-subjective *who* in the sense that it is realized in action and that action takes place *in-between* people. This means that the *who* we are cannot be understood, indeed would not make sense, outside of the “web of relationships” with other human beings in and through which it comes to be.<sup>83</sup>

For Fichte, this ontological commitment to plurality translates into a specific relation of right. For Arendt, the ontological commitment to plurality translates instead into an understanding of human existence as something that is realized in speech and action.<sup>84</sup> Action, for Arendt, means to «take initiative, to begin [...] to set something in motion».<sup>85</sup> Unlike Fichte, she does not tie the possibility of action to any formal legal order. On the contrary, the transformative power of action seems rather to be in tension with– and sometimes even even contrary to law. As noted by Barbour:

Arendt does not believe that action can emerge only within the bounds of a formally constituted legal order. And, quite clearly, her conception of action is designed to repudiate this kind of institutionalism, or any suggestion that only citizens can engage meaningfully in politics. Rather, on Arendt's account, action constitutes a public world, or is coextensive with a public world, while the law encircles it, or establishes the boundaries that, almost by definition, the

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81 HC, 180.

82 LOIDOLT 2017, 155.

83 HC, 181 ff.

84 HC, 179.

85 HC, 177.

'boundlessness' and 'unpredictability' of action is bound to challenge again.<sup>86</sup>

However, while Arendt portrays action as a power that has the ability to transcend the boundaries of law, she also describes action as a power that presupposes plurality and thereby the reality of other free beings like myself. This places the idea, that I am conditioned on the freedom of the other, as an inherent condition in the very concept of action. While Arendt does not portray this inherent condition as a formalized (or even formalizable) relation of right, she would probably agree with Fichte that «positing another free being outside myself implies positing the other as free» which is the ontological meaning of Fichte's concept of right.<sup>87</sup> There is therefore an important affinity between Arendt's notion of plurality, which she describes as «the basic condition of both speech and action»<sup>88</sup> and Fichte's notion of a relation of right, which he expresses in the demand that «*I must limit my freedom through the concept of the possibility of his freedom*»<sup>89</sup>. Both notions entail the «twofold character of equality and distinction»<sup>90</sup> which enables the self to appear in a shared world. In the following, I suggest that we might use this affinity between Arendt's concept of plurality and Fichte's concept of right as a heuristic tool to interpret the ontological and existential meaning of Arendt's famous claim that that the most fundamental right is «a right to have rights».<sup>91</sup>

#### 4. An Existential Perspective on the Right to have Rights

In *The Origins of Totalitarianism*, Arendt discusses what she calls «a

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86 BARBOUR 2012, 311.

87 See supra p. 14.

88 HC, 175.

89 FNR, 49 [52], see also supra p. 14.

90 HC, 175.

91 OT, 297.

right to have rights» under the heading *The Perplexities of the Rights of Man*.<sup>92</sup> Here, she famously claims that «the fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective».<sup>93</sup> While this passage has received much attention in the secondary literature, the meaning of Arendt's claim is still subject to much debate.<sup>94</sup> In the following I add to this complexity by arguing that we should understand this passage not simply as a point of political philosophy, but as part of her phenomenological investigation of the human condition of plurality. For this purpose, I draw on Arendt's phenomenological understanding of plurality as well as on Fichte's transcendental deduction of right in order to explicate the possible ontological and existential implications inherent in Arendt's claim.

Before venturing into such an interpretation it is of course important to note that *The Origins of Totalitarianism* was written six years prior to *The Human Condition* and at no point does it refer to Fichte.<sup>95</sup> For this reason a reading of *The Origins* that draws on the framework of Fichte's *Foundations of Natural Right* and *The Human Condition* can of course not be an exegetic project. The purpose of reading *The Origins* through Fichte and through the phenomenological framework of *The Human Condition* is instead to pave the ground for developing a theoretical framework for an existential perspective on right.

For Fichte, the condition of recognition translates directly into a formal concept of right, which he develops into an argument in favor of the modern *Rechtsstaat*. For Arendt, in contrast, it is the fleeting relations of speech and action, that make plurality real and she explicitly abstains from conditioning plurality on any kind of (historically contingent) institutionalized framework of formalized

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92 OT, 290 ff.

93 OT, 296.

94 For a good overview of the different approaches to interpreting Arendt's claim about a "right to have rights" see Part IV of 2012 anthology *Hannah Arendt and the Law* (GOLDINI & McCORKINDALE 2012).

95 To the best of my knowledge Arendt does not refer to Fichte anywhere in her work.

recognition.<sup>96</sup> Thus, while a central part of Fichte's project in *Foundations of Natural Right* is to explicate the formal legal framework needed for realizing a relation of right, Arendt's project in *The Perplexities of the Rights of Man* is instead to investigate what happens at the margins of such legal frameworks in zones of legal transition where people's legal status is negotiated, changed or ultimately completely dissolved. In contradiction to Fichte, Arendt's investigation of rights thus starts by recognizing that the existential significance of a formal framework of rights is revealed most clearly in its absence: «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» (OT, 296 f.).

Arendt makes this observation in relation to the vast number of stateless refugees in the wake of the Second World War. What was revealed in this crisis, according to Arendt, was the impotency of any framework of human rights to provide protection to the growing number of stateless people. According to Arendt, what these people had lost was not just the instrumental access to «those benefits deemed essential for individual well-being, dignity, and fulfilment», which human rights are supposed to protect.<sup>97</sup> Instead what was at stake was «the loss of an organized community where one's actions, opinions, and speech are taken into account».<sup>98</sup>

The existential dimension at stake in this loss is apparent in Arendt's emphasis that:

The fundamental deprivation of human rights is manifest first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when

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<sup>96</sup> HC, 199.

<sup>97</sup> OT, 295 and HENKIN 1996, 2.

<sup>98</sup> GÜNDOĞDU 2015, 95.

belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless one commits a crime, his treatment by others does not depend on what he does or does not do. This extremity, and nothing else, is the situation of people deprived, not of the right to freedom, but the right to action; not of the right to think whatever they please, but the right to opinion.<sup>99</sup>

Thus, for Arendt, the loss of the right to have rights must be understood as an existential loss; as a loss of the possibility to realize oneself *as a self* in a common world. According to Arendt it is this “loss of an organized community” which is the real predicament of the stateless people. On Arendt’s view, this predicament cannot adequately be expressed in terms of human rights because human rights are specifically intended to articulate rights as something that «spring immediately from the “nature” of man [...]».<sup>100</sup> Therefore, any framework of human rights ultimately depends on a conceptualization of human beings as isolated individuals: «The decisive factor is that these rights and the human dignity they bestow should remain valid and real even if only a single human being existed on earth; they are independent of human plurality and should remain valid even if a human being is expelled from the human community» (OT, 298).

While this is obviously also a political point, it is first and foremost an ontological and existential point about the inadequacy of human rights to capture the fundamental human condition of plurality. Thus, Arendt continues:

The paradox involved in the loss of human rights is that such a loss coincides with the instant when a person becomes a human being in general—without a profession,

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99 GÜNDOĞDU 2015, 296.

100 OT, 297.

without a citizenship, without an opinion, without a deed by which to identify and specify himself—and different in general, representing nothing but his own absolute unique individuality which, deprived of expression within and action upon a common world, loses all significance. (OT, 302)

In *The Origins of Totalitarianism*, Arendt thus explicates the human condition of plurality negatively as that which is lost when human beings become deprived of rights. Importantly, no specific right can compensate for this loss, on the contrary any attempt to solve this problem in terms of guarantees of specific rights instead hides the existential predicament which is really at stake:

Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity. (OT, 297)

This is why Arendt argues that this kind of loss can only be captured as «a loss of the right to have rights», which she defines as the right «to live in a framework where one is judged by one's actions and opinions».<sup>101</sup>

How is this critique related to Fichte's transcendental deduction of right? It is related because with the notion of a "right to have right" Arendt expresses right in terms of a fundamental relation that conditions the appearance of the self as a self in a common world. Thus, for Arendt, any meaningful notion of right ultimately depends on an ontological condition of plurality. The problem of human rights is exactly that it overlooks or hides this ultimate condition which

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<sup>101</sup> OT, 296 f.

transcends law itself. While this ontological claim is visible at many points in Arendt's own text, her observations have often been interpreted as political philosophy rather than phenomenological investigations of subjectivity. Fichte's transcendental deduction of right helps us focus on the ontological dimensions by explicating the extent to which the condition of plurality emerges as an inherent condition of the individual and finite *I*'s consciousness of itself in the world, what Arendt calls "appearing mineness".

As noted by Barbour, we should avoid «the error of thinking that, for Arendt, a right is something like a property or possession, rather than a capacity to act». <sup>102</sup> This is why the right to have rights cannot be reduced to a formal right to belong in a political community. Such understanding would overlook «the sense in which 'the right to have rights' is also an enactment of equality—something that exists only in as much as it is practiced, or asserted or performed». <sup>103</sup>

This leads Barbour to interpret Arendt's notion of a right to have rights as disconnected from any formal systems of law. «But it seems to me», he argues, «that when Arendt talks of "the right to have rights", she is referring precisely to the possibility of action and politics that remains *after* one has been expelled from a particular legal order – the capacity to act remains, as it were, outside of the legal order, or on the border in-between law and lawlessness». <sup>104</sup>

While I agree with Barbour that Arendt does not exclude the possibility of enacting a right to have rights outside of any formal legal framework, I think he overlooks the enabling and mediating power of the formal legal systems from which the stateless were excluded. The right to have rights is exactly something that is lost for the stateless, that is, it is something that they had access to before. And this something was the ability to appear in speech and action in a common world.

While no law can guarantee this ability, it is important to note how

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102 BARBOUR 2012, 314.

103 BARBOUR 2012, 314.

104 BARBOUR 2012, 315.

law in the modern state functions as a medium through which action is realized. This is why, for Fichte, the ontological investigation of right cannot be detached from the practical application of the concept of right. Fichte's point is that outside such formal legal structure our actions cannot have reality, in the sense that they present limitations on ourselves and other subjects. If there is no shared formal space of action, then action is reduced to intention. I can give you this horse, enter this agreement or pass this decree but if there is no formal structure of ownership or authorization, my action is reduced to mere intention; it has no reality beyond the gesture which in and by itself is meaningless. Therefore, for Fichte, a formal system of law functions as a necessary medium that conditions actions because it is through the formal categories of law that we come to articulate ourselves *as selves* in a common world.<sup>105</sup> On Arendt's account, «action is never localized in a single sphere or realm but enigmatically conditions and threatens every such realm – being the effect not of a secured legal order, but of what Arendt calls “natality”, or the new beginning that, before everything else, each human already “is”».<sup>106</sup>

Nevertheless, her emphasis on the loss of a right to have rights as a *loss* suggests that we must think of this right not simply as a capacity to act outside a formal system of law but also as a capacity that can be mediated by law and that comes under threat particularly in zones of legal transition where people's legal status is negotiated, changed or ultimately completely dissolved. Therefore, while Arendt is much more acutely aware of the paradoxical inclusion-exclusion

105 Note that this reasoning is not equivalent to standard interpretations of Hobbes' contractual argument namely that we need the physical threat of a sovereign to make such an agreement real. What Fichte is arguing is not simply that our common world must be supported by the physical power of a sovereign. What he is arguing is instead that we need to belong in an intersubjective world where an agreement has a specific and shared meaning so that such an agreement poses real and specific limitations on our I. For Fichte, these limitations are real because we recognize and experience them as limitations on our freedom. We recognize and experience them as limitations because we find ourselves in a shared world, not because the limitations are transformed- (or rather reduced to) a material limitation expressed in the sovereign's legitimate use of physical force.

106 BARBOUR 2012, 318.

mechanisms in the modern concept of right than Fichte, she also emphasizes that «the basic actualization of plurality *should be* or even *has to be institutionalized* in order to survive and persist at all: because its status is always ontologically fragile».<sup>107</sup> Institutional structures lend stability and continuity to the fleeting space of actions and when this institutional stability is lost plurality is always in danger of collapsing into sheer multiplicity.

While Fichte employs the existential dimension of right to explicate the importance of the legal structures in the modern *Rechtsstaat*, Arendt instead invokes this existential dimension to point to a certain and implicit vulnerability produced in the modern state system: because human togetherness is structured through relations of right, human existence is always implicitly at risk of being radically diminished through the lack of access to manifest oneself through these structures.

## 5. Conclusion

The aim of this article has been to draw up a theoretical ground for further phenomenological reflections on the existential dimension of right. As I argued in the beginning of the article, one has to look outside the traditional canon of legal phenomenology in order to find such an existential reflection on the concept of right. I did this by bringing Fichte's transcendental deduction of right into dialogue with Arendt's phenomenological discussion of plurality and the right to have rights.

Fichte's transcendental deduction of right represents one of (if not *the*) most thorough attempts to systematically think through these existential dimensions of right. His transcendental deduction therefore helps us bring these dimensions into focus in Arendt's work as well and while we might dismiss Fichte's dedication to the specific formal structure of the modern *Rechtsstaat* as unwarranted and excessive, the

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107 LOIDOLT 2017, 135.

enduring significance of Fichte's theory of right lies in his commitment to articulate right as a structure that has an unavoidable existential significance as one (important but maybe not exclusive) medium through which we gain access to the kind of shared normative space within which we actualize ourselves as individuals.

The point of reading Arendt through Fichte was not that the political and legal thinking of Fichte and Arendt can – or should ever be – reconciled but that Fichte's theory of right constitutes an important heuristic tool that can be used to bring certain important, but mostly overlooked, phenomenological and existential aspects of Arendt's analysis of the right to have right into focus. The exercise of reading Arendt through Fichte revealed an existential and phenomenological dimension in Arendt's discussion of right and rightlessness in *The Origins of Totalitarianism* that is much closer linked to her analysis of self, intersubjectivity and plurality in *The Human Condition* than is usually recognized. As a consequence, the exercise of reading Arendt through Fichte ended up revealing Arendt's discussion of right not as a version of Fichte's bold confirmation of the modern *Rechtsstaat*, but instead as an existential reflection on the paradoxical vulnerability in the very structure of the modern state where law mediates individual existence on the one hand but also- or rather simultaneously forces individual existence into a specific shape on the other.<sup>108</sup>

Thus, what we learn from both Fichte and Arendt is that we miss an important point if we conceive of a formal system of right simply as an instrument or tool by which we realize our intentions. By paying heed to the ontological and existential dimensions of right we come to recognize that a formal system of right always also expresses and mediates – or fails to express and mediate – our individuality in a common world.

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108 MENKE, 2015. Arendt's existential reflection on the human vulnerability inherent in the modern notion of right also suggests a further link between discussions of right within phenomenology and critical theory (a project that will have to wait for another article).

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