

Crisis and Social Order in the Post 9/11 Era: Sovereignty, Rule of Law and the Case of Maher Arar

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Abstract

Canada's political and juridical spheres have transformed post 9/11. Borrowing from the analytic framework of Michel Foucault, Giorgio Agamben and Jacques Derrida, I will examine these transformations philosophically and sociologically. One of the aims of this essay is to dispel liberal views that maintain that emergency rule is aberrational; on the contrary, I argue that emergency rule is part of the 'normal juridical order'. Another aim of this essay is to analyze how a perceived crisis shapes the *modus operandi* of the state and law. The third aim of this essay is to show how state power works under emergency rule. In terms of the former and latter, I will focus on the power the state has to produce 'bare life' and rogue states. Finally, this essay will examine the case of Mr. Maher Arar to illustrate the intellectual and material significance of these transformations in Canada.

Introduction

Maher Arar is a Syrian born Canadian engineer who was traveling back to Canada from a family vacation in Tunisia in September 2002. He was apprehended by the United States government while transiting through JFK airport back to Canada. He was detained and interrogated by FBI and INS officers; twelve days later, he was deported to Syria. In Syria, he was jailed (under substandard living conditions), tortured and interrogated for ten months. Syrian authorities exonerated him of all connections to terrorism and he was discharged into Canadian custody (Meerpol 2005: 60).

In October 2001, Canada developed Project A-O in response to 9/11. Canadian police (RCMP) and intelligence (CSIS) began meeting with an FBI agent about the Almalki investigation (Government of Canada 2006: 85). These organizations would share intelligence and information as a result of 9/11. The catalyst of their relationship transpired when Mr. Arar's computer was confiscated by Canada Customs in December 2001 (Government of Canada 2006: 85).

According to the Arar inquiry, Project A-O sent misinformation to U.S. intelligence, which distorted Mr. Arar's travel record and his unwillingness to cooperate with Canadian intelligence and law enforcement. In terms of the former, for instance, Mr. Arar was suspected of being near Washington, D. C. on September 11, 2001. In terms of the latter, it was alleged that Mr. Arar declined to be interviewed in January 2002 and that he abruptly left Canada for Tunisia (Government of Canada 2006: 28). Both allegations are false. Mr. Arar was not near Washington, D.C. on September 11, 2001. Next, Mr. Arar did not oppose the interview request. Another point to clarify, Mr. Arar did not depart from Canada immediately after the interview request; he departed five months later. Despite the allegations, there is no evidence he left earlier

(Government of Canada 2006: 28). Based on the allegations about Mr. Arar, we can appreciate why the RCMP and U.S. intelligence was interested in developing an investigation on Mr. Arar. Notwithstanding Project A-Os' case against Mr. Arar, they failed to include a caveat to their respective allegations against Mr. Arar (Government of Canada 2006: 28).

Project A-O continued with its investigation on Mr. Arar, there were suspicions that he might be associated with Al-Qaeda. The basis of this suspicion rests on the fact that Mr. Arar had contact with individuals of interest to Project A-O. For example, Mr. Arar had contact with Mr. Almalki; there is evidence that the two met at Mango's Café in October 2001 (Government of Canada 2006: 160). There was no definitive association between Mr. Arar and Al-Qaeda, however (Government of Canada 2006: 160).

The point to distill from the forgoing account is that when Mr. Arar landed at JFK airport, U.S. intelligence was particularly interested in apprehending him for questioning. U.S. intelligence seized Canadian intelligence on Mr. Arar; they were determined not to risk any mistakes, which according to their rationale, could lead to another September 11, 2001, or worse (Government of Canada 2006: 160). Once Mr. Arar was apprehended by U.S. officials, Canadian intelligence was marginalized from an active role in the investigation to a more passive, secondary role. The latter can be appreciated through the example that it was the U.S. that decided that Mr. Arar would be transferred to Syria not Canada. For some time, Canadian intelligence had no knowledge on the whereabouts of Mr. Arar (Government of Canada 2006: 180).

By October 2002, CSIS officials were aware that the United States probably had rendered Mr. Arar to a country, in which, he could be questioned. The case of Mr. Arar highlights a particular practice that the U.S. engages in when they cannot legally detain a terrorist suspect, or wish to question a suspect; they render the individual in question to a country willing to execute this task (Government of Canada 2006: 245). This practice, which emerged post 9/11, is called rendition (Government of Canada 2006: 245). The Arar inquiry found that CSIS knew that Mr. Arar was removed from the United States to be tortured and interrogated for the purposes of extracting information about him and his so called connections with Al-Qaeda (Government of Canada 2006: 245).

Mr. Arar's case highlights a unique strategy in the way that investigations have shifted from traditional prosecution investigations to preventative investigations (Government of Canada 2006: 75). Mr. Arar's case embodies the latter, both Canadian and American intelligence were interested in him because their evidence loosely suggested he might be connected to Al-Qaeda. Pursuing preventative investigations is difficult because failure to do so may result in a terrorist attack; however, following through may lead to innocent people being detained indefinitely, tortured, interrogated or killed.

Mr. Arar's case raises dire questions at this historical juncture of post 9/11. As a result, I seek to conceptualize an inclusive and expansive understanding of the complexities in the interplay of the state, law and life. I am interested in exploring how a perceived crisis can shape the contours of state and law practices. Specifically, I am concerned about how emergency rule impacts domestic targeted groups (Arabs, Muslims and South East Asians or those that are deemed to physically or culturally resemble said groups). I am also interested in the interplay of sovereignty, law and rogue states; namely, Afghanistan and Iraq. This essay will concentrate on current state practices of the U.S. and Canada; however, more emphasis will be allocated to Canada.

The literature review of this essay will explore the claims of Jacques Derrida, Michel Foucault and Giorgio Agamben, on issues pertaining to sovereignty, law, life and rogue states. One of the goals of this literature review is to uncoil some philosophical and sociological tensions relating to the state and law. In doing so, I will address a number of provisional points: (1) to critically examine the formation of these concepts and to juxtapose what they are designed to do,

(ideal) versus some problems in their current practice; (2) to develop and extend the theoretical and material significance of the state and law at this particular juncture of post 9/11.

Sovereignty and law were designed to protect citizens from foreign invasion and violence among each other (Hobbes 1651/1996; Locke 1689/1996). In the post 9/11 world, liberal views on sovereignty and law maintain that the two have breached their contract of protection; this view perceives this breach as an anomaly or as temporary. Postmodern and Post Structuralists, on the other hand, reject the latter position and show that the suspension of law and the states' inversion from so-called protection is part and parcel of sovereign power and juridical order (Benjamin 1978; Foucault 1979; Butler 2004; Agamben 2005; Derrida 2005). Drawing from the tradition of Derrida, Foucault and Agamben, I will try to demonstrate how sovereign power manifests in the context of a perceived crisis; its complex structure during emergency rule, and I will address the problems pertaining to its practices in relation to life and rogue states.

The key argument is that in a crisis, it is through the suspension of law and use of military and police violence that order is established (Agamben 2005). Here, the state is able to ensure its survival and pursue economic and political control through violence, which is legitimated by the law. In a crisis or exceptional circumstances, the state and law have little regard for the lives of targeted citizens and/or targeted nation states. The latter therefore, reveals the power state and law have over some citizens and some nation states.

What can be deduced from the above perspective is that sovereign power needs to be hierarchized in terms of strong state and rogue states (Derrida 2005). It also needs to be contextualized, for the 'rule of the strongest' materializes under conditions of perceived threats or in the name of a cause, for example, humanitarian intervention, terrorism, national security and so forth. In this vein, it is the 'strongest' state that is the sovereign (in relation to the smaller sovereigns) and it is able to impose its violence and discourses of democracy and rule of law on so called rogue states (Derrida 2005; Chomsky 2005).

Section 1: The Base: Early views on Sovereignty and law

Thomas Hobbes argues that the 'state of nature' is characterized by perpetual fear and peril. Hobbes' solution to the drudgery of living in a state of nature was to seek collective peace and safety. The latter would provide protection from foreign and local invasion. It would also provide people security and enable them to live contentedly; Hobbes suggests that people confer their power and strength upon one man¹ or an assembly of men² (Hobbes 1651/1996: 650). The people will appoint one man or an assembly of men to embody their will to ensure the common peace and safety, this is also known as the social contract. The former and latter encapsulate what Hobbes means by the 'Leviathan' (state) and what it is designed to do.

Hobbes informs us that the Leviathan can be established in two ways; first, by resorting to violence/force: as when a government subdues a foe, the subdued party either submits to the will of victorious government or is killed; second, when men agree amongst themselves, to submit to some man or assembly of men. The latter is done voluntarily; the rationale here is for protection (Hobbes 1651/1996: 651). According to Hobbes, citizens are not allowed to oppose the Leviathan. The only occasion when a citizen can oppose the Leviathan is when a citizens' life is in peril.

John Locke characterizes the state of nature as having plenty of resources and people are equal and free. For the most part, Locke maintains that people are not evil, conniving, and self-centered. Rather, people in a state of nature get along; however, there is potential for conflict when someone attempts to infringe on the life, health, property or well being of another. Inequalities are the by-product of these conflicts (Locke 1689/1996: 741). Locke concurs with Hobbes in that the Leviathan is inevitable; however, he calls it 'Civil Society' (state and law) (Locke 1689/1996: 766).

According to Locke, the role of the state is not only to protect the lives of its citizens, but also their lifestyles and property (Locke 1689/1996: 741). Locke elaborates on four functions of the state, including legislative power (right to make laws, particularly, property rights); executive power (right to enforce laws); defense power (right to protect members from foreign invaders); and the obligation to respect the public good (cannot make laws that infringe on individuals public rights) (Locke 1996: 1689/778-779). If the sovereign fails to fulfill these duties, Locke reserves to citizens the right to elect a new sovereign. This can only be achieved through the law; the sovereign should not be overthrown through violence (Locke 1689/1996: 815).

The main points from Hobbes and Locke are that they both promoted the development of the state and law to alleviate and arguably, to improve the living conditions of humans. According to both Hobbes and Locke, the formation of the state and law was designed to protect and maintain order. In this vein, the interests of the common are protected from local and foreign invasion.

What neither author asked or foresaw however, is what happens if the state uses the law against its citizens? More directly, these authors failed to consider how the state could use the law to coerce, appropriate assets, kill and engage in practices of rendition. Rendering targeted bodies to foreign countries will likely result in practices of torture, interrogation and violation of human rights. The state can engage in such abominable practices to ensure that a particular order is established or maintained. They failed to see that if the state is confronted with peril, it will endeavor to prevail at all costs; the legal apparatus is the guiding tool that ensures the life and security of the state. These theorists did not consider the state of nature that can emerge between the state and some citizens. They also did not consider the power and control the state has over its citizens precisely because the state affords them protection. In other words, Hobbes and Locke did not inquire into the possibility that the state could strip citizens of the rights it guarantees them. The authors in the next section address the latter issues.

Section 2: Post-Structuralist Debates on Sovereignty & law

Recent scholars such as Carl Schmitt, delineate the complex relationship between sovereignty and law in the context of a crisis. Schmitt postulates that the sovereign is he who decides (Schmitt 1934/2005: 5). This suggests that the sovereign is able to rule independent of legal restrictions and public support if there is an emergency at hand. For Schmitt, the sovereign must not only decide if there is an emergency, but must also decide how to effectively address it (Schmitt 1934/2005: 7). From this thesis, one can infer two important points; first, the state suspends the law (normal civil order) if it perceives a threat (Schmitt 1934/2005: 12). Second, the sovereign has the 'monopoly to decide' (Schmitt 1934/2005: 13). Schmitt writes, "Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety" (Schmitt 1934/2005: 7).

Schmitt's analysis indicates that state power can do as it pleases to ensure its survival against "others" who pose an imminent life or death threat. Schmitt's position suggests that the rule of law can be suspended; that authoritarian and perhaps, inhumane measures may be indispensable to ward off threats and imminent catastrophes (Schmitt 1934/2005). According to Schmitt, the state and exception are intimately connected and it is the latter that affirms the existence of the former. On this point, Schmitt writes, "The rule proves nothing; the exception proves everything: it confirms not only its rule but also its existence, which derives only from the exception" (Schmitt 1934/2005: 15).

Michel Foucault's analysis of state power, however, challenges the views of Schmitt. Foucault theorizes that sovereign power is concerned with sophisticated technologies of discipline and regulation of the body. The Leviathan perspective of the sovereign was underscored by its power over life: to kill or let live. Foucault writes, "The old power of death

that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life” (Foucault 1990: 140).

He elaborates on this shift by framing sovereign power as “biopower.” Biopower has two characteristics, first, to discipline the body; second, to regulate the population (Foucault 1990: 139). Disciplining the body refers to making the body useful yet docile, and to its ‘integration into systems of efficient controls.’ Both the latter and former features of biopower are subject to ‘intervention and regulatory control’ (Foucault 1990:139).

Therefore, the shift in sovereign power and rule should not be misinterpreted to suggest that concepts and practices of sovereignty and law are ‘progressing,’ in terms of providing security and protection to all. In this way, Foucault defies liberal views on sovereignty and law. Unlike Hobbes or Locke, Foucault argues that the development of sovereignty and law represent sophisticated techniques of regulation and social ordering. Foucault (1995: 169) writes “...Its fundamental reference was not the primal social contract, but to permanent coercions, not to fundamental rights, but to indefinitely progressive forms of training, not to the general will but to automatic docility.”

To sum up, Schmitt characterized state power as being able to resort to violence to ensure maintenance or establish political and social order. In contrast, Foucault’s analysis explores various technologies of power linked to the sovereign to ensure social control and regulation. These strategies are not permanently coercive; instead, they are disciplinary and target the soul not the body of the population.

Giorgio Agamben’s book, *State of Exception* (2005), theorizes on the capacity of state power to suspend due process, while abandoning its citizens to violence, detention and torture. In times of emergency, the executive is able to suspend the normal juridical order and invoke the military apparatus to address the so-called emergency; Agamben refers to the latter as the ‘state of exception.’ Agamben’s work resonates with Schmitt’s work in that it demonstrates the complexities of the role of state; both highlight the ability the state has to be bound to the normal juridical order and yet be able to step outside of it (during a crisis) to restore order. The latter suggests that the *modus operandi* of the state is dependent on the context. Therefore, the sovereign is tied to the law as much as it is not (Agamben 1998/2005: 15; Schmitt 2005).

Agamben postulates that the prevalence of the state of exception should not be perceived as an anomaly or temporary; but rather, as constituting modern state power. Agamben’s analysis of the state of exception is tied to the “camp” (1995/1998: 166-167). For Agamben, the concentration camp is no anomaly or anarchism; instead, it is the highest manifestation of sovereign power over life. The camp is thus a zone of exception, outside normal juridical order. Agamben demonstrates this point by highlighting how the camp was pervasive throughout World War 1 and 2 (Agamben 1998: 167). According to Agamben, the camp is a space that opens when the state of exception unfolds and becomes the rule. Agamben warns that during times of indefinite emergency, the camp is rendered with a permanent spatial arrangement. The significance of the camp for Agamben is that it is the site whereby the sovereign materializes tactics of interrogation that would otherwise be condemned by domestic and international legal protocols. Agamben writes, “Whoever entered the camp moved in a zone of indistinction between outside and inside, exception and rule, licit and illicit, in which the very concepts of subjective right and juridical protection no longer made any sense” (Agamben 1998: 170).

Agamben theorizes that the camp is the highest manifestation of biopolitics in the context of the state of exception. Those detained in connection with the war on terrorism are subject to torture, violation of human rights, deprived of domestic and international rights, forced to live under subhuman conditions and so forth. Their lives are in the hands of legal and military officials who run these camps. Their lifestyles are coordinated and monitored by agents of law enforcement and/or military officers. Therefore, in the camp, the normal legal order is suspended; the possibility of atrocities occurring depends not on the law, but on the civility and military

officers who act as sovereigns of the camp (Agamben 1998: 174). Agamben captures how the camp is an expression of biopolitics, Agamben writes,

The camp was also the most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life, without any mediation. This is why the camp is the very paradigm of political space at the point at which politics becomes biopolitics and *homo sacer* is virtually confused with citizen. (Agamben 1998: 171)

Individuals in the camp are referred to as *homo sacer*. Agamben conceptualizes *homo sacer* as an individual who is reduced to 'bare life', denied legal provisions; *homo sacer* is a person that can be killed without committing homicide (Agamben 1998: 183). Two points follow from here: first, the impunity of killing *homo sacer*; second, killing *homo sacer* implies that the violence done, does not constitute a sacrilege (Agamben 1998: 82). Therefore, under a state of exception and in the zone of the camp, *homo sacer* may be killed but not sacrificed; the death of *homo sacer* is with impunity.

Homo sacer's vulnerability in the camp demonstrates the biopolitical power the sovereign has over life under a state of emergency or crisis. *Homo sacer* is subject to sovereign power, which decides the continuity of life or the death of *homo sacer*. The act of killing *homo sacer* demonstrates the politicalization of life through the very capacity the sovereign has to produce and kill *homo sacer* (Agamben 1998: 89).

Another important concept that Agamben emphasizes is the "ban" (1995/1998:109-110). The ban relates to the state of exception, *homo sacer* and the camp. Agamben delineates that whoever has been banned is at the mercy of the one who abandons him/her; this person is excluded from the normal juridical order and is incorporated into the zone of sovereign power under a state of exception (Agamben 1998: 110). Agamben captures the interplay of state of exception, *homo sacer* and biopolitics, this way

If it is the sovereign who, insofar as he decides on the state of exception, has the power to decide which life may be killed without the commission of homicide, in the age of biopolitics this power becomes emancipated from the state of exception and transformed into the power to decide the point at which life ceases to be politically relevant. (Agamben 1998: 142)

Derrida's book, *Rogues* (2005), explains how power works in relation to sovereignty and law. He uses the term *ipseity* to refer to sovereign power. *Ipseity* articulates the rationale of the sovereign, which he views as a rationale of "I can", or the "power that gives itself its own law, its force of law" (Derrida 2005: 11). The latter speaks to the sovereign's ability (because it can) to impose through force/violence and rule of law. Derrida views the representation of the sovereign as having a peculiar bias; for him, the sovereign represents the rationale and interests of the 'strongest.' The sovereign can enforce its desired rule through force, which is legitimized by law. Derrida writes, "There is no sovereignty without force, without the force of the strongest, whose reason - the reason of the strongest - is to win out over (*avoir raison de*) everything" (Derrida 2005: 101).

Derrida narrates how sovereign power works generally; however, he focuses specifically, on U.S. sovereignty, which he claims is not constrained by international law. In this way, the U.S. is the strongest for it cannot be restrained by other sovereign powers, domestic law or international law. On a global level then, it can be argued that Derrida's notion of *ipseity* is unfolding, for U.S. sovereign will is being enacted through violence and force. U.S. sovereignty is able to fulfill its desires, while undermining international law, violating war and detainee arrangements and so forth (Derrida 2005). For Derrida then, U.S. sovereignty is might that makes right through violence, force and law (Derrida 2005: 22).

Derrida is critical of the claim that the ‘reason of the strongest’ imposes democracy through force. His critique is based on the notion that democracy is inaccessible to all and so, in the case of a ‘rogue state’, democracy can only be accessed through the medium of the strongest, which relies on force of law and violence (Derrida 2005: 71-72). Therefore, according to Derrida, the strongest decide who the rogue state is, and the accessibility and contours of “democracy” that will be imposed. It is the strongest (political elite groups) that is able to impose democracy and their rule of law to eradicate networks of terrorism. On this point, Derrida writes,

To speak democratically of democracy, it would be necessary through some circular performativity and through the political violence of some enforcing rhetoric, some force of law, to impose a meaning on the word democratic and thus produce a consensus that one pretends, by fiction, to be established and accepted – or at the very least possible and necessary: on the horizon. (Derrida 2005: 73)

Derrida’s deconstructs the term “voyou” (rogue), which the strongest uses to legitimate intervention and war. Derrida writes, “The quality “voyou” is always precisely an attribution, the predicate or *categoria* and thus, the accusation leveled not against something natural but against an institution” (Derrida 2005: 79). Derrida elaborates on the term “voyou” and addresses the connotation and implications the word has; specifically, a type of denunciation, accusation or a charge. In this way, the word sets up a platform that, inevitably leads to, or prepares to, legitimize some type of reprisal (social, political, economic, for example) (Derrida 2005: 79). Derrida writes, “The Etat voyou must be punished, contained rendered harmless, reduced to a harmless state, if need be by the force of law (*droit*) and the right (*droit*) of force” (Derrida 2005: 79).

The significance of Derrida’s analysis here, is to show that the reason of the strongest is able to designate or accuse a state as being rogue and use force to tackle the perceived threat (Derrida 2005: 80). Another crucial point is the intimate relationship between being officially designated a rogue state and force of law, Derrida writes,

A horse can be called rogue when it stops acting as it is supposed to, as it is expected to, for example as a race horse or a trained hunting horse. A distinguishing sign is thus affixed to it, a badge or hood, to mark its status as rogue. This last point marks the point rather well; indeed, it brands it, for the qualification rogue calls for marking or branding classification that sets something apart. A mark of infamy discriminates by means of a first banishing or exclusion that then leads to a bringing before the law (Derrida 2005: 93-94).

Being labeled a rogue state therefore, needs to be situated in the context of who has the power and ability to confer such a negative label. Not all sovereign states have the ability to designate another state as rogue and follow through with military, political and economic sanctions. The charge of being called a rogue could mean that the strongest will resort to force, violence and law to address a perceived threat.

Derrida uses historical analysis to deepen and contextualize his claims. Specifically, he reminds us of how American administrations have been denouncing rogue states for a couple of decades (Cuba 1963–2008; Panama 1980s, Iraq 1990–2006, North Korea 1980s-2008, Libya 1980s–2003); these states have been accused of disrespecting their obligation as a state before domestic and international law (Derrida 2005: xiii). As a result of being called a rogue state, these nation states have experienced military, political and economic sanctions by the rule and reason of the strongest: the United States of America.

The above literature review has shed light on the complex structure of the state and law in relation to producing ‘bare life’ and rogue states in times of a perceived crisis. For Schmitt, the

state is able to suspend normal civil law and resort to violence to maintain or establish sociopolitical order. On the other hand, for Foucault, the power of the state relates to the administration and regulation of the public. It is concerned with acquiring knowledge about the activities of the population, which is inseparable from disciplining them. Agamben explores the working of the state of exception as a biopolitical apparatus and asks how its practices affect targeted bodies. Derrida's deconstruction of the state and its use of law in the context of a crisis highlight how the 'reason and rule of the strongest' prevails through the use of violence and force of law. More broadly, however, the analysis of Agamben and Derrida illustrates the unfettered power the state has to produce 'bare life' and rogue states under emergency rule.

Section Two: Analysis and Critical Reflections

This section will analyze the contributions of (1) Agamben and (2) Derrida. The goal is to theorize how state and law power manifest under emergency rule.

(1) Agamben's analysis disputes liberal views, which separate normal juridical order from emergency, with the latter being on the basis of a crisis, which is deemed to warrant exceptional measures. This liberal framework assumes that emergency rule is aberrational; however, far from being outside the rule of law, emergency powers are underwritten in legal structure—it is through law that violent actions during so called crises, have been legitimated (Neocleous: 2006: 206-207; Agamben 2005; Hussain 2003). More directly, no constitution exists that does not contain provisions for emergency rule. Therefore, state violence is entrenched in the daily activities of state practices, the state works from within the law rather than against the law; both are part of a consolidated political strategy in the production and/or maintenance of social and political order.

A criticism of Agamben's work, however, is that his literature review is based on states of exception in Europe; these states of exception were temporary or episodic (for example, Nazi Germany, France 1924, Switzerland 1914 and so forth (Agamben 2005: 12, 14, 16). In contrast, the state of exception has been the reality for racialized, colonialized people, women and ethnic groups, all of whom only know one rule; specifically, the state of exception and the camp. For example, Pakistan from 1977–1985 and 2006; Chile 1973; Peru 1981; South Africa apartheid; Zambia 1964–1991 and so on highlight the ubiquity of the state of exception and the camp. The latter therefore, challenges Agamben's view that there has been a paradigm shift in modern nation states (Agamben 2005). One could ask a shift for whom? Would racialized people perceive the so-called ubiquity of the state of exception as a novelty? My critique is reinforced by Benjamin, who writes, "The tradition of the oppressed teaches us that the "state of emergency" in which we live is not only the exception but the rule" (Benjamin 1940/2003: 392).

Another limitation of Agamben's work is that his analysis does not look at how issues of race, gender and sexuality intersect with state power and the production of bare life. The latter has been addressed by Jasbir K. Puar. Her analysis looks at how current state practices protect some queer subjects while abandoning racialized groups such as Arabs, Muslims or those that resemble their physical, religious and/or cultural practices. Puar argues that the inclusion of some queer subjects depends on the production of 'Orientalized' terrorist bodies, which are excluded from state and legal protection (Puar 2007). The implication is that the inclusion of queer subjects, which she refers to as 'homonationalisms' are utilized as a technique to distinguish between different categories of citizenship. On the one hand, there is the category of 'properly heterosexuals' and also 'properly homosexuals.' These two categories are considered as U.S. patriots. On the other hand, terrorist look-alikes such as, Muslims, Arab and Sikhs, whom are sexualized and racialized are consequently, abandoned by the state and subject to detention and deportation (Puar 2007). Therefore, the nuance of Puar's work is that it looks at the way race, gender and sexuality shape state knowledge, which informs its practices of distinguishing citizenship, subjection to violence, detention and deportation of Arabs, Muslims and/or those that

resemble the physical and cultural characteristics of said groups. Further elaboration of Puar's work is relevant; however, it is beyond the scope of this academic endeavor.

Notwithstanding some troubles with Agamben's analysis, his work demonstrates the complex relationship between sovereignty and law. His work also addresses the ubiquity of the state of exception—this can suggest that a new paradigm of government is unfolding for all. The above analysis, forces us to rethink traditional orthodoxies surrounding the nation state, sovereignty and law and its relation to the production of bare life and rogue states.

(2) A number of important conclusions can be inferred from Derrida's analysis of sovereign power and law. First, sovereign rule is intrinsically problematic because it reflects the reason of the strongest. Two, the rationality of *ipseity* is problematic because it reveals the power imbalance that exists between the interests of the state and the public (Derrida 2005). Namely, the state can do as it pleases because it has the power and means to fulfill its goals. Therefore, connecting sovereign power and the law to the rule of the strongest is problematic for Derrida, because the order of the strongest prevails through force of law and violence.

Derrida's analysis supports the position of this paper that concepts such as sovereignty and law are fundamentally problematic. These concepts ensure protection of civilians as much as they ensure the violation of their rights, if the occasion is deemed to warrant it. Ultimately, the state ensures its survival and imposes its will through violence if necessary. Under current U.S. emergency rule, the existence of some can be precarious; particularly, Arabs, Muslims and/or those that resemble the physical and/or cultural characteristics of said groups. The latter groups are vulnerable to rendition, detention, violence, torture, deportation and so forth. On a global level, countries such as Afghanistan and Iraq are subject to U.S. military aggression.

Derrida is critical of the way the United States exploits the notion of rogue. The United States denounces a rogue state when that state disregards domestic and international law. A rogue state is one that assaults its civilians and engages in activities that exalt existing tensions between dominant and subordinate groups stratified through race, gender, sexual orientation and so on. By this very standard, Derrida argues, the United States and its allies are rogue states (Derrida 2005: 102). Derrida however, is not necessarily concerned about who the rogue states are; he is more concerned with exposing how the reason of strongest prevails and how it is able to apply conceptual standards of a rogue state unilaterally. In this way, one can contextualize sovereign power on a hierarchy; the strongest state is able to denounce another state as "rogue," while not applying the same standards to its own practices and activities. Another point Derrida emphasizes is his concern on sovereignty itself, and the extent that, sovereignty can transform into a rogue state if the conditions warrant it or to establish its rule. Derrida writes, "As soon as there is sovereignty, there is abuse of power and a rogue state" (Derrida 2005: 102).

Notwithstanding the political, economic and social sanctions that targeted groups or nation states experience by the reason of the strongest, Derrida warns that the rule and reason of the strongest is curtailed by that which it aims to subdue or obliterate. Derrida refers to the practices and strategies of the strongest as being 'autoimmune.' Derrida writes "A living being can spontaneously destroy, in an autonomous fashion, the very thing within it that is supposed to protect it against the other, to immunize it against the aggressive intrusion of the other" (Derrida 2005: 123). We can infer from this perspective that the practices, policies and strategies of the strongest will result in intensifying Anti-American attitudes. Aggravating widespread hatred of the U.S. can be exploited by terrorist networks to recruit and deploy individuals to commit terrorist activities.

The essay to this point has developed an inclusive and expansive understanding of the state and law in the context of a state of exception. Indeed, consolidating all theories provide us with multiple perspectives on how power works in relation to sovereignty and law under emergency rule. On the one hand, one of the more disturbing features of this interplay of sovereignty and law under emergency rule is its connection to life (in general) and the production

of bare life (in particular). The latter speaks to a larger concern of this inquiry, which is the power the state has to produce bare life; the production of bare life is part and parcel of the sovereign's capacity to restore or maintain order. On the other hand, and equally disturbing, is the interplay of sovereignty and law also has the power to produce rogue states. Stronger states are able wage war against rogue states, stronger states are also able to enforce legal, economic and political sanctions on rogue states to restore and/or maintain sociopolitical stability. With the former and latter in mind, one can appreciate the dire implications for targeted groups or nation states. For example, South East Asians, Muslims, Arabs or those that resemble their physical characteristics; in terms of nation states, Afghanistan and Iraq are facing U.S. military aggression.

Section Three: The State, law and life

This essay now returns to the case of Mr. Arar. The case of Mr. Arar illustrates Agamben's key concepts of *homo sacer*, the ban and the camp. Although Mr. Arar was not killed, he was removed from legal jurisdiction, which, under normal legal order, would afford him protection. Individuals responsible for his removal, torture and abuse were not punished for their actions. Mr. Arar's case demonstrates how life under emergency rule can be exposed to an unfettered capacity to be detained, removed, tortured and abandoned by domestic and international law. Mr. Arar's case also highlights the control the state has over life, death and its ability to deny targeted bodies from legal protection. Specifically, it shows how in times of crisis, an individual deemed *homo sacer* (in this case, Mr. Arar) is excluded from legal protection; his/her lives are politicized and rendered exceptional; consequently, the sovereign has power over life and death (Agamben 1998: 90).

Agamben's concept of the ban also applies to Mr. Arar. Agamben theorizes that someone who is banned is isolated and at the whim of the sovereign power that abandoned it. Someone who is banned is therefore excluded from normal juridical order, and is inserted into a zone of exception (Agamben 1998: 110). To contextualize Agamben's analysis to Mr. Arar's case, one can infer how Mr. Arar was stripped of legal protection (domestic/international); and was forcefully removed in secrecy from JFK airport to Syria. Once he was in Syria, he was captured by interested personnel who unremittently tortured him.

Agamben's concept of the camp is also relevant to the case of Mr. Arar. The camp is the open space, which emerges under a state of exception, it is a zone in which the rule of law is suspended; what transpires in the camp is left to the discretion of the agents operating in the camp. Mr. Arar was in multiple camps; first when he was detained at JFK airport, where it is alleged that he was interrogated aggressively by U.S. intelligence; second, when he was in Syria. More broadly, the latter demonstrates the ubiquity and normalcy of the camp in modern civil societies (Agamben 1998: 175).

Mr. Arar's case is not an anomaly; other Canadian citizens have shared a similar fate. None of these individuals have been found guilty of any association with a terrorist network. The following are the names of other *homo sacer*'s: Abdullah Almaki, Ahmad El Maati, Muayyed Nureddin. All these men claim they were shipped to countries like Syria to be tortured (CBC News. www.cbc.ca/news/background/arar/torture-claims.html). The Canadian government may be trying to protect the nation from a terrorist attack. However, its methods are problematic because too many innocent people are embodying *homo sacer*; they are banned and shipped to camps around the world where they are tortured, interrogated, removed from their normal life and denied due process.

Although these four men are now in Canada, they are psychologically damaged. Traveling means something different to these individuals who have been detained and shipped to a country to be tortured. Despite the fact that the Canadian government was forced to give Mr. Arar \$10 million in compensation, this does not rectify the injustice done to him. Mr. Arar's name has not been cleared from U.S. intelligence. As a result, the Arar inquiry has developed

seven recommendations to avoid making the same mistakes as the RCMP and CSIS did with Mr. Arar, Mr. Almaki, Mr. El Maati and Mr. Nureddin. The latter discussion has looked at several of the political and legal transformations in the Canadian state post 9/11. Agamben's theoretical concepts were applied to the empirical case of Mr. Arar³.

Employing Agamben's conceptual framework to the case of Mr. Arar has dire implications in terms of the relationship of state control over life. Under emergency rule, the state can render someone to be the exception and therefore ban the individual in question. The banned individual is stripped of all rights and is reduced to mere biological life. This process of reducing someone to mere biological life enables the state to do anything against this person, including rendering them to a camp in a foreign country, indefinite imprisonment, torture or death. The power the state has to render someone the exception is directly connected to the state's will to ward off threats. The state's ability to exclude someone from the normal juridical order and insert them into the realm of exception is part of a wider sociopolitical strategy the state can use to restore or maintain order. Perhaps more disturbing however, is that all subjects have the potential of being rendered the exception by the state if the material and discursive conditions warrant it. Agamben persuasively points out the latter to be the necessary constitution of modern sovereignty.

It is useful to return to Derrida's analysis of sovereignty; specifically in terms of its logic and power. The logic of *ipseity* can be applied to better our understanding of the power the state has to produce rogue states. As such, under emergency rule, the state has the ability to resort to military and police repression; it has the ability to suspend the law, and wage war against designated 'enemy states.' According to Derrida's analytic tools, the 'strongest' state can do this precisely because it has the power and means to do so. It is useful to put into perspective the interplay of "voyo" and *ipseity*. The latter reveals the power the state has to designate the label of "voyo," to targeted rogue states and domestic targeted groups. The power of being able to identify the voyou sets up a situation whereby the voyou must be dealt with in order to restore or sustain sociopolitical stability. Therefore, the labeling of voyou enables the 'strongest' state to wage war, to employ practices of rendition and subject designated enemies to deportation, detention, torture and death.

Conclusion

From the perspectives of Hobbes and Locke the formation of the state and law was imperative to improve the living conditions of humans—it was also a means to safeguard their lifestyle and property. Here, one can appreciate how the context of the state of nature led to the formation of the state and law. For these two intellectuals, the state and law embodies a protective role and it represents the will of the common.

Scholars such as Schmitt, Foucault, Agamben and Derrida challenge this so called protective role of the state. For them, during times of emergencies, the state is able to breach its mandate of protection and it uses military and police apparatuses to establish or sustain order; the latter is legitimized through the law. This literature review synthesized the multiple roles of the state and law and showed how external circumstances shape the *modus operandi* of the state and law. This essay aimed to dispel the liberal views which distinguish the normal juridical order from a state of exception; as I have shown, both are characteristics of the state and law. In this way, I have provided an inclusive and expansive framework to capture the complex role of the state and law under a perceived crisis.

This essay demonstrated the role and mandate of the Canadian state and law after 9/11. The case of Mr. Arar was used to contextualize the discursive and material practices of the Canadian state. The case of Mr. Arar is a snap shot of a wider project of extraordinary rendition and detainees in camps all over the world. The practices of the state under emergency rule demand an interrogation on the practices of extraordinary rendition, control over life, production

of rogue states and the ubiquity and normalcy of the camp. However, more broadly, it demands further interrogation of the constitution of modern sovereignty.

Appendix A

Excerpts from the *Report of the Events Relating to Maher Arar*

- That CSIS examine its agreements and policies with the RCMP to determine whether they provide the necessary protection against third-party disclosure, while still recognizing the importance of information sharing between the two organizations;
- That the O'Connor Commission determine whether the RCMP shared CSIS obtained information with American agencies;
- That CSIS amend an operational policy in relation to foreign travel proposals including human rights concerns;
- That CSIS amend an operational policy to require consideration of human rights issues when seeking to use information for targeting approval;
- That SLOs maintain written records when requests for information are transmitted to foreign intelligence agencies and that formal letters be sent to confirm verbal requests;
- That CSIS identify an effective means of prioritizing sensitive requests to their Washington SLOs, and explore ways to reduce delays when seeking information from U.S agencies;
- That CSIS examine its practices relating to the receipt, prioritization, and review of RCMP reports to ensure more timely identification of time-sensitive or important information.

Source: "The Report of the Events Relating to Maher Arar" Government of Canada, 2006: 550.

Note: The preceding recommendations have been crafted to improve better awareness about countries; particularly those that are likely to engage in practices of torture. In this way, the recommendation hopes to prevent detainees from being tortured or interrogated (recommendation #3 & 4). Recommendation five and six emphasizes effective and efficient communication among various intelligence agencies particularly, when it concerns the whereabouts of a detainee. Recommendation five and six also proposes that intelligence agencies respond to each other in a timely fashion –meaning that they prioritize sensitive cases.

Endnotes

¹ Thomas Hobbes uses the term "man" to refer to a male leader, which reigns in the Leviathan (state).

² Thomas Hobbes uses the term "men" or males, to refer to those that embody the Leviathan (state).

³ The recommendations by the Arar inquiry can be viewed in appendix A. The aim of the review in this section is to show the urgency to rethink notions pertaining to the nation state and the law in the context of post 9/11.

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