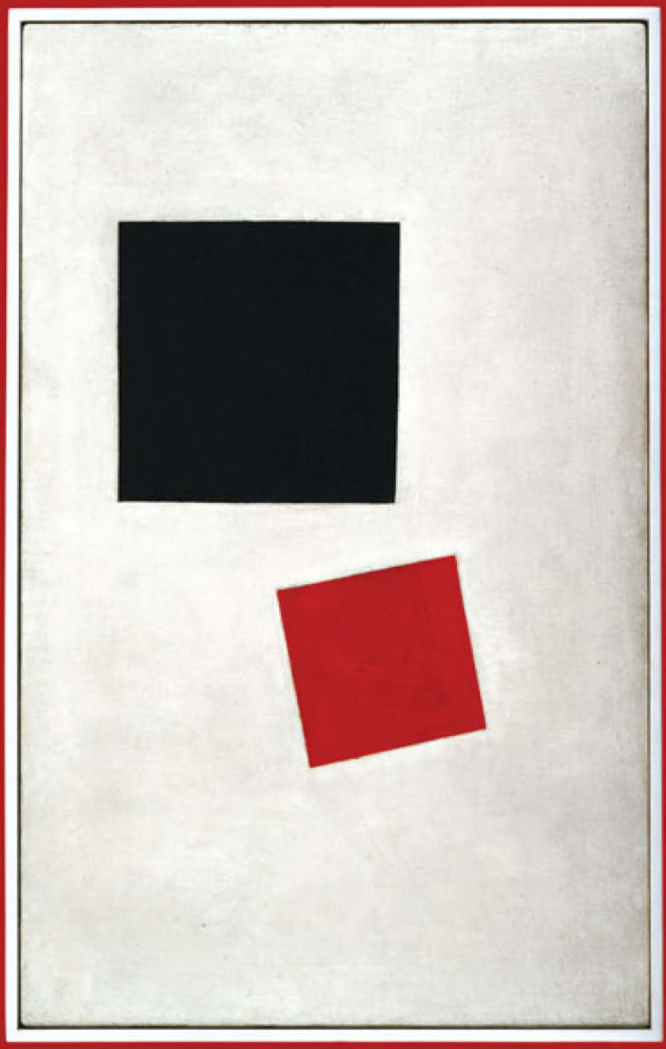
TERRITORIES OF CITIZENSHIP



EDITED BY LUDVIG BECKMAN AND EVA ERMAN

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Also by Ludvig Beckman

THE FRONTIERS OF DEMOCRACY: The Right to Vote and Its Limits (Palgrave Macmillan, 2009)

THE LIBERAL STATE AND THE POLITICS OF VIRTUE (Transaction, 2001)

Also by Eva Erman

HUMAN RIGHTS AND DEMOCRACY: Discourse Theory and Global Rights Institutions (Ashgate, 2005)

LEGITIMACY BEYOND THE STATE? Re-examining the Democratic Credentials of Transnational Actors (Palgrave Macmillan, 2010) (*edited*)

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Introduction

Ludvig Beckman and Eva Erman

Citizenship represents both a fact and an ideal about political membership. The former is manifested in the citizenship policies pursued by governments and the latter expressed in the ideals of citizenship shared by people in different places. Citizenship policies both include and exclude people from political membership and thereby distribute the goods of legal protection, political power, and symbolic recognition. These policies are the potential subject of criticism from the vantage point of various ideals of citizenship. But such ideals also serve as the ideological foundation of existing policies, from which policies and governance structures can derive legitimacy.

The ambiguous legal and aspirational nature of the term 'citizenship' is undoubtedly one reason for its attraction for scholars, but it is also a reason why its usage is sometimes a cause of confusion. Frequently, the category of 'citizens' is the unquestioned subject in reasoning on justice and democracy. However justice is conceived, it is commonly assumed that at the nation state level it is concerned with the patterns of distribution between *citizens*. Similarly, the democratic character of political systems is often defined in terms of the opportunities for political participation available to *citizens*. But it remains unclear if 'citizens' here refers to the people granted citizenship status in positive law, or if 'citizens' is merely shorthand for the circle of people that ought to be citizens, irrespective of existing legal constructions. If the former, we are indeed justified to ask why the legal status achieved by some people as a result of political and often partisan decisions should remain the privileged focus of attention in debates on justice and democracy. This pitfall is avoided by talking of 'citizens' in normative terms, as the people that ought to be granted citizenship. At the same time, in the latter case it becomes unclear which people are in fact being referred to.

Another reason for paying closer attention to citizenship is found in recent and ongoing political developments. Concern about what citizenship is and ought to be is fuelled by the sense that traditional understandings of what it means to be a member of a political community, and what the conditions for membership should be, stand in need of revision as a result of current social and political transformations, in the form of increasing diversity within states and as

a result of new and overlapping governance structures appearing above and in between states. It is against the backdrop of these transformations that the present volume sets out to study what we have called territories of citizenship. This multifaceted topic involves two dimensions of particular importance: the different kinds of political actors that are involved in political rule- and decision-making and the different kinds of boundaries within which these practices take place. The contributors to this volume consequently investigate the dimension of *actors* (or agency, as it is sometimes referred to) and the dimension of *boundaries*. The relationship between these dimensions of citizenship is examined in conceptual, normative, and empirical terms.

As noted earlier, the immediate way of thinking about citizenship is in terms of legal status. Despite the emergence of 'post-national citizenship', where the rights enjoyed by members of the community are less conditioned by formal citizenship status, citizenship remains associated with a distinct legal status and forms of legal protection. Significantly, only citizens are recognised as equal political agents insofar as they take part in the very formulation of these laws, both through formal (via elections) and informal avenues (e.g., taking part in civil society activity, debating in the public sphere, and so on). Furthermore, citizenship is often understood in terms of collective identity, for example, national, cultural, or political identity, expressing a sense of belonging. However, while the relationship between the distinct statuses associated with citizenship has been much discussed in political theory and citizenship studies; the status of citizenship and the rights and duties associated with it are typically regarded as a set available to *each* individual. But what we witness in an era of intensified globalisation is that the statuses of citizenship that are usually ascribed to individuals have become increasingly diverge and fragmented, both vertically and horizontally; vertically in the sense that political subjects are increasingly members of several overlapping communities, horizontally in the sense that a political subject might share a sense of belonging to a political community while at the same time being refused the legal status of citizenship in it. For example, one might have a cultural and national belonging through family members, but still live in the community as a non-citizen. Or one might have the legal status as a citizen in a pluralist society, but primarily identify with a minority group whose members do not act as political agents by exercising their rights. In addition, when we move beyond the nation state to contexts of regional, global, and multilevel governance, individuals are not only acting as political agents but also take part in collective agency, for example, in civil society organisations or transnational NGOs.

Similar to the legal, political, and cultural statuses of citizenship, which traditionally have been looked upon as a set package assumed by each political subject, the domain within which these statuses are practiced and expressed, namely, within the bounds of the nation state, has also been viewed as a set package, involving corresponding legal, political, and sociocultural boundaries. But not only have the different roles of citizens as political actors become increasingly fragmented, these boundaries have become increasingly diffuse and loosened up. Undeniably, the changing role of the state in the global political and economic order has had massive implications for the roles of citizens. The term 'multilevel' governance is often used to describe both the inclusion of political authorities at several levels and the inclusion of non-state actors in public regulations. In order to get a firmer grip of these changing 'territories of citizenship', this volume sets out to disentangle and analyse the relationship between several different kinds of 'boundaries': the *territorial* boundary, expressing citizenship within a geographical domain; the *demos* boundary, expressing citizenship as a democratic people who rule over itself within a political community; the *legal* boundary, expressing citizenship in terms of legal status, rights and duties; and the *moral* boundary, expressing citizenship either as a universal or particularistic moral status.

Indeed, there are many ways to study the two dimensions of political *agency* and *boundaries* and the relationship between them. The present volume approaches them in an inside-to-outside manner, such that the first three chapters deal with citizenship and conditions for the democratic subject on the 'inside' of the nation state, as it were. From an 'inward-looking' perspective, they address basic questions about which individuals are to count as citizens of a democratic community and on what grounds, and about the moral and symbolic significance of the distinction between citizens and non-citizens. These are undoubtedly salient issues in democratic theory since democratic institutions are commonly presumed to be premised on the active participation of *citizens*. However, similar questions arise at transnational and global levels. Focusing on the democratic subject and on the boundaries within which it is located from an 'outside' perspective, the subsequent four chapters investigate the proper place of citizenship in attempts to divorce the ideal of democracy from the state. While Chapters 4 and 5 start out from the domestic political context, they add an 'outward-looking' perspective by moving our eyes to contexts outside the state in attempts to problematise what conditions are required in order for political agents to become democratic subjects in multilevel governance

structures. Chapters 6 and 7 start from an outward-looking perspective, analysing prospects and challenges for transnational and global democratic institutions, and what kind of boundaries this would require. Finally, Chapter 8 introduces a more complex understanding of the distinction between inside and outside through the lens of justice theory, focusing on the question of secession, and the status of citizenship when new territorial and legal boundaries are created.

If we look at political subjects within states as rights bearers, different rights are coupled together with different statuses, relying on distinctions such as resident and non-resident citizens, resident aliens, temporary residents, and irregular migrants. In all democratic states, citizenship involves a range of legally protected rights, ranging from civil and socio-economic rights to a bundle of political rights. As a result of increasing levels of transnational migration, however, who ought to have such a right package has become a hard normative question to answer. One of the most difficult distinctions is that between citizens and resident aliens, that is, people who live in a state but are not citizens. According to Andrew Mason, citizens differ from resident aliens in one or both of two respects: first, they have some political rights that resident aliens lack, most notably, the right to vote; and second, they possess an unconditional right of permanent residence that the resident aliens lack. The normative challenge is to come up with a plausible account for when a resident alien rightfully becomes a citizen.

One common route to take in order to offer such a proposal is what Mason refers to as the 'justice account', the core of which consists of the protection of various moral rights and entitlements. According to the justice account, the value of citizenship consists in the role it plays in promoting justice or ensuring that justice is done, the task being to disaggregate the different legal rights and entitlements that is associated with citizenship and the rights packages that are compatible with the different roles of political subjects. However, while such an approach might be attractive since it offers clarity regarding the legal rights that are ascribed to citizens in comparison to resident aliens, which might be useful for explanatory purposes, it runs the risk of making the concept of citizenship normatively redundant. More specifically, the problem of deriving the value of citizenship from a theory of justice, according to Mason, is that it is not able to account for one important good, namely, the value of equal membership. For if we disaggregate the various rights associated with citizenship, we obscure the ways in which these rights combined constitute this single good. On the holistic view proposed by Mason, political and social equality are not merely seen as constituted

by civil, political, and socio-economic rights but as a status that is enjoyed in a context of a collective that exercises control over its members, thereby lending equal membership a non-instrumental value.

Evidently, the distinction between citizen and non-citizen is crucial to the distribution of political rights among the inhabitants of contemporary states. From the perspective of democratic theory, the legal construction of citizenship is therefore of paramount importance. While many democratic states today permit non-resident citizens to vote, residence for some period of time continues to be a basic condition for citizenship status and hence for full status of being recognised as a democratic participant as well. Physical presence in the territory of the state thus appears fundamental to democracy in its present form of configuration. But presence in the territory of the state is not a single legal status. Some non-citizens are categorised by the state as temporary residents or mere transients; others have earned the right to be permanent residents in the territory. Hence, added to the boundaries of democratic rights and the boundaries of territorial location are the boundaries created by different forms of residence status. The complex and often overlooked ways in which the rights of people depend on territorial location and residence status is the main focus of the first three contributions to the volume.

Many critics of citizenship policies have argued that the exclusion of permanent residents from the full rights of democratic participation is indefensible from the point of view of democratic theory. Conceived of as subjects to the binding decisions of the government and the parliament, there appear to be no distinction between resident citizens and permanent resident non-citizens. They are all equally subject to the laws and policies of the state. And yet, the participatory rights of the latter remain unrecognised in most places today. While this criticism has been made many times before, Ludvig Beckman raises the question of whether permanent residence status is the appropriate alternative from a democratic standpoint. Beckman argues that permanent residence status is born out of the guiding aims of immigration policy and that the interests affecting such policies could not be definitional for democratic theory. The right to participation in collective decision making should not depend on the extent to which an individual has earned the right to remain resident but on the extent to which the individual is in fact a resident. This proposition opens up new questions about the democratic relevance of different legal constructions of residence. Beckman examines and rejects suggestions that democratic rights should be recognised based on either forward-looking (people likely to remain

residents) or backward-looking principles (people that have been residents in the past). If the scope of jurisdiction decides who is and who is not a democratic subject, and jurisdiction is inevitably territorial in nature, then it follows that democratic rights should be recognised among all (adults) present in the territory of the state. The obvious objection to this view is that it implies extending the vote to tourists and transients, which many would regard as absurd. Yet this conclusion only follows on the assumption that we are required to maximise the inclusiveness of the people, according to Beckman. But there are other relevant ends to consider such as the interest in administrative expediency of elections. Incorporating these practical concerns, any democratic order could justifiably exclude *some* temporary residents (e.g., tourists) from democratic elections.

While Beckman's chapter examines the democratic consequences of distinctions between residents and citizens, the different legal categories of persons within the state undoubtedly have other consequences too. Whereas most citizens achieve citizenship by birth, the route to citizenship open to immigrants is often by 'naturalisation'. The conditions stipulated by such policies constitute a crucial ingredient of the legal citizenship regime as they decide the boundary between resident non-citizens and citizens. As noted by Sune Lægaard in his contribution to this volume, naturalisation of the immigrant has increasingly been conceived of as a 'prize' earned for successful integration into society. Rather than viewing citizenship as the start-off point for integration, citizenship marks the symbolic goal of the process towards integration. Lægaard points at the existence of a new 'desert paradigm' of naturalisation where residents aspiring to become citizens need to prove themselves worthy of such status. The boundary between citizens and non-citizens is thereby moralised and is no longer merely concerned with the legal status of the person.

The legitimacy of increasingly demanding criteria of naturalisation can and has been subject to criticism from liberal and democratic perspectives. Yet, Lægaard's concern is rather with the consequences of such policies for public perceptions of what it means to be a citizen of the state. The more emphasis is on deserving citizenship by people who do not achieve it by birth, the less citizens who earn it have in common with citizens who have achieved it by birth. After all, citizens who were born to be citizens did nothing to earn their status. As a result, Lægaard argues, the equal and uniform status of citizenship is becoming harder to sustain by the introduction of desert-based naturalisation policies. Public understandings of what it means to be a citizen of the state are in

effect transformed by the move from objective criteria for naturalisation to more subjective criteria.

Indeed, these conditions of citizenship are not merely a concern for the liberal democratic state. Questions of political agency and the kinds of boundaries within which citizens are supposed to participate in collective decision making are also of concern in contexts beyond the state. In an era of intensified globalisation, the changing role of the state and its responsibilities in the global political and economic order has become an issue of growing importance. These globalised conditions have not only produced a massive growth in governance beyond traditional state borders, they have also raised the normative problem of how to conceive of democratic legitimacy in light of increasing asymmetries between rule-makers and rule-takers, inequalities among states, and disparities in scope between global political problems and existing democratic state institutions. These developments have fuelled debates about the democratic deficit of regional, transnational, and global institutions and about the political subjects who are supposed to be the democratic agents within them.

Eva Erman's chapter is concerned with the question of whether it is possible to turn political subjects into democratic agents in multilevel governance. Erman takes issue with the tendency among current theories of transnational democracy to stress the role of civil society for enhanced democracy in transnational and global decision making, for example, via the involvement of NGOs, social movements, and advocacy networks, which are said to represent marginalised groups through 'voice' rather than vote. The problem with such theories, Erman argues, is that they misconstrue the basic requirements of democratic citizenship by neglecting necessary conditions such as political equality. Rather than proposing a specific normative democratic theory applicable to transnational contexts, Erman develops a conceptual and normative framework for assessing the different roles that different political subjects – acting as citizens, or representing non-state organisations, private interests, corporations, and so on – can and ought to play in multilevel governance.

Concerned with similar problems but from a practical rather than normative standpoint, Christine Chwaszcza examines whether the possibility of transnational forms of democracy hinges upon the practical conditions for legitimate political procedures. These conditions are 'practical', Chwaszcza argues, as all participants must accept the majority rule as the favoured mechanism for the making of collective decisions that, in turn, implies that everyone must be able to know

that everyone else is accepting this rule. Consequently, the challenge for any institutional arrangement of majority rule at the international level is partly cognitive. 'Robust knowledge' about the attitudes of other citizens is a practical condition for the employment of democratic procedures at the transnational level.

Chwaszcza's chapter develops a certain conception of the legitimacy of democratic procedures and demonstrates the inadequacy of the responses provided by other current conceptions. While others are predominantly occupied with the normative legitimacy of democratic procedures in transnational settings, they tend to ignore the question of how to secure the cognitive and ultimately practical conditions of legitimacy. The argument suggests that democratic citizenship requires more recognition of status, rights, and opportunities for political participation. In a democracy, citizenship is also conditioned by an institutional heritage that permits individuals to make reliable inferences about the attitudes of other citizens.

Also preoccupied with the boundaries of democracy in contexts beyond the state, the starting point of David Chandler's chapter is a concern for the widespread recognition of the erosion of political community on the territorial basis of the nation state. What we witness today, according to Chandler, are alternative framings of 'being political' and of engaging in politics, which have supported arguments for a more radical post-territorial space of political possibilities, of what it means to be political, and of how we envision political community. Focusing on two dominant articulations of post-territorial political community, liberal cosmopolitan and radical post-structuralist approaches, respectively, Chandler sets out to analyse the possibilities and limitations inherent in the search for the political community beyond the boundaries of the state. While the aspiration to engage in, construct, or recognise the existence of a post-territorial political community is articulated in different terms by liberal cosmopolitans and radical post-structuralists, Chandler's chapter draws out the similarities between these two seemingly contrasting approaches, in order to point to the severe problems they face when attempting to divorce the political community from the territorial community in conceptualising democratic citizenship.

In a more optimistic spirit, Kenneth Baynes's chapter is concerned with the possibilities for the democratisation of transnational and global governance structures under present conditions. He sets out to trace an emerging cosmopolitanism in recent legal developments, through which important democratic elements such as accountability

and transparency of transnational institutions have been increasingly secured by the constitutionalisation of international law. In Baynes's view, the promise of this cosmopolitanism lies in the coupling together of the new modes of governance that we observe today, involving a growing global civil society, with new practices and understandings of the rule of law in terms of procedures of public reasoning and adjudication. It is argued that Jürgen Habermas's two-track view of deliberative democracy is very well suited for theorising these two developments. According to this model, democratic legitimacy is generated by two interdependent tracks or deliberative practices: an 'informal track' (or weak public) consisting of processes of opinion- and will-formation in the civil society, and a 'formal track' (or strong public) consisting of institutionalised deliberative and aggregative decision procedures. Since the equivalent of a strong public at the global level will most likely be dispersed among a variety of transnational institutions, developing primarily through juridification, it is all the more important that it is accompanied by a weak public in the form of a strengthened role of a global civil society, the latter of which could have a taming effect on this juridification. In the last decades, we have actually witnessed the emergence of a transnational weak public that might be able to perform such a role, according to Baynes.

As we have seen, the chapters of this volume move from the inside to the outside of the state, analysing citizenship along various dimensions of agency and boundaries. In the last chapter, however, Jouni Reinikainen investigates the conditions of citizenship in seceding political units, where the inside/outside boundaries are called into question. Legal constructions of citizenship are premised on well-defined territorial boundaries of the state. But the territorial boundaries of the state are not immutable features of the political world as new states are born and old states dissolve. When external boundaries are transformed and new political identities are created, citizenship in the new political entity easily becomes contested. This is particularly true in cases where the new political unit is created in response to perceived historical injustices and when the territory has been subject to settlement policies. Reinikainen calls these instances of 'rectificatory secession'. The question asked is if the people who have settled in the territory during the occupation should have the right to 'initial citizenship' in the newly formed state. According to Reinikainen, the answer depends on the extent to which individual settlers do indeed have legitimate expectations of remaining residents of the territory. This in turn depends on the extent to which the decision to settle in the occupied territory

represents an active choice for which the person could be held responsible. People who knowingly and actively decided to settle in the occupied territory do not have legitimate expectations to remain residents and could therefore legitimately be denied citizenship in the new independent state formed in this territory. Consistent with this argument, Reinikainen argues that the descendants of settlers are not themselves responsible for being residents in an occupied territory and should therefore be entitled to 'initial citizenship'. The many determinants of individual responsibility in these complex situations, access to information, and the legal incorporation of the territory by the occupying state, are further assessed in Reinikainen's chapter.

Winding up, while citizenship is both part of ordinary parlance as well as fundamental to theoretical accounts of democracy and justice, the complex boundaries and agencies on which it is premised are frequently overlooked. Citizenship under globalised conditions cannot be conceptualised exclusively in terms of a legal and political membership shared by the residents of a state. Rather, it is determined by and determinate for a multiplicity of legal, political, moral, and territorial boundaries and forms of political agency. To explore what we have called the territories of citizenship means to show in what ways citizenship carries significance for a non-citizen, a resident, a democratic participant, a rights-bearing subject, and a cosmopolitan. Our ambition in this volume is to examine the relationship between a variety of statuses and boundaries pertinent to citizenship. The chapters demonstrate how separating different aspects of the boundary dimension and the agency dimension helps us get a firmer grip of citizenship in our contemporary world, characterised by multilevel governance and multiple citizenship statuses. Such an inquiry will not only generate timely questions about citizenship of value for both academics and policymakers, it will also create bridges between different disciplines of the social sciences, fruitful for generating new cross-disciplinary research, which takes into account the changes in recent years and transformations of the conditions, problems, and prospects of citizenship.

1

Citizens, Resident Aliens, and the Good of Equal Membership

Andrew Mason

Citizenship in liberal-democratic states generally involves the possession of a range of legally protected rights, including civil and political rights, a right of permanent residence, a right to enter employment contracts, a right to diplomatic assistance when travelling abroad, and a right to pass on one's citizenship to one's children. Which, if any, of these rights are essential to citizenship? What legal rights must a resident of a state possess for her to be properly regarded as a citizen of it? Could she correctly be described as a citizen if she lacked a right to return were she to live abroad for a number of years, or if she could be stripped of her right of residence for a criminal misdemeanour? What if she had voting rights and a right of permanent residence but her children lacked an automatic right to acquire the same? Questions such as these can be posed in the abstract but they are also gaining practical importance as a result of increasing levels of transnational migration coupled with the different ways in which states treat their migrant workers, both of which inevitably raise issues of justice.

The diversity of relationships that the residents of a state may bear to it without necessarily being deprived of any of their moral rights or entitlements may lead one to wonder whether, in normative theorising at least, clarity would be better achieved by abandoning the concept of citizenship altogether and disaggregating the various rights and entitlements that are associated with citizenship when it is understood as an ideal. In that way, we could avoid the ambiguities that arise from the too crude and often problematic distinctions we draw between (resident and non-resident) citizens, resident aliens, temporary residents, and irregular migrants. This line of argument has some credibility, as I shall try to show by considering various difficulties that arise in attempting to distinguish between citizens and resident aliens in

a plausible and normatively helpful way. But I shall maintain that following through on its conclusion would lead to the neglect of an important good, which I shall refer to as the good of equal membership. Indeed a consideration of the reasons we have for retaining the concept of citizenship serves to draw attention to two rather different accounts of citizenship and its value, which I call the justice account and the equal membership account.[1]

Distinguishing citizens and resident aliens: Descriptive and normative approaches

All states distinguish between their own citizens and resident non-citizens, with the latter group often referred to as 'resident aliens'. But once we go beyond the idea that the citizens of a state, unlike resident aliens, have a legal right to be issued a passport by it, the way in which states draw this distinction varies, with different packages of rights being assigned to each. This might seem to raise a dilemma for any attempt to define these categories: should it stay close to the way in which actual states have drawn the distinction in terms of the sets of legal rights they assign to each, or should it start from an *ideal* of citizenship, and its view of the legal rights which any full member of a state *should* be assigned, then attempt to fashion an account of what it is to be a resident alien from it? The approach one adopts may depend in part upon one's purposes in drawing the distinction: if it is going to be used in comparing the policies of different states towards migrants, then a broadly descriptive approach may be appropriate, whereas if it is going to be used in developing an 'ideal theory' of the rights, duties and virtues of citizens compared to those of resident aliens, then it may make more sense to draw the distinction in such a way that it is consistent with various moral constraints – even if in practice states often violate those constraints.

Let me expand on these remarks by describing in more detail three possible approaches to distinguishing citizens from resident aliens, then considering the value of each. First, we might survey the different ways in which states (or some subset of states, such as those generally classified as liberal–democratic) have distinguished between these two categories, and the legal rights they have accorded each, in the hope that there is enough common ground to be able to make some generalisations that could then be used as the basis for an account of the way in which that distinction is drawn in state practice. Second, we might use our linguistic intuitions, rather than an empirical survey, as a basis for providing an analysis of

what, conceptually speaking, distinguishes citizens from resident aliens in terms of differences in the legal rights they are accorded, but in a way that brackets deeper normative issues concerning whether the range of legal rights possessed or lacked by resident aliens renders that status in itself morally problematic. These intuitions would not be entirely independent of the multiple ways in which actual states have drawn the distinction, but the method would not rely upon an investigation of state practices, appealing instead to these linguistic intuitions to defend a general descriptive analysis. Third, we might treat citizenship as a moral notion that picks out an ideal relationship, characterised at least in part in terms of a set of moral rights, which can be used to assess the desirability of existing relationships between states and their members, and then attempt to fashion an account of what it is to be a resident alien that distinguishes it from citizenship but nevertheless captures a relationship to the state that involves no necessary injustice or other moral wrong, and which bears some resemblance to the categories that actual states employ. This approach might allow that the legal rights of citizens and resident aliens can legitimately vary from one state to another, for different configurations of legal rights might be adopted in different states to protect and promote the underlying moral rights of each group. But it would nevertheless provide a standard against which the practices of particular states could be measured: an ideal theory would allow us to stand in judgement on the package of legal rights that a state provides for resident aliens or for those it calls its citizens, find this package wanting, and perhaps even argue that none of them are correctly regarded as citizens.

The first two of these approaches have value if our purpose is to compare different kinds of immigration policy or different policies towards migrants. It is less clear that they are well adapted to the purposes of an 'ideal theory' that aims to provide an account of perfectly just arrangements.[2] If we employ the first or second approaches we may end up with an account of the distinction that makes the category of resident alien in itself morally problematic because resident aliens are in effect defined as lacking various legal rights that they morally ought to enjoy. To this it might be replied 'Why bother with ideal theory anyway?' Indeed it might be thought that the distinction between citizens and resident aliens only has a role in 'non-ideal' theorising, on the grounds that ideal theory presupposes a world without migration. Rawls, for example, in effect starts from the assumption that citizens are born, live and die within the same society.[3] But ideal theories need not make this 'idealising' assumption, and indeed such theories are better served by not doing so,[4] for arguably it creates an unbridgeable gap between

them and our non-ideal circumstances, depriving them of any value in the normative assessment of actual migration policies.[5] An ideal theory that, in contrast, grapples with the facts of migration is potentially of great value because (if it is properly constructed) it will enable us to understand what a just world would look like in which many residents are not citizens and many citizens are not residents.

Even if we employ an ideal theory approach of the kind I have described, there are different ways within it of drawing the distinction between citizens and resident aliens. As an uncontroversial starting point, we might suppose that a resident alien is a resident of a state who has a legal right to live there but is not a citizen of it – and indeed is a citizen of some other state. Resident aliens would differ in this respect from tourists and visitors who have a legal right to enter the country but no right to reside there, and from irregular migrants who either had no legal right to enter in the first place or no longer have a right to remain. So understood, however, the category of resident alien is parasitic on that of citizenship: part of what it is to be a resident alien is not to be a citizen. The hard question, then, is how we should distinguish resident aliens from citizens. Consider the following proposal. Citizens necessarily differ from resident aliens in one or both of two respects. First, citizens have at least some political rights that resident aliens lack. Second, citizens have an unconditional right of permanent residence that resident aliens lack. Resident aliens' right of residence may be short-term or long-term. Even if it is long-term, it may be for a restricted period of time or require renewal at regular intervals, or if it is permanent, it may be that it can be rescinded under certain circumstances (for example, if the person concerned breaks the criminal law or has an extended period of absence from the country). According to this view, citizens, properly called so, have full political rights and an unconditional right of residence; in contrast, resident aliens either lack full political rights or their right of residence is qualified in some way – or, what is most common in practice, they lack both.

Does this proposed way of distinguishing between citizens and resident aliens satisfy the requirement that it captures a relationship to the state that involves no necessary injustice or other moral wrong? On the surface at least, there need be no injustice in resident aliens lacking political rights or lacking an unconditional right of permanent residence, or both, provided they have a fair opportunity to become citizens. (What counts as a fair opportunity is, of course, a matter of dispute and, on any reasonable interpretation, resident aliens in the societies in which we live are often deprived of it.) In response,

however, it might be argued that an injustice is done to resident aliens unless they are given a fair opportunity to acquire each of these rights *without* acquiring citizenship. For example, it might be maintained that long-term residence in a country should be regarded as sufficient for a moral entitlement to full political rights or to an unconditional right of permanent residence without having to go through any process of naturalisation.[6] Even if that were so, however, it would not undermine the way I am proposing to distinguish between citizens and resident aliens. If a resident alien were to acquire *both* of these rights, then, according to my definition, she would become a citizen. This would still leave conceptual space for resident aliens who are not deprived of their rights or suffering some other injustice. Some resident aliens may not yet have resided in the country for long enough to become entitled to an unconditional right of permanent residence or full voting rights. Furthermore, a person might remain a resident alien even after she has resided in a country long-term because she *opted* not to acquire at least one of these rights.[7] This would, however, raise the difficult issue of whether a resident alien should have the right to *refuse* the conferral of these rights or whether they should be conferred automatically, but this goes beyond the scope of this chapter. It might be maintained that an unconditional right of permanent residence should be acquired automatically after a period of residence, but that voting rights should only be acquired through a voluntary process of naturalisation. This seems to be Rainer Baubock's position (Baubock, 2007, p. 2419). But others, such as Joseph Carens (2005) and Ruth Rubio-Marin (2000, pp. 20ff), argue that even voting rights should be acquired automatically, in effect without the resident's consent (see Owen, 2011, for further discussion).

Although the account under consideration provides a possible way of *distinguishing* resident aliens from citizens, it could not plausibly be regarded as providing a full characterisation of citizenship when it is understood as an ideal: in effect the account provides some of the necessary conditions for being a citizen, but not a sufficient condition. An ideal theory approach would need to include various other rights, including civil rights and arguably social rights, in its full characterisation of what it is to be a citizen. It would not need to suppose, however, that it is a *conceptual* truth that resident aliens must also possess these rights: it could leave open the possibility that a resident alien, properly so called, might lack some civil rights or social rights that citizens, properly so called, must possess. This would, of course, raise the moral question of whether differences in these rights could ever be morally justified.[8]

But even if such differences were always morally suspect, this would not violate the constraint that our characterisation of a resident alien must capture a relationship to the state that involves no *necessary* injustice or other moral wrong, for it would not be part of the very characterisation of a resident alien that they lack some civil or social rights.

Partial citizenship and equality of status

According to the distinction under consideration, citizens necessarily differ from resident aliens in one or both of two respects: citizens have at least some political rights that resident aliens lack or they posses an unconditional right of permanent residence that resident aliens lack. This allows that, as a matter of contingent fact, there may be further differences between the legal rights of citizens and resident aliens in different states. For example, in some states the children of citizens, unlike the children of resident aliens, might be automatically entitled to citizenship of that country regardless of where they are born. (An ideal theory approach would of course assess such an arrangement in terms of whether it preserves the moral rights and entitlements of resident aliens, but even if that arrangement did not do so, this would not call into question the very basis of the proposed distinction between citizens and resident aliens, for again it would not show that the distinction itself was premised on an injustice or some other moral wrong.)

The distinction I have drawn also seems to allow that in principle some legal rights may vary among the citizens of the same state, for not all legal rights would be included in the very characterisation of what it is to be a citizen. For example, in principle a person might have an unconditional right of residence and full national voting rights, but, unlike her fellow citizens, lack rights to assistance and support when travelling abroad. Does this conceptual possibility reveal a problem with the account I am proposing? It might be argued that citizenship can come in different forms, depending on the additional packages of rights that are contingently connected to it. But it is a consequence of this way of thinking about citizenship that citizens would not necessarily all be 'on a par'; indeed there could in principle be considerable inequalities of status between different forms of citizenship. Yet we might think that it is central to our ordinary concept of citizenship that fellow citizens must necessarily have equal status, and that this should be incorporated as an additional element in our characterisation of that relationship, at least when it is understood as an ideal. Then, whatever people described as citizenship in the real world would not count as such unless the

relationship they were picking out accorded equal status to the parties involved in it. This view would imply that fellow citizens, properly so called, must have the same rights unless differential rights can be reconciled with their equal status.[9] (This is not to deny that sometimes differential rights are compatible with a fundamental equality of status. For example, federal arrangements of various kinds that give citizens living in different provinces different political rights might nevertheless be consistent with their equal status. Nor is it to deny that different kinds of political arrangements can preserve equal status: one can maintain that citizenship, properly so called, must involve equal status without implying that it must take a particular form.)

Note, however, that when we incorporate the idea that citizenship requires not only full political rights and an unconditional right of permanent residence but also equality of status, it is no longer possible to hold that the categories of citizen and resident alien exhaust the logical possibilities. For, in principle at least, a person might possess full political rights and an unconditional right of permanent residence, so not count as a resident alien, but not properly be described as a full citizen either, because she lacked some rights that others enjoyed, such as the right to diplomatic protection when travelling abroad, and as a result lacked equal status with them. In response to this problem, it might be thought that we should introduce the language of *full* and *partial* citizenship, thus allowing us to characterise the various logically possible types of residents in terms of the degree of citizenship they possess. We might suppose that full or complete citizenship conceptually requires all of the rights that have so far been mentioned: full civil and political rights, social rights, an unconditional right of permanent residence, the right to pass on citizenship to one's children, and the right to diplomatic protection when travelling abroad. Partial citizens, in contrast, would lack at least some of these rights. Residents of different kinds (including temporary or short-term residents) would be distinguishable in terms of the degree (or gradation) of citizenship they possessed, or the form of 'partial citizenship' they enjoyed (see, e.g., Cohen, 2009, p. 36), judged in terms of the package of legal rights they are accorded.[10] Full citizens would have equal status, as would those with the same degree of partial citizenship, but there would be inequalities of status between full citizens and partial citizens, or between partial citizens with different degrees of citizenship.

This approach would involve moving away from the simple binary distinction between citizens and resident aliens. It would preserve the idea that full citizens are of equal status while allowing the possibility

of forms of partial citizenship that are not of equal status with full citizenship. It would permit us to ask normative questions about what degrees of citizenship residents of different kinds (including temporary residents of different kinds, long-term or permanent residents of different kinds, and irregular migrants) ought to possess. Indeed it might be thought that the language of partial citizenship is better suited to understanding the diverse and complex relationships that the residents of a state may bear to it. In my view, however, it is not particularly well-suited to the normative purposes that are involved in ideal theory. Despite its alleged flexibility (Cohen, 2009, p. 15), the language of partial citizenship obscures rather than illuminates the normative issues that arise in this context because it does not capture very well the impact that differences in the legal rights and entitlements of residents of different kinds may have on their status or on their vulnerability to exploitation. Elizabeth Cohen (2009, pp. 65, 70), for example, distinguishes four types of partial or 'semi-citizenship' in terms of whether they involve autonomous rights (that is, rights to goods that are needed under any circumstances) or relative rights (that is, rights that obtain only in specific contexts and that arise out of the significance of particular goods in those contexts), and in terms of whether these rights are weak or strong, judged in terms of whether they form a bundle that contains few or many rights. But the *number* of rights in a bundle (and indeed whether a right protects a good that is needed under any circumstances or, say, only in some contexts) is not a good indication of the significance or importance of that bundle. To make judgements about the significance or importance of a bundle of rights, we need to trace the connections between these rights and individual interests or well-being, for example, by exploring the extent to which these rights play a role in protecting a person against exploitation.[11]

In the light of this observation, we might begin to wonder what the point is of the concept of citizenship, especially since there are really two different normative issues requiring attention that are framed in terms of this concept: first, the issue of what legal rights ought to be included in the characterisation of citizenship; second, the extent to which variations between residents in terms of the packages of legal rights they enjoy gives them an unequal status in relation to citizens, and the extent to which such variations are justifiable. Given the way in which these issues become jumbled up – and given that some critics may even challenge the idea that all the citizens of a state must have equal status even in a perfectly just world – we might think it is better to address them by retiring the concept of citizenship itself and

disaggregating the various legal rights associated with it, then asking what variations in packages of these rights are compatible with equality of status, and when inequalities of status are justified. This would allow us to achieve greater clarity when we are engaged in ideal theorising, while perhaps retaining the concept of citizenship for comparative, descriptive or explanatory purposes.[12]

Justice and the good of equal membership

Despite the significant reasons we have for abandoning the concept of citizenship in ideal theorising (and indeed normative theorising in general), I want to suggest that there are more powerful ones for retaining it. In the form that it should be retained, it is wedded conceptually to the idea I have already invoked, namely, that citizens are of equal status, such that any variations in their legal rights must be compatible with their equal status. My claim is that if we were to abandon the concept of citizenship, we would lose sight of an important good, namely, the good of equal membership. Indeed the reasons for retiring the concept of citizenship and the competing reasons for retaining it draw attention to two very different ways of thinking about citizenship and its value.

According to the first way, which I shall refer to as the justice account, all the various rights, duties, and virtues of citizenship are ultimately derived in some way from considerations of justice. The rights of citizenship are owed as a matter of justice and the duties of citizenship are understood primarily as the means through which a person discharges the duties of justice that she owes to her fellow citizens. As a result, the demands made by citizenship depend upon the requirements of justice and a normative theory of citizenship is parasitic upon a logically prior theory of justice.[13] The justice account is really a family of views because different theories of justice generate different versions of it. Some versions take the view that all fundamental principles of justice apply independently of how individuals are related to each other, and assign moral rights and entitlements with no regard to citizenship, but argue that the institutions of particular states should be designed with a view to protecting the moral rights of their own citizens, and to forcing or enabling fellow citizens to discharge their duties of justice specifically in relation to each other, on the grounds that this constitutes the best way of realising these fundamental principles.[14] These versions can still allow that the legal rights and entitlements granted to citizens may vary from one state to another without compromising the fundamental principles of justice because cultural and other

particularities may affect what counts as the best means of realising these principles. Other versions maintain that fellow citizens are related to each other in a way that means that some fundamental principles of justice apply to them that do not necessarily apply to others (for example, fellow citizens might be regarded as part of a cooperative scheme for mutual advantage, and this might be thought to license the application of egalitarian principles to them but not to outsiders), while allowing that there are other such principles (for example, those that concern human rights) that apply equally to everyone (see, for example, Nagel, 2005; Sangiovanni, 2007; for relevant discussion, see also Blake, 2001; Risse, 2006; Armstrong, 2009).

According to the justice account, the value of citizenship derives from its role in promoting justice, or ensuring that justice is done. In a world in which migration was the norm – for example, in what Rainer Baubock describes as a 'hypermigration society' where most people are temporary migrants for most of their lives and as a result 'in most countries a majority of citizens would be non-residents and a majority of residents would be non-citizens at any given point in time' (Baubock, 2011, p. 684) – a justice account need not suppose that the concept of citizenship is indispensable for normative (or even descriptive/explanatory) purposes. At root a justice account is concerned with the protection of various moral rights, and with securing people's just entitlements. If a clearer view could be obtained of how justice could best be secured for and between the residents of particular territories without invoking the concept of citizenship at all, then the justice account would have no further reason to retain it. Suppose, for example, that this clearer view could be achieved simply by talking about the different legal rights or entitlements of different people, including their different rights of residence (that is, whether their right of residence is long-term, short-term, or permanent, and whether it is conditional or unconditional), the various institutional mechanisms for protecting or providing these rights and entitlements, the moral duties that individuals owe to others who live in the same territory or to different groups of residents, and the moral virtues they express in their relationships with them. Even if this would make the notion of citizenship redundant from the point of view of the justice account, there would nevertheless be an important role for it to play within what I shall call the equal membership account.

According to the equal membership account, citizenship and its value is understood in terms of its relationship to an important good, the good of equal membership. Like the justice account, the equal membership account can operate at the level of ideal theory, but in contrast to

a justice account that aims to describe a society that is perfectly just in terms of the rights it accords to citizens and the duties they act upon, the equal membership account when it is part of ideal theory provides a characterisation of a society that realises the good of equal membership to its fullest and richest extent. In practice, individual states may fall short of this ideal to differing degrees and in different ways.

According to the equal membership account, the role of the rights of citizenship is to protect the good of equal membership, while the duties of citizenship express or promote that good. Judged impartially, we might say that the good of equal membership consists in the value of a collective body in which its members treat each others as equals, and which makes decisions that importantly affect their conditions of existence, with each member having the opportunity to participate on equal terms in the decision-making process.[15] In short, its value is (at least in part) the value of a democratic community, conceived in these terms. Different versions of the equal membership account will divide on the issue of whether the value of a democratic community of this kind is based solely on its contribution to the good of individuals. But any plausible version of it will acknowledge that at least some of the value of such a collective body consists in its contribution to the good of its members. Being an equal member of it might be regarded not just as a condition of each person's good, but also as an irreducibly social good that is partially constitutive of each person's good, namely, the good of being recognised and treated as an equal member of a collective body that makes important decisions that concern one's conditions of existence.[16] From the perspective of the equal membership account, abandoning the concept of citizenship runs the risk of losing sight of the value of equal membership. Disaggregating the various rights associated with citizenship (and the various duties, responsibilities and virtues that are connected to it) obscures from view the way in which they combine together to protect or constitute a single good.

In response, it might be argued that equal membership and its value can be reduced to justice and its value. The conditions for the realisation of the good of equal membership, it might be argued, are simply a subset of the conditions for realising a just society; indeed the equal membership account is simply *redundant* since the good of equal membership is equivalent to political equality, which in turn is equivalent to the just distribution of political rights and opportunities. From this perspective, the value of a collective body that makes key decisions and in which each member has equal standing is simply the value of a society that is just in terms of its distribution of political rights and

opportunities. There are a number of ways in which this reduction can be resisted, however (see Mason, 2011, 2012, Chs. 1 and 2). Equating political equality with the just distribution of political rights and opportunities is open to contest, since it is not clear that full political equality is *necessary* for a just distribution of those rights and opportunities. Political equality seems to be a more demanding ideal. Whatever the precise relationship between political equality and the just distribution of political rights and opportunities, there are other reasons for thinking that the justice account and the equal membership account can be kept apart. Like the justice account, the equal membership account is really a family of conceptions. Particular conceptions of it can understand the good of equal membership in a way that takes it beyond political equality to embrace *social* equality: that is, each person having equal access not only to the political process but also to the institutions and associations that comprise civil society, and each person enjoying equal standing in that sphere, being recognised and treated as equals by their fellow citizens not only in the political process but also in civil society and beyond. Social equality might be regarded as an irreducibly social good that is partly constitutive of each citizen's good but at least partially independent of justice. (David Miller (1998), for example, maintains that a society in which people regard and treat each other as equals, and where there are no status divisions that allow us to rank people in different categories, has value in its own right independent of justice.) Indeed, these versions of the equal membership account that regard the good of equal membership as embracing social equality are particularly appealing.

There is a tendency to think about value in an atomist way. If we understand the good of equal membership as consisting of political equality combined with social equality, the value of social and political equality might then be regarded as simply the sum of the value of its component parts, including the justice component that is partially constitutive of political equality. But there is another, more holistic way of thinking about the value of the good of equal membership: namely, that part of its non-instrumental value emerges from the interaction of these components, and indeed that this aspect of its value is conditional upon the presence of all of them. The value of equal membership might arise at least partly as a result of the fact that both social and political equality are enjoyed in the context of a collective that exercises significant control over its members' conditions of existence. This is in effect to treat the value of the good of equal membership as an organic whole, in G. E. Moore's sense.[17] The organic whole formed by political equality

and social equality in the context of a collective that exercises control over its members' conditions of existence might be held to possess value that is more than simply the sum of the value of those parts. It is this good (and its importance) that we would lose sight of were we to abandon the concept of citizenship.

Concluding remarks

There may come a point at which state practices render the division of the residents of a state into citizens and resident aliens pointless or unhelpful for comparative or descriptive purposes because too many people fall outside of it, and for these purposes we might come to think simply in terms of the different packages of legal rights they possess. There would nevertheless be normative reasons for retaining the concept of citizenship. There would still be something distinctively valuable about enjoying equal status or standing in a collective that exercised significant control over its members' conditions of existence – what I am calling the good of equal membership – even if it could no longer be effectively realised to the same extent, and even if our understanding of what differences in rights are consistent with equal status was transformed. It is this that speaks in favour of retaining the concept of citizenship, at least for normative purposes.

If we think of resident aliens as those who reside in a country but lack either full political rights or an unconditional right of residence, and we think of citizens as possessing these rights and enjoying equality of status, then we will have to tolerate the fact that 'citizen' and 'resident alien' do not exhaust all the logically possible forms of residence within a state. In principle at least, there could be residents of a state who enjoyed full political rights and an unconditional right of residence, so did not count as resident aliens, but who lacked some of the rights that citizens possessed, such as the right to diplomatic protection when travelling abroad, and as a result lacked the equality of status required to count as citizens. We should be wary of the language of *partial* citizenship as a way round this problem, however, for it does not facilitate answering the kind of normative questions that we need to raise about the justifiability of inequalities of status between different kinds of residents. Part of what makes citizenship valuable is the equal status that is constitutive of it, yet forms of partial citizenship, characterised in terms of their possession of different sets of rights, are not of equal status with full citizenship. There need be nothing unjust in this: forms of partial citizenship may have value in virtue of the protections they bring and the opportunities

they provide. But if the inequalities of status between full and partial citizenship are to be just, partial citizens must at the very least be given a fair opportunity to become full citizens. When they are not given such an opportunity, there is good reason to think that even the existing full citizens of that state are to some degree deprived of the good of equal membership, for the value of the social and political equality they realise between them is tainted or undermined. The value of a collective body whose members have equal standing within it and an equal opportunity for a say in decisions that affect their conditions of existence (and indeed the value of being a member of such a body) is diminished simply because some are unjustly denied the good of equal membership.

Notes

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1. For a more detailed analysis of these accounts and the differences between them, see Mason, 2011 and Mason, 2012, especially Chs. 1–2.
2. Elizabeth Cohen argues against a normatively driven account but seems to suppose that the same account of citizenship is required independent of our purposes (see Cohen, 2009, pp. 14ff.). In contrast, I would argue that what account of citizenship we need depends in part upon our purposes, and for some normative purposes we are better served by an account of citizenship that is normatively driven.
3. Rawls aims to devise principles for the basic structure of a society conceived 'as a closed system isolated from other societies' (Rawls, 1971, p. 8).
4. Onora O'Neill contrasts idealisation with abstraction: abstraction 'is a matter of bracketing, but not of *denying*, predicates that are true of the matter under discussion', whereas idealisation involves making claims that are strictly speaking false as a way of simplifying an argument or theory (O'Neill, 1996, p. 40). She regards idealisations as potentially problematic in a way that abstraction is not.
5. For the notion that there may be an unbridgeable gap between ideal theory and our non-ideal circumstances, see Valentini, 2009, pp. 347ff; Mason, 2010, pp. 663–4; Farrelly, 2007, pp. 848–56.
6. Rainer Baubock, for example, argues that it is unjustifiable not to give resident aliens an unconditional right or residence equivalent to that which citizens enjoy once they have resided in a country for an extended period of time: see Baubock, 2009, p. 483.
7. Why would anyone not opt to acquire these rights? In the case of the right to vote, one might think that it carries with it a burden, in the form of a moral duty to exercise that right.

8. It is hard to see how such differences could ever be morally justified, even in the case of social rights, such as pension rights, health care rights, and welfare rights. First, it would be hard to justify the exclusion of resident aliens from these benefits if they are being taxed at the same rate as citizens who receive them. Fairness would seem to require that if they are being taxed at the same rate as citizens, they should receive the same benefits. Second, if there is an argument of justice for the provision of health and welfare benefits to those citizens in need of them, and for instituting compulsory taxation to provide these benefits, then it is hard to see what could justify the exclusion of resident aliens from such a scheme. Libertarian theories may stand opposed to raising taxes to fund the provision of social rights, on the grounds that the compulsory forms of taxation required to do so are a violation of individual property rights. But in that case, this will stand against the provision of these rights for citizens as well as for resident aliens. It will be hard for a plausible theory of justice to justify the exclusion of residents from schemes that are compulsory for citizens: if it can justify the provision of these compulsory schemes for citizens on grounds of justice, then it would seem that the very same considerations that justify their provision to citizens will justify extending that provision to resident aliens.
9. This would be to challenge Cohen's claim that 'the elements of citizenship cannot be contingent on each other' (Cohen, 2009, p. 15). If equality of status is properly described as an element of citizenship, then (in general at least) it relies upon the existence of equal rights.
10. Cohen uses the language of semi-citizenship, apparently as a synonym for partial citizenship, which is perhaps unfortunate since 'semi' normally means 'half', whereas Cohen is emphasizing that citizenship has different gradations. See Cohen, 2009.
11. Although it seems to me that Cohen's taxonomy is lacking for some normative purposes, it may be useful for comparative or descriptive purposes, or to explain variations in the practices of different states.
12. Cohen asserts that 'without some concept of citizenship, much of what justifies liberal democratic states in the first place, namely, the possibility of secure political membership that they hold out, becomes unintelligible' (Cohen, 2009, p. 31). But secure political membership can itself be 'disaggregated' in terms of various rights; there is no need to express these concerns in the concept of citizenship at all.
13. For this reason John Tomasi refers to the justice account as the derivative interpretation of citizenship: see Tomasi, 2001, pp. 57–61.
14. According to this view, there may be duties of justice that extend beyond state borders, and not all duties of justice will be duties of citizenship. Some justice views are radically critical of the existing state system on the grounds that in practice the preference that states give to the interests of their own citizens undermines rather than realises impartial principles of justice. Some of these critics of the state system favour dispersing the sovereignty that is currently concentrated in states in order to create a variety of different political units, above and below. See, for example, Pogge, 2002, Ch. 7.
15. Each citizen having the opportunity to participate on *equal terms* need not exclude the possibility of a differentiated citizenship in which different groups of citizens (perhaps women, or cultural minorities) had different sets

of rights. Indeed a differentiated citizenship might be required in order for them to be included on equal terms. See Lister, 2003, esp. Ch. 3; Kymlicka, 1995; Young, 1989.

16. According to the equal membership account, the value of citizenship depends in part on the relevant collective being able to exercise significant control over its members' conditions of existence. If processes of globalisation undermine the degree of control that it is possible to exercise over these conditions, then the value of citizenship is correspondingly diminished.
17. 'It is certain that a good thing may exist in such a relation to another good thing that the value of the whole thus formed is immensely greater than the sum of the values of the two good things. It is certain that a whole formed of a good thing and an indifferent thing may have immensely greater value than that good thing itself possesses. … The value of a whole must not be assumed to be the same as the sum of the value of its parts' (Moore, 1993, p. 79).

Bibliography

Armstrong, C. (2009) 'Coercion, Reciprocity, and Equality Beyond the State', *Journal of Social Philosophy* 40: 297–316.

Baubock, R. (2007) 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', *Fordham Law Review* 75: 2393–447.

Baubock, R. (2009) 'The Rights and Duties of External Citizenship', *Citizenship Studies* 13: 475–99.

Baubock, R. (2011) 'Temporary Migration, Partial Citizenship, and Hypermigration', *Critical Review of International Social and Political Philosophy* 14: 665–93.

Blake, M. (2001) 'Distributive Justice, Coercion, and Autonomy', *Philosophy and Public Affairs* 30: 257–96.

Carens, J. (2005) 'The Integration of Immigrants', *Journal of Moral Philosophy* 2: 29–46.

Cohen, E. (2009) *Semi-Citizenship in Democratic Politics* (Cambridge: Cambridge University Press).

Farrelly, C. (2007) 'Justice in Ideal Theory: A Refutation', *Political Studies* 55: 844–64.

Kymlicka, W. (1995) *Multicultural Citizenship* (Oxford: Oxford University Press).

Lister, R. (2003) *Citizenship: Feminist Perspectives*, Second Edition (Basingstoke: Palgrave).

Mason, A. (2010) 'Rawlsian Theory and the Circumstances of Politics', *Political Theory* 38: 658–83.

Mason, A. (2011) 'Citizenship and Justice', *Politics, Philosophy, and Economics* 10: 263–81.

Mason, A. (2012) *Living Together as Equals: The Demands of Citizenship* (Oxford: Oxford University Press).

Miller, D. (1998) 'Equality and Justice' in A. Mason (ed) *Ideals of Equality* (Oxford: Blackwell).

Moore, G. E. (1993) *Principia Ethica*, Revised Edition (Cambridge: Cambridge University Press).

Nagel, T. (2005) 'The Problem of Global Justice,' *Philosophy and Public Affairs* 33: 113–47.
O'Neill, O. (1996) *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press).
Owen, D. (2011) 'Transnational Citizenship and the Democratic State: Modes of Membership and Voting Rights', *Critical Review of International Social and Political Philosophy* 14: 641–63.
Pogge, T. (2002) *World Poverty and Human Rights* (Cambridge: Polity).
Rawls, J. (1971) *A Theory of Justice* (Cambridge, MA: Harvard University Press).
Risse, M. (2006) 'What to Say About the State', *Social Theory and Practice* 32: 671–98.
Rubio-Marin, R. (2000) *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge: Cambridge University Press).
Sangiovanni, A. (2007) 'Global Justice, Reciprocity, and the State', *Philosophy and Public Affairs* 35: 3–39.
Tomasi, J. (2001) *Liberalism beyond Justice: Citizens, Society, and the Boundaries of Political Theory* (Princeton, NJ: Princeton University Press).
Valentini, L. (2009) 'On the Apparent Paradox of Ideal Theory', *Journal of Political Philosophy* 17: 332–55.
Young, I. (1989) 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', *Ethics* 99: 250–74.

2

Is Residence Special? Democracy in the Age of Migration and Human Mobility

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Each year millions of people enter a foreign country as a temporary worker, asylum seeker, international student or unauthorised migrant in search for safety or new opportunities. As the number of people 'on the move' is growing, we need to reconsider prevailing assumptions about the democratic people as a collective at once subject to rule and entitled to participate in ruling.[1] While the number of people subject to the laws of foreign nations grows larger, the number of people relegated to the status of mere subjects expands. These subjects are forced to pay taxes, forced to comply with a variety of laws and regulations, and are fined or imprisoned whenever they fail to abide to existing legal rules. If democracy entails that the people subject to rule should also have the right to participate in ruling, it is time to ask whether democracies as they are and democracy as it should be hold pace with current trends of transnational mobility?

The claim defended in this chapter is that neither democratic institutions nor democratic theory is in tune with the fact of human mobility and that this is most evident in relation to the 'right of rights': the right to elect the people in power by the vote. Consider for instance the evolving European Union for which freedom of movement is a defining and fundamental principle. Due to the right to free movement enjoyed by all citizens of the EU, it has been concluded that 'state borders' in Europe have lost most of their former significance (Maas, 2005, p. 233). And yet, borders remain powerful and effective with respect to the democratic right of voting. Freedom of movement of people is introduced without a corresponding freedom of movement of voters. Any citizen of the EU taking advantage of the right to free movement is swiftly deprived of the right to a say in the process deciding the laws under which to abide (Shaw, 2007, p. 2553; Stanislas, 2007, p. 419).

Now, it may be pointed out that external voting is increasingly introduced by democracies around the world and that, therefore, people moving *out* are sometimes allowed to remain voters in their home country (IDEA, 2007). But people moving *in* are not allowed to vote. People entering a country for purposes of work, study, asylum, or for any other reason, are often relegated to silent subjects, forced to comply with the laws and policies of the host country. This is regularly attributed to the dominant conception of political rights as the privilege of citizens. Non-citizens entering a country are denied voting rights due to the simple fact that they are not citizens.[2] The co-existence of human mobility and norms that restrict voting to citizens is creating a world where more and more people are unable to participate in the process deciding the laws to which they are compelled to abide.

The argument developed here is that the essential trouble for democratic theory does not reside in the privileged status of citizens but in the assumption that voters must be settled, possessing a right to permanent residency. Therefore, the main difficulty is not the discrepancy between the political rights of citizens and the absence of political rights for non-citizens (even though it undoubtedly constitutes a stain on the democratic credentials of contemporary governments). The principal difficulty is rather how to account for the democratic standing of subjects to the law that have not been admitted as permanent residents. Hence, we need to inquire the rationale for the view that permanent residency should be a condition for the right to vote in a democracy. I shall argue that there is no acceptable basis for this view.

From citizenship to residency

For some time, the status of citizenship has come under attack by students of migration. The notion that suffrage should be the privilege of citizens has been rejected as an arbitrary restriction from the point of view of democratic inclusion. As is frequently pointed out, permanent residents are equally affected by the government's decisions and there is consequently no basis for the distinctions based on the formal title of citizenship. Permanent residents should accordingly be considered as part of the democratic people and be offered the opportunity to participate in the democratic process. This view is echoed by many scholars today, arguing that permanent residents are either 'denizens' or 'potential citizens' and should as such be entitled to vote (Hammar, 1985; Rubio-Marin, 1998, p. 209; Harper Ho, 2000, p. 306; Bauböck, 2005, p. 686).[3]

Nevertheless, the claim that political rights should be available for all permanent residents does not fully absolve the asymmetry between those subjects to political authority and those entitled to vote. The claim that people need not be citizens in order to vote still requires that voters are stationary since it is crucial to the argument that the vote should be extended only to *permanent* resident non-citizens. The new and admittedly more inclusive understanding of the basis for political rights, proposed by critics of formal citizenship, is unable to accommodate the full implications of migration. If the problem is that human mobility leaves many people without a vote, the solution is unlikely to be that all *permanent* residents should be allowed to vote. A state of permanence is exactly *not* to be expected from people on the move. A democratic theory built on the premise of permanent residency is unable to mitigate the full range of exclusions in democracies today.

Moreover, it should be noted that extending the vote to permanent resident non-citizens is not that radical in relation to current practice. The significance of the distinction between permanent residence status and formal citizenship status has diminished as rules of naturalisation and acquisition of citizenship has been liberalised. Long-term permanent residents now find that citizenship status is increasingly accessible in most if not all democratic countries (Castles and Miller, 2009, p. 308; Weil, 2001, p. 32; cf. Neuman, 1994, p. 101). In addition, the notion of 'post-national' citizenship derives from the precise observation that the legal protections and social entitlements enjoyed by permanent residents are more often equal to those enjoyed by citizens (Brubaker, 1989, p. 161; cf. Torpey, 2000, p. 156).

Whether citizenship status or permanent residence status is considered fundamental to democratic rights, it appears to follow that temporary residents should be excluded from the rights of participation. But there is an alternative according to which democracy is premised on the inclusion of everyone subject to collective decisions. Hence, what is significant from a democratic standpoint is the extent to which a person is a subject to the law and thereby forced to comply with binding collective decisions. In contrast to the previous and arguably dominant views, emphasising either the importance of citizenship or permanent residence status, this alternative conception of democratic inclusion does not condone the exclusion of any resident in the territory of the state. The question is of course what follows from it and if there is reason to believe that it offers a superior account of the idea of democratic inclusion. I shall deal with these questions below. However,

first it is necessary to elaborate on the distinction between these views by clarifying the meaning of permanent residency.

Residence and permanence

The view that the vote should be extended to permanent residents evidently entails that permanency as well as residency are considered as necessary properties of the voter. To clarify the implications of this view, we need to begin by appreciation of the fact that the concept of residence is not identical to the concept of physical presence. Physical presence is a natural kind, deriving its meaning from ordinary language. It appears obvious that physical presence can be ascertained objectively. By contrast, residency is a legal concept that derives its meaning from stipulations of the law, court judgements, and other legal sources. Whereas the physical presence of a person represents an easily observable fact, the residence of a person is not, as it is a judgement based on a complex set of legal standards (Rogerson, 2000, p. 90).[4]

Hence, it shall come as no surprise that a resident may not be physically present at all. A person may be a resident and, yet, physically absent. Conversely, a person may be physically present and, yet, not a resident. For example, following common law, a person present in England for less than six months, not intending to remain, is not considered an 'ordinary resident'. Also, according to common law, a resident of England remains a resident for some time after leaving the country (Smart, 1989, p. 177). As noted above, residence is a legal term and refers to the status ascribed to a person based on legal criteria. A resident is a person legally recognised as a resident by authorities. People that are physically present may nonetheless fail to achieve the legal status of residence if authorities refuse to grant them this status. In fact, authorities regularly deny people residence status when their presence in the territory is considered unauthorised. 'Illegal' or irregular immigrants are indeed physically present but are scarcely ever residents, as the criteria for the ascription of these statuses are in most cases mutually exclusive.

The claim that democratic rights should be accorded to all residents is obviously distinct, then, from the claim that democratic rights should be accorded to everyone physically present within the jurisdiction of the state. But what does extending the vote to all residents entail? Unfortunately, there is no standard meaning of residence established by international law and little regularity in the application of the concept in domestic law (Garot, 1998, p. 237). Instead, we find a number

of different criteria for the establishment of a residence employed in different various jurisdictions. One frequent criterion of residence is that the person has a 'permanent place of abode' in the country or, as it is sometimes stated, a 'habitual' place of residence. In establishing whether a person satisfies this condition, a number of considerations may be deemed relevant. These include the duration of the stay, the intention to stay 'indefinitely' and an assessment of the place of principal interests. A few days stay in a hotel may not be sufficient to establish residence. At the same time, a person checking in and out of different hotels in the same country for a longer period may be considered a resident of that country (McClean, 1962, p. 1160). A certain period of legally authorised physical presence in the country thus constitutes a sufficient condition for the recognition of residency. Yet, it does not constitute a necessary condition. A person moving into a country with the intention of settling there may immediately be recognised as an 'ordinary resident' if circumstances suggest that the physical presence of the person is no longer 'transitory' (Smart, 1989, p. 177; McClean, 1962, p. 1155). The fact of residence may therefore be established either by reference to the past time of physical presence or by reference to the intention of remaining present in the future.

This observation is clearly pertinent to the suggestion that all residents should be able to vote. Since expected future presence of a person may constitute evidence of 'residence', the enfranchisement of all residents would include some people that have been physically present only briefly. At the same time, the suggestion that all residents should be able to vote would exclude some people spending a somewhat longer period in the territory if their presence is considered 'transitory' and is not connected to a permanent place of abode. In sum, the idea that the vote should be premised on residence implies that some physically present people are excluded whereas other physically present people are included.

As noted earlier, the predominant view is rather that only permanent residents should be able to vote. Proof of residence does not suffice, that is. So we need to ask what is distinctive about permanent residence status. In fact, this status contrasts not with residence but with *temporary* residence. This may seem confusing given the analysis of residency above. A temporary resident is, after all, a resident. Since temporary residents do satisfy the conditions of residency they could evidently be in possession of a 'permanent place of abode'. The status of temporary residence is in other words *not* distinguished from the status of permanent residence by reference to *social facts* but, rather, by reference to the *legal rights* associated with it. A temporary resident is someone with

no right to remain indefinitely physically present in the jurisdiction whereas a permanent resident is someone in possession of that right. To an extent, these distinctions reflect the political and administrative aims of distinct branches of government. For tax purposes, it is essential to determine whether a person is a resident or not. Taxes are raised by taxing all residents, not just citizens.[5] But in order to regulate and control migration, the more basic distinction is that between temporary and permanent residency. Restricted migration is achieved by management of permanent residence rights, not by management of temporary residence permits.

The claim that permanent residents should be granted the vote is in other words equal to the claim that anyone with the right to remain in the country in the future should be granted the vote. Of course, some reason is needed to support the view that the legal right to remain resident is relevant from a democratic standpoint and that the mere fact of residence is not enough.

Future or past residence?

The view that voting should be reserved to permanent residents can be defended in two very different ways. One argument is that permanent residents are more likely to remain future residents and that only future residents should be able to vote. Another argument is that permanents residents are more likely to have been past residents and that only past residents should be able to vote. Let us briefly review these arguments.

The first argument is premised on the importance of ensuring that voters remain subjects tomorrow. The right to permanent residence is serving as a proxy for the future physical presence of the individual voter. Such a 'forward-looking' conception of the democratic vote is defended by Dahl according to which an essential requirement for the right to vote is that voters remain subject to the laws their 'participation might have helped to bring about' (Dahl, 1989, p. 355). The deeper motivations for this view are certainly worthy of examination. But the question here is just whether to accept the importance of future residence supplies a reason for the conclusion that only permanent residents should be able to vote. The forward-looking argument would at least be consistent if true that there is a strong connection between future residency and rights to permanent residence.

The crucial word here is 'connected'. For a connection to exist, it does not suffice that A comes with B. Perhaps it is true that permanent

residents are most likely to remain residents in the future. But this does not entail that people who are not permanent residents are unlikely to remain future residents – or that not-A comes with not-B. The evidence for the existence of a connection between permanent residence and future residency must in other words depend on the availability of reasons for concluding that people who are not permanent residents are less likely to remain future residents. Speaking against this is the fact that every person classified as a resident is by definition a person with either a permanent place of abode or a stated intention of remaining resident in the territory. Hence, the social facts do not seem to support the contention that residents are necessarily more unsettled.

Now, the reason why residents could not be expected to remain future residents is nevertheless evident. Residents without permission to remain permanently can be forced by authorities to leave the country if their visa expires or if they otherwise fail to meet the legal requirements for the acquisition of permanent residence status. That is, after all, why a resident is in fact a temporary resident as long as he or she does not enjoy permanent residency status. So, the argument that residents are less likely to remain future residents must be premised on the tendency of governments to deny residents this status (Miller, 2008). In the end, the forward-looking argument is credible only on the basis of a certain set of public policy decisions. If governments generally admitted residents as permanent residents there would be no forward-looking rationale for excluding residents from the vote. The relevance of the distinction between residents and permanent residents for democratic rights is hence contingent upon a particular government's attitude towards temporary residents.

A quite different argument supportive of the electoral privileges of permanent residents is that past residence is essential for the right to vote. The importance of past residence follows the assumption that the electorate ought to be composed by people who are familiar with the country and its institutions. The argument is basically 'backward looking' as it emphasises past social and political experiences as encapsulated by time of residence. Now, we need to ask if these considerations support the contention that mere residents should not be able to vote and that the vote should be reserved to those accepted as permanent residents.

Given the provisions of the law in certain countries, it does appear plausible to submit that permanent residents have been residents for a longer period than mere residents have. For example, according to Canadian immigration law the status of permanent residence is

premised on being 'physically present in Canada' for at least 730 days in a five-year period (Immigration and Refugee Protection Act). In the Canadian context it is thus the case that a longer period of physical presence is expected from anyone becoming a permanent resident than what is usually required in order to qualify as a resident. But there is no guarantee that permanent residents have been present longer than mere residents have.

Consider, for example, the case of Germany. Following the dictates of German Immigration Law the status of permanent residence is available to people who have resided in the country for a certain period on a temporary resident visa. However, past time of residence is not strictly speaking a necessary condition for the right to permanent residence. Anyone belonging to the category of highly skilled labour identified by the government and anyone able to prove German ancestry can bypass the residency requirement and achieve permanent residency status from the outset (e.g., Kruse, 2008). Similar practices are known in other places. For example, in Israel some people (mostly Palestinians from the occupied territories) never qualify as permanent residents although their permission to enter the country on a temporary resident visa may be indefinitely extended. At the same time, people of Jewish ancestry can be admitted as permanent residents without any previous evidence of physical presence in the country (Kemp, 2010, p. 34). These cases indicate that the relationship between past time of residence and the right to permanent residence is largely contingent. In fact, contingency may even be an explicit aim of public policy. The most well-known example is the annual 'green card' lottery arranged by the US Department of State. It distributes some one hundred thousand permanent residence visas by lot among eligible applicants. And the conditions for eligibility do *not* include proof of past residence.

The conclusion is that the connection between past residence and permanent residence rights is a contingent one and depends upon government policy and the requirements it stipulates. A permanent resident may be a person with a long period of documented residence in the past, as in Canada, or a 'lucky' person that may not even have been physically present in the country, as in the United States, or a person with some proven ethnic or cultural relationship to the nation but without past time of presence, as in Israel. From these observations it follows that permanent residents may not have been present in the territory for a longer period than residents. From the fact that certain people are permanent residents we are justified to infer that they possess legal rights to future residency. We should be careful though in

making any inferences about the past residence of permanent residents (Hammar, 1994, p. 193).

In sum, securing the vote to permanent residents does not secure that voters have been residents in the past. The implications of the claim that all de jure permanent residents should be able to vote depend on the political context. More specifically, the implications depend on the rules and categories defined by immigration policy. It is of course difficult to see why the facts of immigration policy should be regarded as pertinent to democratic theory. The criteria defining the extent of the democratic vote could not possibly equal the criteria capriciously set by the government, as they would be in case 'permanent residence' is deciding the right to vote. If accepted that the scope of democratic rights could not be whatever the government decides, we must conclude that permanent residence status is ill-suited as a general criterion for the right to vote.

Residence and membership

Legal criteria of residence and permanent residence may not be valid conceptualisations of the conditions for the democratic vote. But it may still be a valid position that past physical presence in the territory of the state is a relevant qualification. A most straightforward reason for accepting this view is that durational residence provides an indication of membership in society. This is a principle embraced by Joseph Carens in the argument that 'the longer the stay […] the stronger the case for full membership in society' (Carens, 2008, p. 419). If membership in society is essential for the vote, it clearly makes sense to exclude transients, tourists, and other temporary visitors from the vote. They should be excluded because they are temporary residents and therefore fail to qualify as members of society.

Persuasive as this argument may sound, it does not represent a valid inference. It does not follow from the fact that a person is not a member of society that he or she should be denied access to rights of democratic participation. In order to be conclusive, two additional assumptions are needed. The first is that voting rights should be the privilege of the members of the association. The second is that voting rights should be the privilege of people who are members of the particular association we call 'society'.

I shall not question the first premise. As understood here 'democracy' refers to the right of any member of an *association* to participate on equal terms in the process deciding the rules that apply to all of

them. This is a widely accepted view and is recognised by Robert Dahl's claim that democracy requires the inclusion of all 'members of the association' (Dahl, 1989, p. 129). A rightful claim for inclusion in the demos is consequently premised on membership of an association, however defined.

The second premise is more dubious and the reason why is that it remains to be specified what 'associations' are relevant in the context of the democratic nation state. Clearly, a democratic nation could be conceived of as an association in various ways (social, economic, ethnic, ideological, religious etc.). But the idea that a democratic nation should be inclusive with respect to all the members of 'society' has been particularly influential. The principle that the demos should be inclusive with respect to all members of the association has in other words been understood as equivalent to the claim that the demos should include all members of society.

A specific interpretation of social membership, with a tint of nationalism, merged with the democratic idea already at the time of its modern rebirth following the French Revolution. The French reinvention of democracy stimulated a new conception of the state that brought together the ideas of popular sovereignty and nationhood (Brubaker, 1992, p. 46). The ethnocultural visions implicitly affirmed by this conception culminated in the first half of the twentieth century only to recede in the following decades. It remains an important tenet, however, that 'the people' of any democratic nation refers to the set of people that are first of all members of a distinctive society (see Rubio-Marin, 2006, p. 119).

As noted above, the idea of social membership helps to explain why the time spent in a country is considered to be relevant for the allocation of political rights. By the passage of time, it can be assumed that people are becoming more socially integrated. To get the vote people need to live 'in a society on an ongoing basis' since it is only by the passage of time that people are able to form 'connections and social attachments' (Carens, 2005, p. 33). Therefore, a non-citizen should be considered a member of the demos only if he or she is also a member of society, which in turn presupposes that the person is a resident on a more permanent basis.

It is worth reflecting upon, however, why societal membership should be considered a necessary condition for democratic membership. In fact, the claim that membership in society is a precondition for democratic rights require justification by appeal to democratic standards in order to be recognised as a democratic claim. According to Joseph

Carens, the connection between the vote and integration into society is indeed a reflection of the 'inner logic of democracy'. Carens argues that democracy calls for the 'full inclusion of the entire *settled* population' (Carens, 2008, p. 419, emphasis added). Yet, it appears that a crucial step is missing in this argument. It is not evident why the 'inner logic' of democracy should lead us to believe that only the 'settled population' should be included and why membership in society is for that reason fundamental.

A more elaborate account is provided by Ruth Rubio-Marin who suggests that the basic democratic principle is the right to lead a 'meaningful life' on equal footing with others. This principle purports to demonstrate why the right to vote is essential since, following Rubio-Marin, liberal and democratic canons imply that each person should be offered equal opportunities to question and redefine the social and political circumstances affecting the good life. It also demonstrates, according to Rubio-Marin, why temporary residents may safely be excluded. Only permanent residents are in possession of that long-term commitment that provides them with a 'context for the conception of meaningful life options'. In the end, the reason why voting rights remain the privilege of permanent residents is that only people who are settled for a long time are also dependent on the host society in their pursuit of the good life (Rubio-Marin, 1998, p. 206).

But the reasoning of Rubio-Marin reveals that an altogether different democratic principle is operative. The basic principle is that anyone 'subjected to the laws' has a legitimate claim to inclusion in the demos (Rubio-Marin, 1998, p. 205). Following Rubio-Marin, the political rights of permanent residents are ultimately accounted for by the fact that they too are subjects to the laws and regulations enacted by the government. However, given this principle it is far from clear why temporary residents should not qualify as members of the demos as well. True, the 'life options' of temporary and permanent residents may not be equally affected. But they are both subject to the laws. More interestingly, the principle invoked by Rubio-Marin introduces a potential escape from the notion that societal membership is the condition for political rights. Subjection to the law suggests that what counts is essentially membership in the legal community.

An alternative view

The idea that suffrage rights are premised on subjection to the laws, rather than on social membership, represents a powerful alternative.

Indeed, the notion that anyone subject to laws and policies should be offered an opportunity to participate in their making is a fundamental criterion for inclusion according to Dahl (1989, p. 219). The question though is how to interpret that principle. Does it provide the resources to justify the distinction between temporary and permanent residents, as Rubio-Marin and others believe it does? To begin with, we should acknowledge the central place accorded by Dahl's principle to the legal relationships between individuals and the state. Democracy is envisaged as collective rule by means of the law, where there is a correspondence between the duty to obey legal precepts and the right to participate in their making. The demos is constituted by the subjects of a particular legal and political authority. As noted by Rawls, the right to participate in the creation of the law should be recognised among everyone 'forced to comply' with the law (Rawls, 1971, p. 221). This expression is in tune with the classic notion of symmetry between rulers and ruled, traceable to Aristotle. Democracy is the idea of 'rule and be ruled', according to this view (Peacock, 1995).

Dahl's principle helps to substantiate the claim that inclusion necessarily applies only to the members of an association. The relevant association, following the principle that everyone subject to collective decisions should be included, is not that of society but that of the legal community. Anyone that is a subject to the legal order is by virtue of that fact also a member of that legal community. Whenever the legal order is also democratic, anyone that is a member of the legal community should be considered a member of the demos. This image of democracy is making the physical location of the individual pertinent to membership. As the reach of the law is equal to the jurisdiction of the political entity, and jurisdictions are territorial entities, it follows that the circle of people subject to the law is equal to the people present within the territorial boundaries of the political unit. On the assumption that legal subjects should be granted the right to participate in the making of collectively binding rules, it is clear that any person within the relevant territorial jurisdiction should be included. Membership in the demos is not contingent upon membership in society but upon membership in the legal community as specified by territorial jurisdiction.

The notion of territorial jurisdiction is certainly historically contingent. Before the modern era, a person's title was more important than a person's place of residence. Jurisdiction as we know it appears only with the abolishment of separate legal communities within the state and with the rise of a unitary conception of law (Brubaker, 1992, p. 53, Ford, 1997, p. 882). And yet, the validity of the notion of territorial

jurisdiction is currently contested. It is argued that migration and transborder movement of people have effectively undermined the territorial fixity of legal authority (e.g., Benhabib, 2005, p. 675; Barry, 2006, p. 17). In response, it should be noted that territorially delimited jurisdictions remain a basic feature of the contemporary legal and political world (Wildhaber, 2007, p. 221).

Given the territorial conception of jurisdiction it is hard to sustain the view that membership in society is vital for democracy. In fact, the particular blend created by the all subjection principle and the notion of territorial jurisdiction provides a promising starting point for a critique of current restrictions on the vote. Granted that all residents are legal subjects to the same extent, any resident should be granted the right to vote and to participate in government. The question whether the location of the individual is temporary or permanent should be of no import if acknowledged that democratic rights ultimately depend on the territoriality of political authority.

Although this principle is not yet widely recognised among democracies with respect to non-citizens, it has been more successful in litigation related to interstate movement in federal systems. In the past, individual states in the US could withhold the vote for citizens from another part of the country who had not remained resident long enough. Up to two years of intrastate residence could be required before a new resident was allowed to vote, resulting in the disenfranchisement of as much as seven per cent of the US voting age population in the early 1960s (Schmidhauser, 1962, p. 829). However, in a landmark decision the US Supreme Court decided in 1972 that requirements for the vote that involve prolonged time of residence are unconstitutional. The Court reasoned that durational residence requirements were not necessary to further any compelling state interest (Dunn v. Blumstein, 1972; Smith, 1996). The decision has since served to invalidate state laws that disenfranchised college students and military personnel (Ostrow, 2002). The consequent norm in the US is that any resident citizen should be able to vote without unnecessary restrictions pertaining to the duration of residence in the jurisdiction.

The experience of American constitutional law is concerned with durational residence criteria for voting by citizens. Translated into the context of non-citizen voting in democracies more generally, the implications turn out to be more radical. Granted that non-citizens are at all eligible to vote, the US experience indicates why it is problematic to require long-term residence or a permanent residency permit for voters. By contrast, European countries that allow non-citizens to vote in local elections at

present require anything between two and five years of residence before participation is allowed. In other countries up to ten years of residence may be required before a permanent resident is authorised to vote (e.g., Uruguay). But the question is why a certain period of residence should be deemed necessary for people who are already residents and who have thereby proven their intention of settling there? In *Dunn v. Blumstein* the US Supreme Court found this particular way of reasoning dissatisfactory and consequently struck down on the durational residence requirements found in the electoral laws of Tennessee:

> A durational residence requirement is not simply a waiting period after arrival in the State; it is a waiting period after residence is established. Thus, it is conceptually impossible to say that a durational residence requirement is an administratively useful device to determine residence.
>
> (Dunn v. Blumstein, 405 U. S. 330, 1972)

By analogous reasoning, it appears that no useful purpose is served by the durational residence currently imposed in many European states, if it is a fact that the vote should be available to all residents. The duration of a person's residence is simply immaterial to the question whether a person is a resident or not.

However, it certainly remains to be demonstrated that the expansion of voting rights to all residents is entailed by the territorial interpretation of the all subjection principle. A substantive reason is needed to prove that all residents are in fact equally subject to the law and hence equally entitled to participate in the process of lawmaking. Indeed, it might be objected that permanent residents are 'more' subject to the law than non-permanent residents and therefore have a stronger claim for participatory rights. The argument would be that permanent residents are 'more pervasively affected' than temporary residents by the decisions taken by the government (Rubio-Marin, 1998, p. 205).

At this point, we need to distinguish between 'affected' and 'subjected'. The interests of permanent residents are evidently more affected by public policy than are the interests of tourists. But in speaking of the extent to which policies and laws 'affect' the life prospects of different people we are inviting confusion about the relevant criteria of inclusion. From the point of view of the principle of inclusion, the important thing is whether a person is a legal subject or not. Anyone that is a legal subject is certainly 'affected' in the sense of being targeted by the laws and policies introduced by the government. However, it is

important to distinguish between affected in a legal sense and affected in socio–economic terms. Only people located within the bounds of jurisdictional authority are affected in legal terms. The circle of people affected in socio-economic terms is more diffuse (Beckman, 2009, pp. 36–50; Goodin, 2007). Consistent with the idea of self-rule spelled out above, a legitimate claim for inclusion is premised on being affected in a legal sense only. Hence, for permanent residents to be 'more affected' than other residents it has to be shown that they are more affected in the legal sense of the term.

Residents as equal subjects

The final question is whether it is plausible to maintain that a person entering the borders of another state, fulfilling any of the criteria of residence (intention of remaining, permanent place of abode, etc.) is a legal subject to the same extent as a person in possession of a permanent residence permit. In order to answer it we need to spell out what is entailed by the claim that a person is a legal subject. It has been argued that the relevant criterion of inclusion is that of being 'forced to comply' or, more properly, to be 'subject to coercion' even if not actually coerced (Miller, 2009, p. 219; Abizadeh, 2008). This view emphasises the *enforcement* of law by the state.

Subjection to coercion is indeed a fundamental feature of the state. However, it should not be confused with the extent to which people are subject to the law. The provisions of the law are not identical to the institutions whereby the law is enforced (Lamond, 2001). Legal subjects are identified by the fact that they are bound by legal norms present in the legal system, not by them being coerced or subject to sanctions by public authorities. Law is a system of norms that is constituted by legal 'oughts' or duties. Of course, legal norms are not necessarily sanctioned by morality and their claim for obedience is not, for that reason, the same as a *legitimate* claim for obedience (Raz, 1986, pp. 23–7).

Given this view, asking whether permanent residents and residents are equally subject to the state is tantamount to the question whether they are equally bound by the legal norms present in the legal system or not. The reach of legal norms may be understood as a function of the applicability of a particular legal precept to the behaviour and whereabouts of a person. Alternatively, the reach of legal norms may be conceived of as a function of the relationship between the legal system as a whole and particular individuals. If the first view is accepted, it does seem plausible to say that one person may be a legal subject to a

greater or smaller extent than another. In case each legal precept is the expression of single legal norm, a person subject to a larger number of legal precepts should be subject to a larger number of legal 'oughts'. This theory is perhaps the one implicitly affirmed by Rubio-Marin in the remark that a permanent resident will 'more often' be subject to the law than a short-term resident (Rubio-Marin, 1998, p. 205).

Following the second view, the norms that bind the individual do not emanate from the legal precept but from the legal system of which it is part. The relevant relationship is that between the *system* of law and the individuals it construes as legal persons. The validity of each legal rule is derived from the legal system and, therefore, the legal duty to obey any specific legal rule derives from the legal duty to obey the system as such. Each person to whom any legal rule applies is hence equally subject to the legal system as a whole and has a legal duty to obey the system of law. There is in other words an important sense in which the legal duty to obey the law is 'universally borne' and applies equally to everyone (Edmundson, 2004, p. 216).

It is quite clear that the second view is more plausible. A person does not become a legal subject whenever a legal rule applies to him or her. A person becomes a legal subject when he or she is subject to a legal system. This occurs when a person is subject to an authority that has jurisdiction to legislate, adjudicate or enforce legal precepts. Though there are exceptions, the jurisdiction of an authority usually extends over a given territory. Therefore, a person's physical presence in the territory is key to the identification of the authority to which he or she is subject. If this is correct and if true as well that territorial borders are unequivocal, it follows that a person is always either a legal subject or not. The quality of being a legal subject cannot be graded. Since a non-gradable quality applies equally to everyone to whom it applies, it can be inferred that all subjects to a legal authority are necessarily equally subject in relation to that authority. This observation is crucial since it means that the time spent by a person in a jurisdiction, or the 'permanence' of that person's residence, is immaterial to deciding whether the person is a legal subject.[6]

The analysis of legal subjects is directly pertinent to the problem of inclusion. The message is that anyone subject to collectively binding decisions is to be offered a corresponding right to participate in its making. The right to vote should in other words track the circle of legal subjects. In case residents and permanent residents are legal subjects to the same extent, it apparently follows that they should be granted equal rights to political participation (Lopéz-Guerra, 2005; Owen, 2010). This conception of democratic inclusion does not warrant a distinction

between the voting rights of residents and the voting rights of permanent residents. They are equally entitled to inclusion in the demos because they are members of the legal community and because every member of the legal community is necessarily equal. Nothing in turn hinges on anyone being a member of society. As a member of the legal community, the individual is taxed, forced, fined, and held accountable to the law in indefinite ways. Anyone subject to the system of law should accordingly be regarded as a participant in the collective enterprise of ruling.

This conclusion undoubtedly raises some worries about the status of transients and visitors, such as tourists or business persons. They are not residents and yet are legal subjects on a par with citizens.[7] Thus, following the assumptions accepted here it seems hard to resist the conclusion that tourists and business persons and others temporary visitors should also be granted the vote. Now, this conclusion is sometimes rejected as absurd and it is therefore argued that it speaks heavily against the principle of inclusion defended here as well (e.g., Graham, 2002, p. 38). Yet the rejection of the principle for this reason is premature as it mistakes the principle for an 'all things considered' argument for the allocation of voting rights. It surely could not be that. There is a variety of 'structural' interests to be secured by the electoral laws of any democratic association. These interests pertain to the authenticity and effectiveness of the elections and justify the regulation of the conditions for casting ballots, the drawing of electoral districts, the identification of voters, and so on. The weight attached to these interests and the extent to which they justify measures that in effect restrict the opportunities for participation by members of the people is controversial (Fishkin, 2011). But from the fact that these interests are certain to play at least some role in devising the electoral laws of a democratic nation it can be hypothised that the creation of electoral rolls requires some minimum time for eligible voters to be physically present in the territory of the state. Depending on the specification of these needs, it may in other words be fully legitimate to restrict the vote in a way that excludes transients and tourists from entering electoral rolls. This marginal point does not detract from the main argument defended here, namely, that all residents should be able to vote and that reserving the vote to permanent residents is without foundation in democratic theory.

Conclusions

Increasing human mobility and migration provoke us to rethink the way democracy is conceived and practiced today. In particular, these

developments question the assumption that the electorate should be a relatively fixed, permanent, and stable congregation of people where all are members of society. Previous writers have addressed this issue by pointing out the troubling implications of prevalent norms reserving the vote to national citizens. The alternative view defended by many others is that a democratic vote should extend to all permanent residents and not just to citizens. In this paper, I have critically examined this claim and argued that since permanent residency is a legal status construed for the regulation of migration it is ill-suited as a defining condition for the allocation of the democratic vote.

The tendency to define the electorate in terms of either permanent residence or citizenship is traceable to contestable assumptions of the importance of membership in 'society'. The idea of democracy has at times been understood exactly as the idea that all members of society should be able to participate in deciding the rules that apply to them. But societal membership is by no means a defining condition for the idea of democracy to apply to the relations between individuals. While democracy is about the ability of self-rule by the members of an association, it does not follow that only the integrated members of society should be members of the democratic association.

The alternative defended here is that the extent of the vote and other rights of political participation should be defined on the basis of membership in the legal community where this is understood as the extent to which people are subject to the legal system of the state. By emphasising legal membership rather than membership in society, voting rights turn out to have more in common with the legal categories created for purposes of tax law than with the categories created for purposes of immigration law. As long as it is possible to determine a person's residence for tax purposes, it should be equally possible to determine a person's right to participate in the democratic process. Democratic rights should follow the realm of legal authority held by the state.

Notes

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1. The need to reconsider the relationship between democracy and human mobility remains even if true that human mobility is not such a new phenomenon after all. Indeed, almost 50 million people emigrated in the

decades preceding the outburst of the First World War (Nayyar, 2002). But these flows of migration took place before the first wave of democratisation had even begun. Hence, migration simply could not have been a democratic problem in those times. Yet migration clearly affected the way governments defined citizenship and so had long-term effects on access to democratic rights (Brubaker, 1992, p. 70). Also, the rise of democracy clearly had effects on the opportunities for migration. At the same time as 'universal suffrage' was introduced in Western Europe, passports and other administrative devices were introduced in order to supervise and control population flows (Torpey, 2000).

2. Voting is the exclusive privilege of national citizens in every nation except New Zeeland, Uruguay, and Malawi (Massicotte, Blais and Yoshinaka, 2004, p.18ff.). Citizenship requirements are not uniform, however. In a number of countries, resident non-citizens are permitted to vote in local elections and in some places non-citizens of specific nationalities are allowed to participate in national elections. *See* Earnest (2009) for a recent analysis.
3. In a publication, Rainer Bauböck explores in further detail the challenge of temporary migrants in mobile societies. Bauböck opens up for multiple citizenship rights in the long run for temporary migrants, albeit affirming only 'partial' citizenship rights in the short-term (2011, p. 689). In effect, this position reveals the lasting influence of the assumption that democratic rights is the privilege of permanent residents.
4. Ford (1997, p. 905) associates 'residence' with 'metaphysical presence' rather than 'physical presence'.
5. Indeed, indirect taxes are paid also by irregular immigrants, *see* Lipman, 2006.
6. It may further be argued that legal systems retain their identity through time although the contents of specific laws and policies are transformed. This point is relevant in deflecting the objection that temporary visitors may not be subject to future laws and therefore should be accorded no right to participate in their making. If the legal system is always the same, it follows that subjection to current laws is no different from subjection to future laws, and the temporal status of a person no longer provides a relevant basis for exclusion.
7. This description also fits another group: 'illegal', 'undocumented' or 'irregular' migrants. I explore this specific problem in a forthcoming article (Beckman, 2012).

Bibliography

Abizadeh, A. (2008) 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders', *Political Theory*, 36, 37–65.

Barry, K. (2006) 'Home and Away: The Construction of Citizenship in an Emigration Context', *New York University Law Review*, 81.

Bauböck, R. (2005) 'Expansive Citizenship – Voting beyond Territory and Membership', *PS: Political Science & Politics*, 38, 683–68.

Bauböck, R. (2011) 'Temporary Migrants, Partial Citizenship and Hypermigration', *Critical Review of International Social and Political Philosophy*, 14, 5, 665–93.

Beckman, L. (2009) *The Frontiers of Democracy. The Right to Vote and Its Limits* (Basingstoke and New York: Palgrave Macmillan).

Beckman, L. (2012) 'Irregular Migration and Democracy: The Case for Inclusion', *Citizenship Studies*, 16, 8.
Benhabib, S. (2005) 'Borders, Boundaries, and Citizenship', *PS: Political Science*, 38, 4.
Brubaker, R. (1992) *Citizenship and Nationhood in France and Germany* (Cambridge MA; Harvard University Press).
Brubaker, R. (1989) 'Membership without Citizenship: the Economic and Social Rights of Non-Citizens' in R. Brubaker (ed.) *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, MD: German Marshall Fund of the United States and University Press of America).
Carens, J. (2002) 'Citizenship and Civil Society: What Rights for Residents?' in R. Hansen and P. Weil (eds) *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe* (New York: Berghahn Books).
Carens, J. (2005) 'The Integration of Immigrants', *Journal of Moral Philosophy*, 2.
Carens, J. (2008) 'Live-in Domestics, Seasonal Workers, and Others Hard to Locate on the Map of Democracy', *Journal of Political Philosophy*, 16.
Carrera, S. and M. Merlino (2009) *Undocumented Immigrants and Rights in the EU* (Bruxelles: Centre for European Policy Studies).
Castles, S. (2006) 'Guestworkers in Europe: A Resurrection?', *International Migration Review*, 40, 4.
Castles, S. and M. Miller (2009) *The Age of Migration. International Population Movements in the Modern World* (Basingstoke and New York: Palgrave Macmillan).
Dahl, R. (1989) *Democracy and its Critics* (New Haven: Yale University Press).
Earnest, D. (2009) *Old Nations, New Voters* (New York: State University of New York Press).
Edmundson, W. A. (2004) 'State of the Art: The Duty to Obey the Law', *Legal Theory*, 10.
Fishkin, J. (2011) 'Equal Citizenship and the Individual Right to Vote', *Indiana Law Journal*, 86.
Ford, R. T. (1997) 'Law's Territory (A history of jurisdiction)', *Michigan Law Review*, 97.
Garot, M-J. (1998) 'A New Basis for European Citizenship: Residence?', in M. La Torre (ed.) *European Citizenship. An Institutional Challenge* (The Hague: Kluwer International).
Goodin, R. (2007) 'Enfranchising All Affected Interests, and Its Alternatives', *Philosophy and Public* Affairs, 35.
Graham, G. (2002) *The Case against the Democratic State* (Thorverton: Imprint Academic).
Hammar, T. (1985) 'Dual Citizenship and Political Integration', *International Migration Review*, 19.
Hammar, T. (1994) 'Legal Time of Residence and the Status of Immigrants' in R. Bauböck (ed.) *From Aliens to Citizens. Redefining the Status of Immigrants in Europe* (Aldershot: Avebury).
Harper Ho, V. (2000) 'Noncitizen Voting Rights: The History, the Law, and Current Prospects for Change', *Law & Inequality Journal*, 18.
IDEA (2007) 'Voting from abroad' in A. Ellis (ed.) *The International IDEA Handbook* (Stockholm: International Democracy and Electoral Assistance).
Kemp, A. (2010) *Reforming Policies on Foreign Workers in Israel* (Paris: OECD Social, Employment and Migration Working Papers No. 103).

Kruse, I. (2008) 'Immigration Reform in Germany. The Domestic Debate under the Red-Green Government' in O. Schmidtke and S. Ozxurumez (eds) *Of States, Rights and Social Closure* (Basingstoke and New York: Palgrave Macmillan).
Lamond, G. (2001) 'Coercion and the Nature of Law', *Legal Theory*, 7, 35–57.
Lipman, F. J. (2006) 'The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation', *Harvard Latino Law Review*, 9.
Lopéz-Guerra, C. (2005) 'Should Expatriates Vote?', *The Journal of Political Philosophy*, 13, 216–14.
Maas, W. (2005) Freedom of Movement inside "Fortress Europe"' in E. Zureik and M. B. Salter (eds) *Global Surveillance and Policing. Borders, Security, Identity* (Uffculme: Willan Publishing).
Massicotte, L., A. Blais, and A. Yoshinaka (2004) *Establishing the Rules of the Game. Elections Laws in Democracies* (Toronto: University of Toronto Press).
McClean, J. D. (1962) 'The Meaning of Residence', *International and Comparative Law Quarterly*, 11.
Miller, D. (2008) 'Irregular migrants: An alternative perspective', *Ethics & International Affairs*, 22, 193–97.
Miller, D. (2009) 'Democracy's Domain', *Philosophy and Public Affairs*, 37.
Nayyar, D. (2002) 'Cross-Border Movements of People', *Governing Globalization: Issues and Institutions* (Oxford: Oxford University Press).
Neuman, G. (1994) 'Justifying US Naturalization Policies', *Immigration and Nationality Law Review*, 16.
Ostrow, P. (2002) 'Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change', *Columbia Law Review*, 102.
Owen, D. (2010) 'Resident Aliens, Non-resident Citizens and Voting Rights: Towards a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging' in G. Calder, P. Cole, and J. Seglow (eds) *Citizenship Acquisition and National Belonging* (London: Palgrave Macmillan).
Peacock, J. G. A. (1995) 'The Idea of Citizenship since Classical Times' in R. Beiner (ed.) Theorizing Citizenship (New York: State University Of New York Press).
Rawls, J. (1971) *A Theory of Justice* (Oxford: Oxford University Press).
Raz, J. (1986) *The Philosophy of Freedom* (Oxford: Clarendon).
Rogerson, P. (2000) 'Habitual Residence: The New Domicile?', *International and Comparative Law Quarterly*, 99, 86–106.
Rubio-Marin, R. (1998) 'Equal Citizenship and the Difference that Residence Makes' in M. La Torre (ed.) *European Citizenship. An Institutional Challenge* (The Hague: Kluwer International).
Rubio-Marin, R. (2006) 'Transnational Politics and the Normative Challenges of Expatriate. Voting and Nationality Retention of Emigrants', *New York University Law Review*, 81.
Schmidhauser, J. (1962) 'Residency Requirements for Voting and the Tensions of a Mobile Society', *Michigan Law Review*, 61.
Shaw, J. (2007) 'E.U. Citizenship and Political Rights in an Evolving European Union', *Fordham Law Review*, 75.
Smart, P. St. J. (1989) '"Ordinarily Resident": Temporary Presence and Prolonged Absence', *International and Comparative Law Quarterly*, 38.
Smith, G. (1996) 'Interest Exceptions to One-Resident, One-Vote: Better Results from the Voting Rights Act?', *Texas Law Review*, 74.

Stanislas, A. (2007) 'Electoral Rights under the Review of the European Court of Justice: Judicial Trends and Constitutional Weaknesses', *Croatian Yearbook of European Law and Policy*, 3.

Torpey, J. (2000) *The Invention of the Passport. Surveillance, Citizenship and the State* (Cambridge and New York: Cambridge University Press).

UNWTO (World Tourism Organization) (2005) 'World Arrivals by Purpose of Visit', http://unwto.org/facts/eng/pdf/indicators/ITA_purpose04.pdf.

Weil, P. (2001) 'Access to Citizenship: A Comparison of Twenty-Five Nationality Laws' in A. Aleinikoff and D. Klusmeyer (eds) *Citizenship Today. Global Perspectives and Practices*, (Washington DC; Brookings Institution Press).

Wildhaber, L. (2007) 'The European Convention on Human Rights and International Law', *International and Comparative Law Quarterly*, 5.

3

Naturalisation, Desert, and the Symbolic Meaning of Citizenship*

Sune Lægaard

Introduction

This chapter is about specific kinds of naturalisation rules and practices regulating access to citizenship for immigrants, especially those requiring applicants for naturalisation to pass tests of their language proficiency and knowledge of society. Such naturalisation tests have been introduced in many Western countries during the last decade. In this chapter I discuss how one might understand such naturalisation requirements as expressions of what I call a 'desert paradigm'. I propose and defend two theses: First, given that what I call the 'symbolic meaning' of citizenship is partly constituted by requirements regulating access to citizenship, citizenship will have different meanings for native born and naturalised citizens. Second, the desert paradigm of naturalisation exacerbates this difference in meaning in ways that are both avoidable and potentially problematic. This problem is different from a number of other problems with naturalisation practices that have received a great deal of attention in the theoretical literature. I will therefore start by sketching the theoretical terrain for discussions of access to citizenship in order to distinguish the problem I am concerned with from other criticisms of naturalisation practices.

It is quite commonplace to note that the closed nation state is a fiction; there is a great deal of movement across borders, and therefore state and citizenship cannot be taken to be correlated in a simple way (e.g., Bosniak, 2006). Since migrants are present within the state on a more or less permanent basis, the boundaries of citizenship are not equivalent to the borders of the state. One therefore has to distinguish between the *civic* boundaries that delimit a political, legal, and social status, and the *territorial* boundaries that delimit political authority and

legal jurisdiction. Civic boundaries separate citizens from denizens and transients within the same territory by assigning different rights and duties to the individual members of each category, where the rights of citizens include but go beyond those of denizens or transients. Territorial boundaries separate different states by specifying the scope of the authority and jurisdiction of each sovereign power, where the rights of each state may be the same but are specified so as to not overlap and create conflicts of jurisdictions. Given this distinction, it is not in itself mysterious, incomprehensible, or necessarily problematic that some members of a state are not full citizens; one cannot infer from the fact that territorial and civic boundaries are not isomorphic (whatever that might mean) that something is wrong, since the two kinds of boundaries simply (at least in theory) concern different things. One cannot therefore conclude from the fact that the traditional romantic idea of the closed nation state is a fiction that the failure to extend citizenship to all residents within the state is problematic or that one had better abandon the entire idea of bounded citizenship in separate states. It is a further normative question whether anything is wrong (and, if so, what exactly is wrong) with states' practice of regulating the access to citizenship.

This is not to say that there is nothing problematic about the practice of constructing different groups of people within the state as having different statuses, rights and duties, or in the way access to the status of citizenship and the accompanying rights and duties is regulated. Much work in political and social theory has addressed different aspects and dimensions of these practices with a view to exposing the mechanisms in play and criticising both the mechanisms as such, their effects, and the understanding of social and political membership they rely on and help to uphold. Such criticisms are often premised on cosmopolitan ideals that proponents of restrictive rules for access to citizenship reject (e.g., Kostakopoulou, 2008; Shachar, 2009). It is no surprise that cosmopolitans are critical towards exclusionary practices of naturalisation, but such criticisms do not trouble statist and nationalist proponents of such naturalisation practices insofar as they already reject cosmopolitanism.

Criticisms are more challenging if premised on ideals that defenders of restrictive naturalisation practices themselves subscribe to. The exercise by liberal democratic states of political power over their citizens is claimed to be legitimate authority rather than mere coercion because it treats citizens as equals with rights (this is the liberal story of legitimacy) and includes them in the political decision-making procedures (this is the democratic story of legitimacy). For these reasons, state power is

justifiable to citizens and is not an outside imposition on their freedom (Blake, 2001; Abizadeh, 2008; Song, 2009). But if one accepts liberal and democratic stories of legitimacy, the exclusion from citizenship of more or less permanent residents within the state's territory becomes problematic; the state seems to forfeit its claim to be a legitimate authority in relation to these groups of people if it is not sufficiently easy for them to become citizens (Carens, 2008).

Both cosmopolitan and liberal–democratic critiques of exclusionary naturalisation practices are focused on the unjust or illegitimate character of these practices in relation to those *excluded* from citizenship. In this chapter I consider certain practices of naturalisation currently practiced in many Western liberal democracies, but with a different focus than usual in the theoretical literature on the boundaries of citizenship. Rather than discussing how naturalisation legislation is problematic in terms of unequal rights, insecurity, or lack of legitimacy from the point of view of 'aliens' excluded from citizenship I consider what certain naturalisation practices signify for the *meaning* of citizenship among those actually *admitted* to this legal standing. I suggest that practices of naturalisation should not only be assessed from the point of view of those excluded from citizenship, but also from the point of view of those admitted. My point is that there is a distinct reason to be worried about certain naturalisation practices that is independent of the more standard criticisms noted above. So whether or not one accepts the external cosmopolitan or internal liberal–democratic criticisms, there is another reason to be critical of naturalisation tests. This reason furthermore concerns the implications of naturalisation tests for the status of those who receive citizenship rather than for outsiders. It might therefore cut more ice with statist or nationalist proponents of naturalisation restrictions than criticisms based on external normative ideals. These implications concern the *symbolic* aspects of citizenship, more precisely the public significance of what it means to be a citizen.

The structure of the chapter is that I first discuss the concept of citizenship and specify which aspects of citizenship I will be concerned with. I then present some recent trends in naturalisation legislation and offer an interpretation of some elements hereof as expressions of the desert paradigm of naturalisation. I then go on to explain how one might talk about the symbolic meaning of citizenship and how the rules regulating access to citizenship affect this meaning. On this basis I argue that desert-based naturalisation requirements may result in citizenship having different symbolic meanings for naturalised and native born citizens. I finally discuss a number of respects in which such

difference in the symbolic meaning of citizenship might be problematic and conclude by considering what the normative implications of this might be.

Before I begin, three preliminary caveats: First, I do not here try to make *all things considered* judgements of whether desert-based naturalisation requirements are wrong or not; I merely consider one possible reason why they might be problematic. Even if the features I highlight are indeed problematic, it does not immediately follow that naturalisation tests are wrong, since there may be (and almost certainly are) further relevant considerations that might counter the problematic features I draw attention to.

Furthermore, I am not claiming that the features I discuss are the *most* problematic ones; the other noted criticisms of naturalisation practices might be more important and weighty. I am simply noting one consideration often neglected in debates about citizenship. The reason to focus on this feature is partly theoretical, since it provides a way of discussing a different aspect of citizenship than those usually stressed, partly what might be called a perspectival one, since the problematic feature is bad for a different group of people than those, whose exclusion from citizenship usually forms the basis for criticism of restrictive citizenship practices.

Finally, I am not concerned with the general question of whether or not states can entirely deny access to citizenship thus consigning immigrants to a condition of permanent alienage (Seglow, 2009). I assume, on the one hand, that states may sometimes restrict access to citizenship for some reasons, but that they, on the other hand, do not have complete discretion in the sense of being exempted from moral evaluation of their decisions about how to restrict access. The interesting question is which actual practices of and requirements for naturalisation fall on which side of the line of what is morally permissible. Here I merely consider one feature of desert-based naturalisation conditions that might count against the moral permissibility of such requirements.

The concept of citizenship

It is also a commonplace to note that the term 'citizenship' is used in many different ways. In this chapter I am concerned with certain relations between some of these different senses. I take my point of departure in a narrow, descriptive and legal understanding of 'citizenship' as a formal legal status carrying with it specific legal rights and duties.

Citizenship thus understood is defined with respect to a state and denotes the full juridical membership of the state. As such it is extended to individuals by the state according to the state's constitutional principles, legislation and administrative rules (the fact that one can now also be a citizen in the legal sense of the European Union does not affect the statist character of the notion, since Union citizenship is conditional on national citizenship in a member state). It is obviously but trivially true that 'citizenship' can be used both in non-legal and non-statist senses. But the fact that one can use the word in other ways does not show the traditional legal and statist use to be obsolete or unimportant.

I start out from the legal and statist definition of citizenship for several reasons. First, it is as a matter of (contingent) fact the most important and consequential one, since it determines what rights and duties people effectively have in the state-centric world we happen to live in. Second, because it is regulated by positive legal rules and legislation, formal citizenship can be described in a fairly neutral manner and be made the object of a kind of discussion and criticism that is less easy regarding more elusive, informal, and moralised notions of citizenship, for example, ideals of 'participatory' or 'social' citizenship. Third, many of the more elusive notions of citizenship are in some sense parasitic on the legal sense; notions of identity, membership, and belonging are for instance deeply shaped by legal citizenship and affected by the legal rules regulating it. My aim in this chapter is precisely to discuss how the formal rules regulating access to legal citizenship affect the meaning and significance of citizenship in broader senses. So I start out from the narrow legal sense of citizenship and proceed to a discussion of what the rules regulating access to legal citizenship mean for a broader non-legal sense of membership and unity among citizens.

It is common to distinguish between different dimensions or aspects of citizenship. Christian Joppke (2010, pp. 28–30) distinguishes three: first, 'citizenship as status', which denotes formal state membership and the rules of access to it; second, 'citizenship as rights', which is about the formal capacities and immunities connected with such status; and third, 'citizenship as identity', which refers to the shared beliefs or identity that ties the individual to a political community. One might add further dimensions to these, for example, a civic republican focus on citizenship as political participation (Bosniak, 2006, p. 19). The legal understanding of citizenship focuses on the status and rights dimension. In this chapter I examine how the formal regulation of access to the *status* of citizenship affects the meaning of citizenship in senses that one might place under the identity and participation dimensions.

The desert paradigm of naturalisation

In this section I briefly describe certain trends in naturalisation legislation in a number of European states during the last decade with a focus on the place assigned to language tests, knowledge of society tests, and to some extent also economic and so-called active citizenship and good conduct requirements. I then present a specific interpretation of this trend as an expression of what I call 'the desert paradigm of naturalisation', and I explain in what way naturalisation requirements can be seen as involving notions of desert.

Extension of citizenship to immigrants is under national and international law held to be a prerogative of the individual state, which may determine the conditions immigrants have to fulfil to become citizens. Most states set a residence requirement and make access to citizenship conditional on language proficiency, economic self-sufficiency, and 'good conduct' conditions requiring absence of a criminal record, the difference between states primarily concerning the specifications and degree of strictness of the requirements.

Since the late nineties European naturalisation legislation has increasingly become a tool in integration policy; naturalisation requirements now involve considerations of the degree to which applicants are 'integrated'. Naturalisation law is also increasingly seen as a part of immigration policy; access to citizenship is not only about inclusion in an equal status but also functions as an incentive mechanism supposed to deter unwanted immigrants and attract wanted immigrants (Van Oers, Ersbøll and Kostakopoulou, 2010; Joppke, 2010). The politicisation in many European states of immigration and integration policy in the last decade has further resulted in naturalisation being seen as a reward or 'prize' for successful integration rather than as a means towards integration (Bauböck et al., 2006, p. 24; De Hart and Van Oers, 2006, p. 326). Economic and good conduct requirements are direct ways of ascertaining aspects of successful integration and naturalisation tests are supposed to provide a further way of selecting only successfully integrated applicants for citizenship.

This subjection of naturalisation policy to integration and immigration policy has resulted in a new type of naturalisation requirement being introduced, namely various forms of naturalisation tests (De Hart and Van Oers, 2006; De Groot, Kuipers and Weber, 2009; Van Oers, 2009; Wright, 2008). Whereas applicants' proficiency in the national language was earlier often assessed during informal interviews most states now conduct formalised tests. Tests have also been introduced to

gauge applicants' knowledge of the society they wish to become citizens of, including aspects such as history, culture, and even values. Attempts are also made to use such tests as a way of ascertaining applicants' own values and inclinations, for example, to make sure that they understand and accept norms of equality, democracy, and the place of religion.

Much about such tests can be questioned. Even if one accepts the integrationist and migration management objectives informing tests there is a big question as to whether multiple choice tests are at all a good or effective means to secure these objectives. Here I set such practical considerations aside, however, and focus on how one might understand naturalisation tests and certain other naturalisation requirements theoretically. What is distinctive about tests (and some of the other requirements) is that they depend significantly on (1) individual resources (e.g., qualifications, competences, skills, ability to receive and benefit from language instruction) and (2) effort (study, actual participation, engagement).

Naturalisation practices assigning importance to these kinds of requirements can accordingly be characterised as belonging to what I will call *the desert paradigm of naturalisation*. What is distinctive about these kinds of requirements, as opposed, for example, to residence requirements, is that they make the achievement of citizenship conditional on what is perceived as individual merit; they make naturalisation a matter of *desert rather than entitlement*, and the parameters to be assessed in determining whether an immigrant can be naturalised are of a more *personal* sort than impersonal requirements of residence, and perhaps also of good conduct and the like.

The desert/entitlement distinction concerns the nature of the requirements rather than whether the state or officials have discretion in setting or applying them. Desert denotes something that does not come about automatically, as fulfilment of a residence period can be said to do, but where the applicant for naturalisation actually has to *do something active* and *exert some effort* in order to *successfully meet* the requirements, for example, by taking courses and passing a test. Whether applicants for naturalisation meet requirements is individually variable in the case of both desert-based and entitlement-based requirements. The difference is that the kinds of conditions that have to obtain for an applicant to deserve naturalisation are subjective or personal whereas the conditions that ground entitlement as understood here are objective or impersonal. Desert conditions may also be more difficult to meet, since they require an active effort that in fact meets some threshold of sufficiency, but this need not be the case, since some acts are quite easy to perform, and some more passive conditions are hard to meet.

One way to draw the desert/entitlement distinction in practice is on the basis of whether requirements have to do with *active performance* by the immigrant or not. This distinction turns on what counts as active performance, which is of course tricky. But one can arguably place different kinds of naturalisation requirements on a scale depending on the degree to which they require active performance. Residence period would then be towards the most passive end of the scale, since it only requires not leaving the state, and naturalisation tests assessing individual qualifications would be towards the most active end, since they both require that the immigrant exercise a lot of effort to acquire specific qualifications and that they are actually successful in so doing. Absence of criminal record might also be towards the passive end, insofar as not committing a crime is only an act in a weak sense and something that can be required of immigrants independently of naturalisation. Economic requirements such as not being a burden to the state's social security system might fall somewhere in the middle, since getting a salary by having a job of course requires activity, namely getting and keeping a job, but this is arguably something that immigrants can reasonably be expected to do independently of the question of naturalisation (cf. Carens, 2009, on the distinction between requirements and expectations). Symbolic requirements such as swearing oaths of loyalty and signing declarations of fidelity and sincerity are also towards the active end, since this are active acts that immigrants would not have occasion to carry out independently of naturalisation but which do not as such require as much effort and are not as hard to carry out successfully as naturalisation tests. Naturalisation tests are the clearest cases of desert-based conditions for naturalisation.

The meaning of citizenship under the desert paradigm

Naturalisation requirements such as those described in the preceding section have different kinds of consequences. First of all, they make it more difficult for applicants for naturalisation to actually become citizens. Naturalisation tests might entirely exclude some applicants from becoming citizens and are likely to prolong the naturalisation procedure even for those who eventually pass the tests, since applicants will have to study and wait for the tests. Given these consequences, one might then discuss whether or not they are problematic, justifiable, or acceptable. In this section, I draw attention to a different set of possible implications of desert-based naturalisation requirements. These are non-causal effects concerning, not the *difficulty of becoming* a citizen,

but the *meaning of being* a citizen for those admitted to this status, and as such they continue *after* naturalisation, potentially for the entire life of the naturalised citizen, rather than being temporarily confined to the period *before* citizenship is granted.

So what do I mean by 'the meaning of citizenship'? One traditional philosophical notion of meaning is that the semantic meaning of terms is given by the observable conditions under which they are correctly applied. According to such verificationist theories, the meaning of legal terms such as 'citizenship' are given by the requirements regulating access to citizenship and the effects flowing from attainment of the status of citizenship. In the terminology introduced earlier, the semantic meaning of citizenship is a function of the rules of access to citizenship (the status aspect) and the rights following from citizenship (the rights aspect).

Verificationist theories of meaning are now widely rejected, at least in such primitive forms, and I am in any case not making a claim about linguistic meaning. What I suggest is instead that we can talk about the 'meaning' of a status like citizenship in a broader sense, which has to do with the way people understand, perceive, experience, and evaluate it, and that the meaning, or significance, of citizenship in this sense is sensitive to the same factors as the semantic meaning was according to verificationists views. So my suggestion is that the significance of citizenship is partly a function of what the effects of being a citizen are, partly of how one becomes a citizen. And the latter factor importantly includes the rules for naturalisation, especially the requirements for naturalisation and the ways of enforcing these requirements.

This suggestion is hardly controversial. It was in fact a part of the official rationale for the introduction in Britain of citizenship tests that citizenship had earlier been understood as unimportant and was not able to capture, engage, and motivate the feelings, identity, and attachment of people, because of the impersonal administrative way citizenship was previously granted (Home Office, 2002). The same idea informs the more general notion of a 'revaluation of citizenship' (Schuck, 1998; Joppke and Morawska, 2003), according to which the procedures of access to citizenship had to be reformed in order to give a fuller significance, importance, and centrality to the status of citizenship. What is changed here is not the strict semantic meaning of 'citizenship', which still denotes a particular legal status, or the rights attendant upon having this status, but rather what I will call the *symbolic meaning* of citizenship. That citizenship has symbolic meaning is not controversial, although it is often assumed that such a meaning

must take a nationalist form (Kostakopoulou, 2008, p. 81). For the moment, I am not claiming anything about the nature or content of the symbolic meaning of citizenship, only that it is partly constituted by the rules for naturalisation.

In the remainder of the chapter I propose and defend two theses about the symbolic meaning of citizenship: First, given that the meaning of citizenship is partly constituted by the requirements regulating access to citizenship, citizenship is likely to have different meanings for native born and naturalised citizens. Second, whereas this difference is arguably both inevitable and relatively unproblematic, the desert paradigm of naturalisation exacerbates this difference in meaning in ways that are both avoidable and more problematic.

If the meaning of citizenship partly depends on the conditions for attaining citizenship, then naturalisation rules have implications for the meaning of citizenship. This first of all seems to imply that citizenship has different significance for people who are citizens by birth and people who become citizens through naturalisation, even if their rights and duties as citizens are the same. This basic difference is independent of the actual mechanisms for naturalisation and the requirements they impose. What matters is that some people simply have citizenship whereas others have to apply for and are granted this status. This difference would in itself make for different understandings of the significance of citizenship even if there were no exacting requirements to fulfil and access to citizenship was a purely practical matter, such as in proposed models of civic registration (Kostakopoulou, 2008). Even under such citizenship regimes, citizenship in a specific state would be experienced as 'natural' and 'given' for native born citizens whereas registered citizens would be likely to have a different, more reflective, and voluntarist view of it.

The difference in symbolic meaning becomes more significant once substantial naturalisation requirements are imposed as conditions for being granted citizenship. Now native born and naturalised citizens have not only received their citizenship by way of different 'transfer mechanisms' (Shachar, 2009); applicants for naturalisation also have to fulfil substantive conditions that native born citizens do not have to fulfil. My claim now is that the implications for the symbolic meaning of citizenship depends on whether the naturalisation requirements are entitlement- or desert-based, and where they can be placed on the active–passive scale mentioned in the previous section.

Residence requirements are the clearest example of entitlement-based requirements and they are furthest towards the passive end of

the scale; in order to fulfil such requirements, one only has to reside on the state's territory for a given period, and once this condition is met, one would be entitled to citizenship if residence period were the only requirement. Residence period is a relatively objective parameter, assessment of which is fairly unproblematic and which does not involve inquiry into the personal features of the applicant. So the implications for the symbolic meaning of citizenship of such requirements are likely to be reasonably light; residence does not itself distinguish naturalised citizens from native born citizens, the main difference still has to do with the very fact that the former have to apply for citizenship and fulfil conditions whereas the latter do not. The substance of residence requirements does not distinguish natives from naturalised.

Economic conditions and requirements of good conduct are further towards the active end of the scale and involve assessments of the actual behaviour and success of applicants as individual persons. These are stark examples of requirements that native citizens do not have to fulfil; natives are citizens and keep their citizenship no matter what kinds of criminal activity they engage in and whether or not they are economically self-sufficient. Of these kinds of requirements, economic conditions are examples of desert-based conditions, since applicants have to prove that they are worthy for citizenship by doing something valuable. Such requirements are likely to affect the symbolic meaning of citizenship in ways involving moralised notions of worth and value; citizenship is associated with values such as law-abidingness and self-sufficiency, the latter of which implies a kind of work ethic. But citizenship is associated with these values in an almost paradoxical way; where applicants for naturalisation have to prove their worth according to these values, native born citizens do not and cannot even lose their citizenship if they fail to live up to them. The symbolic implication of this differential treatment is that native born citizens actually have this kind of worth in a way that cannot be defeated or forfeited. So even if applicants fulfil these conditions, there is still a symbolically significant difference between them and native born citizens; naturalised citizens are subject to assessment, whereas native born citizens are not; the former have to prove their worth, the latter can never be proven unworthy – they have 'natural entitlement' (Shachar, 2009, p. 130).

The types of requirements furthest towards the active end of the scale are requirements of active citizenship, oaths of loyalty and tests for language proficiency, and knowledge of society. Whether active citizenship requirements, oaths and tests are as moralised as economic conditions and good conduct requirements depends on how precisely they are

specified, e.g. on the exact questions posed in tests. Often language tests will not involve considerations of value or worth, and knowledge tests only do so if they also involve ideological question about the values of the state or questions attempting to gauge the beliefs and values of applicants. But even if tests are usually not as moralised as economic conditions and requirements of good conduct, they are arguably even clearer cases of desert-based requirements since they test for characteristics about the applicants as individual persons.

These desert-based requirements associate citizenship with active participation, loyalty, identification with specific values such as democracy, and knowledge of these ideals, and their historical and cultural context and institutional implementation. The symbolic significance of making naturalisation conditional on tests or other kinds of displays of these associated ideals is that whereas native born citizens are represented as being naturally engaged, democratic, and knowledgeable, applicants for naturalisation are not and have to prove themselves in these respects. This differentiated view has the same paradoxical character as in the case of economic and good conduct requirements; even if they also have civic classes in school, native born citizens are usually not tested in these respects and do not face any penalties if they fail to live up to the civic ideals in question (as they often do).

My suggestion is that these differences express something about the sort of people applicants for naturalisation are, namely people of different value. Because this difference concerns the 'sortal status' of people (Waldron, 2007, p. 140), it is likely to remain salient even after applicants successfully pass the tests and are naturalised as citizens with the same rights as natives; even those applicants who do become naturalised are still the kind of people who cannot be assumed to be active, democratic, and knowledgeable in the way that native born citizens are presumed to be. Even though naturalised citizens deserve naturalisation, they are still different from native born citizens in being people who have to demonstrate their desert rather than having natural entitlement (cf. Ersbøll, 2010, pp. 145, 148–50). The difference might be thought of as analogous to that between 'natural' or 'old' aristocracy, who inherited their privileges and held them as a matter of course, as something they were naturally entitled to, and appointed or 'new' aristocracy, who were given their titles because of loyal service or wealth, and who were accordingly suspected of not being 'real' aristocracy and who therefore continually had to prove themselves. Even though the rights and privileges enjoyed by old and new aristocrats were the same (or insofar as they were) there still was a difference in the symbolic

meaning of their respective statuses. I suggest that something analogous may be implied for the symbolic meaning of citizenship if naturalisation becomes desert-based.

The issue about the different *meaning* of citizenship is different from that of different *degrees* of citizenship. As Elizabeth F. Cohen (2009) observes, there are many forms of 'semi-citizenship', which she characterises as being statuses with less than the full set of citizenship rights. The issue I am addressing is not about inequalities in the rights that different categories of people are assigned, for example, differences between children and adults, convicted felons and law-abiding citizens, or between residents or denizens and full citizens. Some of these inequalities are no doubt problematic and even unjust, whereas others might be inevitable, as Cohen argues. I am rather concerned with an inequality within the class of people with the full set of citizenship rights. So this is not the issue of degrees involved in semi-citizenship but an issue of the *different meanings* of citizenship among people with the *same rights*.

Problems with the desert paradigm of naturalisation

Given the interpretation of naturalisation tests as desert-based and my claim that they partly constitute the symbolic meaning of citizenship the question finally is what we should think about naturalisation tests and whether the implications in terms of symbolic meaning make them problematic? The answer to this evaluative question depends on which normative standards the assessment is premised on. In this section I list a number of potentially problematic aspects or consequences of the symbolic implications and briefly note the kind of normative values or principles that might be implicated. But since I am not making all things considered judgements here, I will not argue further for the relevance of these values or principles or make any claims about their relative weight.

One possible problem is directly due to the nature of desert-based naturalisation requirements. The requirement is that applicants have to demonstrate that they deserve citizenship; if one has the requisite abilities or knowledge, then one deserves citizenship. But since tests only assess behaviour on a specific occasion it can always be questioned whether applicants *really* deserve citizenship even if they have passed the tests. This opens up the possibility that the basis for granting citizenship can always be challenged and put into question even after citizenship has been bestowed. This is not just a theoretical possibility, as can be seen

from debates about stripping naturalised immigrants of their citizenship or residence status if they are found to have cheated, provided incorrect information to the authorities, or if they display a lack of loyalty to their new state by engaging in terrorist-related activities. In a political climate where immigration is politicised and securitised, this theoretical possibility is easily actualised. In that case, desert-based naturalisation requirements imply that the status of citizenship is not secure after all and that naturalised citizens risk losing their citizenship, the attendant rights, and especially the right not to be deported. One of the central features of citizenship is that one is a secure member of the state and political community. So if naturalised citizens do not have the same security in their citizenship as native citizens, citizenship through naturalisation is a second-class citizenship in this respect. This is a direct effect of making naturalisation desert-based.

Another set of problems concerns the consequences of differentiated symbolic meaning of citizenship for naturalised citizens. Insofar as naturalised citizens experience or perceive their citizenship as having a different symbolic meaning than that of native born citizens, this might have a number of consequences for them. The practice of citizenship, that is, the claiming of rights and participation in political life tied to citizenship, is an active effort engaged in by the individual citizen. Active participation and enjoyment of many rights, for example, the right to vote and run for office, is not secured merely by passively having a given legal status and rights. The citizen has to *do* something, to *take* advantage of rights, and to *enter* actively into civic roles and interactions. Such initiative and active engagement is likely to depend in part on the citizens' own understanding of the symbolic meaning of their citizenship, in addition to their understanding of what rights and opportunities they have.

The connection between symbolic meaning and civic acts may be direct or indirect. Directly, a naturalised citizen may simply think that she should not participate in the same way as native born citizens if she perceives her citizenship as having a different symbolic meaning than that of native born citizens. One might think that this is then her own choice for which she herself is responsible. But if the choice is a response to a difference in the symbolic meaning of citizenship between her and others for which there is an objective basis of the kind discussed in the previous section, the response is not unreasonable and may not be her responsibility alone. But even if naturalised citizens have some responsibility for how they choose to exercise their citizenship in response to its symbolic meaning, there might also be indirect

consequences of differentiated symbolic meaning, for which naturalised citizens are not responsible.

Citizenship is claimed by liberals to be important primarily as a way of granting rights to individuals. But some liberals have also followed John Rawls in noting that citizenship has a further significance as one of 'the social bases of self-respect', which in turn is thought of as 'perhaps the most important primary good' since self-respect is a precondition for pursuing one's conception of the good (Rawls, 1999, p. 386). Given such a view of the importance of self-respect, the question is what aspects of citizenship are most important as social bases of self-respect, and what the mechanism linking citizenship and self-respect is? Merely having rights is not in itself a sufficient basis of self-respect in itself, since the idea is precisely that rights are necessary but not sufficient for being able to pursue one's conception of the good; self-respect is thought to be a further necessary condition that is not automatically secured merely by having rights. The status of citizenship as something distinct from the having of rights is a better candidate insofar as the status expresses something about the standing, value, or dignity of the person having rights that might be a basis for that person's self-respect. My suggestion then is that the mechanism by which the status of citizenship might perform this function is the symbolic meaning of citizenship. The problem then is that if citizenship has different symbolic meanings for native born and naturalised citizens, then citizenship might not function, or function as well, as a social basis of self-respect for naturalised citizens as it may do for native born citizens. So if one accepts something like a Rawlsian idea of the social basis of self-respect, differential symbolic meanings of citizenship might be problematic in an indirect way that is not the responsibility of the individual citizen. The resultant inequality in how citizenship can function as a social basis of self-respect is furthermore likely to have effects not only for citizens' ability to practice citizenship but for their ability to pursue their conception of the good more broadly.

If citizenship has different symbolic meaning for naturalised and native born citizens, this may not just affect how naturalised citizens themselves respond to and experience their citizenship, but also how native born citizens respond to and treat them. If naturalised citizens are still viewed with suspicion as to whether they really deserve their new status, or are thought of as people who are not naturally entitled to their new status, this might lead to various forms of discrimination, devaluation, or misrecognition of them as citizens. Such negative differential treatment is likely to be informal and indirect, since naturalised

citizens formally have the same status and rights as other citizens. But even if one's legal rights are respected, it is arguably still problematic if one is not accorded the same recognition in interpersonal interactions.

Even if different symbolic meanings of citizenship for native and naturalised citizens do not have any of these tangible consequences, they might generate a version of the problem of legitimacy. This is so if one understands an aspect of legitimacy to involve the exercise of political power 'in the name of' citizens (e.g., Nagel, 2005). Legitimacy is then not (only) a 'hard' matter of actually being granted rights or having access to the political decision procedures of the state, but (also) a 'soft' matter of how the state's exercise of power is understood by those exercising it and those subjected to it. If those exercising power do so in the name of citizens, but not all citizens are equal in the 'soft' symbolic dimension, then this aspect of legitimacy becomes problematic. Roughly, if legislators or state officials exercise their authority in the name of native born citizens more than in the name of all citizens equally, because they think that natives are more 'genuine' or 'natural' citizens with a greater degree of ownership over the state than naturalised citizens, then naturalised citizens might actually have a complaint in terms of legitimacy. And even if legislators or officials do not differentiate in this way, a problem about the perception of legitimacy and hence of stability might arise if naturalised citizens think that political power is not exercised in their name.

Finally, one might think of citizenship as having many normative functions. In addition to liberal and civic republican views of citizenship, there are nationalist views linking citizenship to cultural or ethnic nationality and bureaucratic views regarding citizenship merely as a tool of administrative efficiency. But citizenship may also be understood as a way of securing a form of social unity in a state – perhaps the only form of social unity one can realistically hope for in pluralistic states where people disagree over political ideals and do not share a common ethnic or cultural background. This is one way to understand the earlier noted identity aspect of citizenship; citizenship is thought to have functions other than and in addition to those captured by the rights dimension and by ideals of civic participation, but the identity secured by citizenship need not be a nationalist one. The question then is what the social or civic unity constituted by citizenship consists in? A good suggestion here is that whatever degree of unity common citizenship might be thought to secure consists in the symbolic meaning of citizenship; it is the public expression of 'the idea of a single status community' (Waldron, 2007, p. 129) that is supposed to

unite citizens rather than the fact that they have specific legal rights. But if citizenship is to constitute or provide the basis for such a civic unity in pluralistic states, then different symbolic meanings of citizenship for native and naturalised citizens might undermine this goal. If the rules for naturalisation partly constitute the symbolic meaning of citizenship in a way that implies that citizenship means something different for native born and naturalised citizens, then the symbolic meaning of citizenship is dividing rather than uniting native born and naturalised citizens.

It might be objected to these arguments that the kinds of naturalisation tests and requirements I have been discussing are not really intended as mechanisms to ensure that naturalised citizens really deserve their citizenship. An alternative interpretation might be that the aim of tests is to ensure that naturalised citizens will be able to use their newly acquired political rights in an informed and responsible way, with due concern for other citizens. Only with the required language skills and knowledge of society can the new citizens follow political discussions, understand political dynamics and structures of opportunity, and enjoy the fair value of their rights. In response, note first that my interpretation of naturalisation requirements as expressions of a desert paradigm is not primarily about the actual intentions motivating such policies. My claim has been that such requirements affect the symbolic meaning of citizenship, whether this is intended or not. So even if the requirements are not motivated by concerns about desert (which, however, they at least sometimes clearly are), they may reasonably be understood by citizens as such, and this is sufficient to establish my point. Furthermore, I have only claimed that this effect on the symbolic meaning of citizenship is one reason to find naturalisation requirements problematic, not that they are wrong all things considered. So I have not ruled out the relevance of concerns such as those involved in the alternative interpretation to the justifiability of naturalisation requirements. But even if such concerns are legitimate, my point has merely been that the attempt to implement them might have unintended side effects on the symbolic meaning of citizenship. I have not gone into the further question about which of these concerns is the most important. But even if the symbolic meaning of citizenship is not the most important concern, the problematic effects I have drawn attention to at least provide a reason to try as best as possible to implement the other concerns in a way that is least likely to have the problematic effects on the symbolic meaning of citizenship.

Conclusion

In this chapter I have described currently fashionable naturalisation requirements as expressions of what I have called the desert paradigm of naturalisation. I have then argued that naturalisation rules partly constitute the symbolic meaning of citizenship and that desert-based requirements do so in more substantial ways than entitlement-based conditions. I have finally discussed a number of reasons why the implied differential meanings of citizenship for native born and naturalised citizens might be problematic.

If there is something problematic about desert-based naturalisation requirements because they publicly symbolise that citizenship 'belongs' to those born into it, whereas others have to earn their citizenship, what does this imply normatively? As noted in the beginning, this consideration is not likely to be the only, nor necessarily even the most weighty, relevant normative factor in assessments of which naturalisation requirements are morally permissible. But if there are problems of the kind I have described and this was the only relevant consideration, what would it imply with respect to which kinds of naturalisation requirements would be permissible?

The problem with different meanings of citizenship is especially salient for desert-based naturalisation requirements, but it need not count against what I have called entitlement based requirements. So my suggestion is that whereas naturalisation tests may be problematic in terms of the symbolic message they send about whether naturalised immigrants are 'real' or 'full' citizens, residence requirements and other more objective conditions need not be. So even if one accepts my argument, one is not thereby committed to dropping all restrictions on naturalisation.

This distinguishes my criticism of naturalisation requirements from the more standard criticisms noted in the beginning. From the perspective of standard liberal or democratic criticisms of restrictions on naturalisation, the problem with all restrictions is the same, namely that they exclude people residing in a state and who are thus subject to the political power of the state from enjoying full rights and participating in the determination of the exercise of political power. The nature of the mechanisms of exclusion is less relevant from such perspectives; what matters is the exclusion, not the stories the state tells to legitimise it. Furthermore, the only relevant thing about naturalisation tests from such perspectives is how hard they are to pass, since this determines the degree to which they contribute to exclusion from citizenship

(Carens, 2008, p. 24). My suggestion is that this picture changes once one includes the perspective of those actually naturalised. From this internal and post hoc vantage point, different mechanisms of exclusion no longer look the same and the scales on which they are assessed change. Now, what matters is (also) the symbolic message of the types of requirements and what they signify about the meaning of the status of citizenship that naturalised immigrants now formally share with native born citizens. Even if citizenship is one status with uniform rights for all, this public meaning might still differentiate between citizens and send the message that citizenship is the natural property of some, which they do not have to do anything to deserve, whereas it is only granted conditionally to others if they have been able to actually prove themselves worthy of it. From this perspective naturalisation tests may have long-lasting implications for public perceptions even if they were not in fact significant contributors to exclusion.

Note

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Bibliography

Abizadeh, A. (2008) 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders', *Political Theory*, 36(1), 37–65.

Bauböck, R., E. Ersbøll, K. Groenendijk, and H. Waldrauch (2006) 'Introduction' in R. Bauböck, E. Ersbøll, K. Groenendijk, and H. Waldrauch (eds.) *Acquisition and Loss of Nationality. Policies and Trends in 15 European States. Volume I: Comparative Analyses* (Amsterdam: Amsterdam University Press), 15–34.

Blake, M. (2001) 'Distributive Justice, State Coercion, and Autonomy', *Philosophy and Public Affairs*, 30, 257–96.

Bosniak, L. (2006) *The Citizens and the Alien* (Princeton: Princeton University Press).

Carens, J. H. (2008) 'Immigration, Democracy, and Citizenship' in S. Ozcurumez and O. Schmidtke (eds.) *Of States, Rights, and Social Closure: Governing Migration and Citizenship* (New York: Palgrave Macmillan), 17–36.

Carens, J. H. (2009) 'Fear versus Fairness: Migration, Citizenship and the Transformation of Political Community' in N. Holtug, K. Lippert-Rasmussen, and S. Lægaard (eds.) *Nationalism and Multiculturalism in a World of Immigration* (Basingstoke: Palgrave), 151–73.

Cohen, E. F. (2009) *Semi-Citizenship in Democratic Politics* (Cambridge: Cambridge University Press).

De Groot, G-R., J-J. Kuipers, and F. Weber (2009) 'Passing Citizenship Tests as a Requirement for Naturalisation: A Comparative Perspective' in E. Guild, K. Groenedijk, and S. Carrera (eds.) *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Farnham: Ashgate), 51–77.

De Hart, B. and R. van Oers (2006) 'European Trends in Nationality Law' in R. Bauböck, E. Ersbøll, K. Groenendijk, and H. Waldrauch (eds.) *Acquisition and Loss of Nationality. Policies and Trends in 15 European States. Volume I: Comparative Analyses* (Amsterdam: Amsterdam University Press), 317–57.

Ersbøll, E. (2010) 'On Trial in Denmark' in R. van Oers, E. Ersbøll, and D. Kostakopoulou (eds.) *A Re-definition of Belonging? Language and Integration Tests in Europe* (Leiden: Martinus Nijhoff Publishers), 107–52.

Home Office (2002) *Secure Borders – Safe Haven: Integration with Diversity in Modern Britain*, white paper, http://www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.pdf, accessed on 17 March 2010.

Joppke, C. (2010) *Citizenship and Immigration* (Cambridge: Polity Press).

Joppke, C. and E. Morawska (2003) 'Integrating Immigrants in Liberal Nation-States: Policies and Practices' in C. Joppke and E. Morawska (eds.) *Toward Assimilation and Citizenship: Immigration in Liberal Nation-States* (Basingstoke: Palgrave Macmillan), 1–36.

Kostakopoulou, D. (2008) *The Future Governance of Citizenship* (Cambridge: Cambridge University Press).

Nagel, T. (2005) 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33, 113–47.

Rawls, J. (1999) *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press).

Schuck, P. (1998) *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (Boulder: Westview).

Seglow, J. (2009) 'Arguments for Naturalisation', *Political Studies*, 57, 788–804.

Song, S. (2009) 'Democracy and Noncitizen Voting Rights', *Citizenship Studies*, 13(6), 607–20.

Shachar, A. (2009) *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press).

Van Oers, R. (2009) 'Justifying Citizenship Tests in the Netherlands and the UK', in E. Guild, K. Groenedijk, and S. Carrera (eds.) *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Farnham: Ashgate), 113–30.

Van Oers, R., E. Ersbøll, and D. Kostakopoulou (eds.) (2010) *A Re-definition of Belonging? Language and Integration Tests in Europe* (Leiden: Martinus Nijhoff Publishers).

Waldron, J. (2007) 'Status versus Equality: The Accommodation of Difference' in Omid A. Payrow Shabani (ed) *Multiculturalism and Law: A Critical Debate* (University of Wales Press), 129–55.

Wright, S. (ed) (2008) *Citizenship Tests in a Post-National Era*, special issue of *International Journal on Multicultural Societies*, Vol. 10(1).

4

‘Democratic Agents’ and ‘Agents of Democracy’ in Multilayered Governance

Eva Erman

Introduction

In an era of intensified globalisation the changing role of the nation state in the global political and economic order has become an ever more salient concern. The changing role of the state’s responsibilities and capabilities is often subsumed under the terms ‘multilevel’ or ‘multilayered’ governance, which alludes not only to the inclusion of public authorities at several territorial and institutional levels but also to the increased formal and informal influence and participation of non-state and private actors in public regulations. These developments have fuelled debates about the role of regional, international and global institutions, both as formal organisations that establish and enforce rules and as shared sets of norms and expectations that shape interaction between political and economic actors. They have has also fuelled debates about the subjects who are supposed to be the political actors in these institutional structures.

Among political theorists, these two concerns have mainly been approached from the perspective of democratic theory, with focus on solving the problem of the democratic deficit of regional and global governance structures. However, while the institutional suggestions have been numerous and often mutually incompatible, the varied justifications offered on their behalf underscore that the ideal of democracy, that is, ‘the rule by the people’, is much contested and still undertheorised. How is the ideal of democracy to be understood under globalised circumstances? Moreover, while the role of citizens in multilayered governance has been studied empirically, citizenship in terms of democratic agency is undertheorised too. This is not at all strange, since the two questions hang together. In order to draw conclusions

about democratic agency we need to specify the conditions required in order for an arrangement to qualify as minimally democratic. In light of the concern that too little attention has been devoted to the question of the normative roles of political agents or subjects in multilayered governance, this chapter addresses the question of the basic conditions of democracy in order to be able to theorise both democratic agency specifically, and other forms of political agency generally. With focus on political agency in multilayered governance, the aim is to contribute a conceptual and normative framework for assessing the different roles that political subjects – acting as citizens, or representing non-state organisations, private interests, corporations, and so on – can and ought to play in these governance structures. Without such a framework, it seems difficult to evaluate the democratic and other legitimacy-endowing qualities of either political decision-making on multiple territorial levels or the transnational participation by different kinds of state and non-state actors.

The purpose of this conceptual and normative framework is not to develop a specific normative theory of multilevel governance but to point at important distinctions to be made and normative criteria to be specified, which are intended to taking the debate forward by noting some of the issues that any satisfactory account must address. This is done in two ways. First, I point at some problems involved in contemporary theories of transnational and global democracy pertaining to political agency, primarily those theories that emphasise the role of civil society and non-state actors for increased democracy. Second, I elaborate the multiple roles that citizens can play as normative agents in a multilayered governance.

The chapter is structured as follows. In the first section, I specify the different aims that democracy might have and distinguish democracy as an ideal from democracy as a decision method. Further, to specify in more detail the contents of the ideal of democracy, namely, 'the rule by the people', I discuss two conditions that I argue must be fulfilled in order for an arrangement to qualify as minimally democratic, namely, political equality and political bindingness. Doing so allows us to identify what constitutes the basic elements of democratic agency, namely, the specific democratic qualities of those included in such arrangements. Within this conceptual and normative framework, the second section takes a critical look at some influential contemporary theories with regard to political agency, all of which share a broadly civil society or stakeholder view of transnational democracy. Thirdly, the chapter concludes with some general suggestions for how

to conceive of political subjects as playing a multifaceted package of normative roles in making regional and global governance structures more legitimate.

The aims and basic conditions of democracy

A basic assumption running throughout this chapter is that we need to draw attention to the difference between *aims* of democracy, *necessary conditions* for democracy, and *aspects* of democracy, in order to properly theorise citizenship as a democratic agency in a transnational context; a difference which is to a large extent conflated in the debate. While this section focuses on aims and necessary conditions, the subsequent sections deal with how they differ from aspects of democracy.

Democracy can be valuable for a variety of reasons. Why it becomes particularly important to distinguish between different aims of democracy when analysing democratic agency is that we might value democracy as a method of decision-making without involving democratic agents. Consider, for example, a group of experts or an executive of a company that wished to decide on an issue in a fair way. Neither of them would claim to participate in this process as democratically accountable representatives of a constituency outside of these groups. Hence, when discussing the aims of democracy it is useful to distinguish democracy as a decision method from democracy as a normative ideal. When we intend to contribute to a normative democratic theory, we usually have the latter in mind. From this point of view, democratic arrangements are *intrinsically* justified (in the sense of being 'valuable for their own sake' rather than 'for the sake of something else') to the extent that they embody 'the rule by the people', which essentially means that they secure equal shares of political influence over the decision-making.[1] But we might also value democratic arrangements for instrumental reasons. Most importantly, in my view, they are *instrumentally* justified to the extent that they secure several of our (other) best interests, one of which is our interest in non-domination, or to the extent that they secure the just distribution of other goods.

Of course, concerning the last two aims, non-domination and distributive justice might in principle be realised without democracy – for instance, human rights may provide important safeguards against several forms of domination, and constrain the distribution of benefits somehow. However, there are empirical grounds for claiming that democratic institutions are good practical devices to secure non-domination

and distributing other goods, since democratic institutions can be trusted to more likely remain responsive to the equal best interests of all citizens compared to alternative decision-making institutions (Sen and Dréze, 1990; Shapiro, 2003; Erman and Follesdal, 2012).

We will return to the distinction between democracy as ideal and decision method in the last section when discussing the different roles that citizens might play as political agents in global governance. But first let us take a closer look at democracy as an ideal, in order to investigate the core elements of democratic agency. The idea of equal decision-making power says, roughly, that at least all persons who are relevantly or significantly affected by a political decision or law (or whose interests are affected) should have an equal influence over the decision-making and in the shaping of the common institutions. If we unpack this idea, it seems to accommodate two conditions of fundamental importance. The first uncontested condition is *political equality* (Dahl, 1989, 2006; Christiano, 1996, 2008). What distinguishes democracy from other forms of government, such a dictatorship, monarchy, or aristocracy, is that it embodies some form of political equality. While equality plays an important role in democracy in several respects (e.g., in terms of equal respect or equal concern for everyone's interest), what is of concern here is a specific conception of equality, according to which anyone who is affected by a political decision (or law), has an equal right to participate (directly or indirectly) in decision-making about it (Christiano, 1996).

But apart from this 'deontological' dimension of being given an equal *opportunity* to participation in the decision-making procedure through equal rights, equal influence also involves a 'teleological' dimension, in that people rule over themselves and shape their institutions if they, at least a sufficient number of them, act politically by 'exercising' their political equality.[2] In other words, democracy requires some sort of *democratic practice* (through informal and/or formal processes, depending on which conception of democracy is favoured). I call this condition *political bindingness*. More specifically, in order for people to rule over themselves through a political authority, thereby making themselves authors of the laws, they have to *bind* themselves as equals to this authority, which requires certain forms of political action. Under modern conditions this *authorisation* is usually made by taking part (directly or indirectly) in the decision-making or at a minimum accepting the constitutionalised procedures as valid, without which the right to participate would not have any binding force.[3] Built into this condition is also a requirement of 'positive responsiveness', presuming

that the more people supporting a proposition, the more likely it is to become law (Goodin and List, 2006).

Since this condition is much less straightforward in comparison to the political equality condition, and much less discussed for that matter, some further qualifications are in order. It should not be interpreted in terms of individual obligations – either as an individual obligation in the Kantian sense, or as a collective obligation in the Rousseauian sense – such that an orientation towards the common good is made into a legal duty. Nonetheless, I argue, such an orientation seems necessary to a certain degree. As stressed by Jürgen Habermas, the 'democratic legislation draws its legitimating force solely from a process in which citizens reach an understanding about the regulation of their common life' (Habermas, 1996, p. 1482).

Thus, it seems that equal influence is dependent on both conditions and that political equality cannot stand alone. Consider a political system within which every member had the right to participate in the decision-making but no one ever did. It would be counterintuitive to call such a system democratic. The reason we rarely give this a thought is perhaps that it is always presupposed as an empirical fact that enough people do. In fact, even if we presumed for the sake of argument that everyone had the substantial opportunity to participate, not merely the formal right to do so, without *political action* there could be no democratic decision-making and hence no democratic legitimacy. A moment of bindingness is thus not merely to do with possible agency but with actual agency in terms of a democratic practice in which political equality is exercised. In my view, one of the reasons why 'equal political *influence'* more appropriately captures 'the rule by the people' than the more popular expression 'equal political *power'*, is that 'influence' is an adjective and a verb at the same time, expressing equal political status (political equality) and the properties that are tied to it (such as a set of basic rights) as well as an action-oriented aspect, since you in fact 'shape something' (e.g., institutions), 'accept something' or 'bind yourself to something' (e.g., authorities, laws, decisions) when you influence it (political bindingness). We will have reason to return to this.

Now, this ideal theoretical framework offers some guidance regarding the basic elements of democratic agency. Notably, democratic law- and decision-making draws its legitimating force, not only from *equal* agency but also from *actual* agency, in that democratic legitimacy is premised on a sufficient number of people *exercising* their political rights and liberties.[4]

Problems of democratic agency in theories of transnational democracy

Several attempts have been made to theorise the asymmetrical relationship between rule-makers and rule-takers in a globalised world from a democratic point of view. While cosmopolitan democracy has often been considered innovative in this regard, it has in recent years been under attack from different quarters, accused of wishing to keep too many 'Westphalian features' in the translation from nation state to global democracy. Even if cosmopolitan democrats attempt to rethink sovereignty in functional rather than territorial terms, the argument goes, they still emphasise electoral representation and focus on the juridicalisation of international organisations (IOs) through some idea of an overarching cosmopolitan law (Held, 2002, p. 32; Archibugi, 2000, 2002). Being sceptical of the import of these 'traditional' features into global politics, an increasing number of democratic theorists instead stress the role of civil society for enhanced democracy in transnational and global decision-making, for example, via the involvement of NGOs, which are said to represent (in a non-electoral way) or speak for marginalised groups through 'voice' rather than vote (Steffek and Nanz, 2008; Scholte, 2005; Keck, 2004; Peruzzotti, 2006; Charnovitz, 2006; van Rooy, 2004).

As noted by Jan Aart Scholte, while under traditional international law, non-state actors did not have any particular legal status and their participation in IOs was at best informal, this is now slowly changing. In recent years, partly as a response to the criticism of the democratic deficits in global governance, there has been a strong tendency toward increased participation of non-state actors in global governance, and most IOs have opened up formal and informal avenues for political participation. In Scholte's view, civil society activism offers significant possibilities to come to terms with the major democratic deficit of IOs in an era when the conventional state formula of democratic legitimacy is not sufficient for expanding global governance arrangements. In fact, this is already happening, according to Scholte. Most notably, civil society actors have increased and continue to increase the democratic accountability of IOs by promoting transparency of global governance operations; by monitoring global policies and policymaking; and by pushing for the creation of formal accountability mechanisms to monitor and control the agencies concerned (Scholte, 2005, pp. 93–8).

In a similar vein, Terry Macdonald argues that we have to abandon the traditional idea that democracy must take place within a 'closed'

society if we aim to globalise democracy beyond the nation state. Under non-ideal conditions, it is suggested instead that a liberal democratic world order ought to be composed of multiple agents of public power held to account by their multiple overlapping stakeholder communities. Even though NGOs are the kind of agent generally discussed by Macdonald, it is claimed that the model is applicable to other agents too, such as IOs and transnational corporations (Macdonald, 2008; Macdonald and Macdonald, 2010).

On this view, stakeholders are theorised as democratic agents. In brief, those who have a relevant interest or 'stake' in a decision are those who are subject to problematic impacts on their autonomous capacities. With stakeholders as basic building blocks, Macdonald outlines a multi-stakeholder model that in her view has the potential of being applied within a global polity without a need for either formal electoral mechanisms or the establishment of state-like structures of global public power (Macdonald, 2008, p. 192). Committed to the deliberative approach to democracy, the representatives of multiple stakeholder constituencies are required to deliberate among themselves and reach consensus on a final decision, according to Macdonald. This deliberative decision procedure is underpinned by a 'dualist' conception of equality. In the first instance, stakeholders should be accorded equal opportunities to identify the interests that are supposed to be represented in a deliberative decision process. Secondly, since these stakeholder interests are not aggregated to reach a decision, as is the case in traditional nation state models, but rather are advanced by stakeholder representatives, they must be accorded equal consideration by these representatives in the deliberative process (2008, p. 143).

Through an in-depth analysis of the normative function of elections in traditional models of democracy, Macdonald infers that the main reason why elections have been so attractive is that they can 'provide stakeholders with a degree of political control over their public political representatives' and as such function as a mechanism for delivering legitimate representative agency (2008, p. 170). Nevertheless, she argues, they are not the only effective mechanisms for delivering such control. It is possible to provide alternative non-electoral mechanisms that are able to fulfil *equivalent normative functions*. In Macdonald's view, the two mechanisms through which elections deliver political control to stakeholders are *authorisation* and *accountability* (2008, p. 171). Authorisation on this account requires two distinct elements: mechanisms of *delegation*, for specifying the public political tasks that the representatives are entitled to perform; and mechanisms of

empowerment, for according them the appropriate capacity to do so effectively (2008, p. 180–85). Accountability also requires two elements: mechanisms of *transparency*, for transparently delineating public political roles; and mechanisms of *disempowerment*, for imposing sanctions that annul certain political resources that enable an actor to perform public political functions (2008, p. 185–90). Finally, concerning the relationship between mechanisms of authorisation and accountability, they are mutually *complementary*, according to Macdonald, since each can 'operate effectively without the other, conferring democratic legitimacy on public political agents' (2008, p. 191).[5]

Another prominent democratic theorist who embraces a similar civil society or stakeholder view is John Dryzek, who stresses the fact that since authority is increasingly escaping the boundaries of a well-bounded demos, we should steer away from the traditional idea of representation defined as the substantive acting for physical others, towards so-called discursive representation, that is, the substantive acting for others' arguments via the representation of relevant discourses (Dryzek and Niemeyer, 2008, p. 481).

From this discursive standpoint, Dryzek has recently proposed three ways of thinking about deliberative democracy and democratic agency in global politics: in terms of a soup, a society, or a system. In his view, there are certain deliberative practices that could contribute more democracy on the global level. Apart from representation from NGOs within communities of stakeholders, theorised by Macdonald, Dryzek stresses the importance of practices such as transnational social movement activism, self-appointed unelected popular representation, and deliberation within international negotiations such as the G20 or the World Economic Forum (Dryzek, 2011, p. 216).

According to the soup 'model', these practices are ingredients of a 'democratic soup' insofar as they are of the right proportion to strengthen democratic norms such as authorisation, accountability, deliberation, and participation. Further, the society 'model' shows democratic promise on the global level since it involves norms that regulate the interactions and activities of relevant members, for example, the global spread of democratic norms of authorisation, accountability, deliberation, and participation through communicative action. On the society model, international politics is to a large extent a struggle between discourses, and what Dryzek calls 'discursive democracy' is said to increase to the degree that multiple discourses compete for attention and are subject to critical, inclusive, and competent control in transnational public spheres, exercised by actors such as stakeholders,

NGOs, social movements, and national governments. The system 'model', finally, is conceptualised in terms of a *public space*, in which free communicative action occurs (not necessarily tied to the exercise of political authority), and an *empowered space*, in which authoritative collective outcomes are generated (even without clear moments of binding decision). Accountability on this view is understood in terms of the empowered space being *answerable to* the deliberative public space (Dryzek, 2011, pp. 225–6).

The central question for our purposes is what makes these civil society or stakeholder models democratic and, accordingly, what makes those involved democratic agents. Let us first return to the stakeholders of Macdonald's model. In my view, it is difficult to see how this model is able to satisfy either political equality or political bindingness. With regard to political equality, nowhere do these institutional structures secure for stakeholders the equal opportunity to participate in egalitarian decision-making. Recall that this deliberative model lodges a dualist conception of equality, according to which stakeholders have *equal opportunities* to identify the interests that are supposed to be represented by relevant NGOs in the deliberative decision process (for the sake of simplicity, let us call this 'the equal opportunities condition'), on the one hand, and stakeholder representatives are then required to accord *equal consideration* to these interests in this process (henceforth 'the equal consideration condition'), on the other. The problem from the standpoint of democracy is that the authorisation of an authority or a political agent is not primarily about the equal possibility of identifying the interest that one wishes to have represented (equal opportunities condition). More importantly, it is to have the equal possibility of approving of this authority by participating in egalitarian decision-making, thereby accepting its political decisions and laws as binding.

For sure, the equal consideration condition is not able to satisfy this condition either. While the equal opportunities condition concerns stakeholders' possibility of defining interests to be represented, the equal consideration condition does not involve stakeholders at all, but the equal consideration of *their interests* by NGO representatives, that is, that decisions are made through procedures that they have 'equally good reasons to accept' (Macdonald, 2008, 150). This means that the equal consideration condition is solely tied to some kind of *hypothetical* consent and as such does not necessitate any political action whatsoever. So, while both the equal opportunities condition and the equal consideration condition might play important normative roles in a democratic theory, *they do not connect conceptually and normatively to*

authorisation and cannot therefore replace political equality as specified by the present conceptual framework.

Furthermore, if we take a look at the non-electoral mechanisms of authorisation, in order for *empowerment* to constitute part of the process of authorisation from a democratic point of view, it is the stakeholders who are supposed to empower the NGOs, not other actors. Although Macdonald admits that the connection between the stakeholders and the actors involved with NGOs 'is not so straightforward', it is difficult to see how political equality and bindingness could be fulfilled in this process of empowerment *even if* there was some kind of 'indirect mandate' involved of the kind Macdonald has in mind (2008, p. 207). Similarly, even if mechanisms of *delegation* through general codes of conduct had been developed by involved stakeholders (and thus constituted 'fully democratic mandates', in Macdonald's words) rather than by UN agencies, states, and NGOs, which is presently the case, what makes them part of an authorisation lending NGOs democratic legitimacy? Again, for this *act* of authorisation to be democratic, these stakeholders must not only be involved in developing such codes of conduct but must have an equal opportunity to participate in the decision-making about them as well as actual influence. Thus, against Macdonald, who argues that these non-electoral mechanisms can serve the same normative purpose as elections by way of providing stakeholders with a degree of political control over their public political representatives, I doubt that this is a political control *of the right kind*, since it has very little to do with democratic self-determination.[6]

We confront the same problems with the suggested mechanisms of accountability. Like empowerment, *disempowerment* from a democratic point of view does not primarily mean the removal of resources that enable representatives to act politically, as suggested by Macdonald. It means to remove them entirely from that particular political position. What is more, this political act cannot be done by anyone; rather, it comes about through a decision-making process in which stakeholders have the equal opportunity to force the representatives to leave office and replace them in a common act of bindingness. And *transparency* faces similar problems as delegation, since it is supposed to be established 'democratically' by codes of conduct that codify NGO responsibilities within some international charter.

Similar problems arise for Dryzek. First, concerning the idea that discourses rather than individuals should be represented in global governance, it is far from clear how the inclusion of every possible argument makes the political decisions binding to democratic subjects. The

moment of factual (not hypothetical) political action, through which a constituency approve of a political authority, is missing. While an important *epistemic* dimension is expressed by the inclusion of marginalised voices and of all possible arguments, such a dimension cannot alone fill the gap between the citizenry and the political authority in order to generate *democratic* legitimacy. When we say that democracy is 'government for the people', we mean that it exists for the sake of the people and rules in the interest of the governed. But this is only half the story about democracy. Also a compassionate dictator could rule with the interest or 'voices' of the governed at heart. Making democracy into a matter of satisfying people's interests or representing their arguments and voices will not suffice to capture the 'by' in 'the rule by the people' (Erman, 2010, 2011; Rostboll, 2008, pp. 45–77). This 'by' cannot be conceptualised without political equality and political bindingness, which turn people into democratic agents and thus into democratic rule-makers.

Moreover, the three 'models' of democracy proposed by Dryzek all seem to rely on the presumption that a few ingredients – consisting of deliberative practices such as representation from NGOs within transnational communities of stakeholders, deliberation within international negotiations, or self-appointed unelected popular representation – lead to increased democracy insofar as they strengthen the democratic norms of authorisation, accountability, participation, and deliberation. Certainly, Dryzek acknowledges that none of these deliberative practices offers in itself the key to global democracy and that they only strengthen these norms under certain circumstances. Moreover, many of the practices are hard to judge in isolation, because whether their effects are good or bad for democracy depend on other external factors (Dryzek, 2011, p. 216). Nevertheless, none of the models take into account the conceptual and normative relationship between those very democratic norms as well as between the empowered space and the public space.

The basic point made here is this: while it is uncontroversial to claim that mechanisms such as authorisation, accountability, deliberation, participation, and transparency are important *aspects* of democracy, these mechanisms must be understood as part of a *conceptual and normative package* in order to minimally satisfy the conditions of political equality and political bindingness. In other words, we cannot draw any conclusions about increased democracy through increased accountability independent of authorisation, because they hang together and involve the same subjects (Erman, 2010; see also Follesdal, 2011). There are of

course numerous ways for authorities and agents to be accountable in politics, but increased accountability without any authorisation would not be *democratic* accountability (Erman, 2005, 2006; see also Grant and Keohane, 2005; Buchanan and Keohane, 2006).

This relationship of interdependence cannot be captured by the civil society view of democracy. According to Macdonald's model, accountability and authorisation are wrongly claimed to be equipped to do the normative work of conferring democratic legitimacy effectively *independently* of each other (Erman, 2008, 2010). Likewise, while Dryzek stresses 'the need to trace connections' from the deliberative public to the empowered space, it is far from clear what kind of connection would count as sufficient for increased democracy (Dryzek, 2011, p. 232). First of all, only when the actors involved have equal influence are they able to authorise the empowered space, which is precisely what *in turn* makes this space accountable. Secondly, to increase democracy, deliberation and participation in the public space would have to have an impact on the very decision-making in the empowered space. For how could we otherwise reasonably demand of the empowered space to be accountable to the deliberative public space, as Dryzek seems to presume?

Citizens as political agents in multilayered governance

So far the chapter has drawn attention to the distinction between *aims* of democracy, *aspects* of democracy (e.g., accountability, authorisation, deliberation, and transparency), and *necessary conditions* for a system to qualify as minimally democratic, which I think is crucial for appropriately theorising citizenship as political and democratic agency in a transnational context. In this section, I conclude by illustrating the manifold roles that citizens as political agents can play in multilayered governance to make it more legitimate, and how these roles connect to applicable conceptions of legitimacy in relation to the three different aims of democracy discussed in the previous section.

Drawing on the distinction between democracy as a normative ideal and as decision method, recall that I identified three important aims of democracy. From this triple-headed outlook, democratic institutions are seen as devices for fulfilling several tasks in tandem: to provide democratic self-determination by securing equal influence over decision-making, to secure several of our (other) best interests, one of which is our interest in non-domination, and to promote distributive justice among citizens. Such an approach has several advantages. To begin

with, it opens the door for a flexible division of labour between different normative ideals, such as that of democracy *and* justice, thereby resisting the trend in political philosophy to elaborate one of them and uphold an unwarranted dividing line between the debate on global democracy and on global justice.

Second, it opens for a broader set of institutional arrangements. On this view, for instance, the best arrangement concerning certain issues might be majority rule in smaller democratic units – into which others do not have 'democratic' rights to intervene – whereas other issues might require democratic decision-making over a larger domain, for example, in the European parliament or even in a future revised UN setting. Discussions of 'subsidiarity' address precisely some of the difficult issues of deciding which issues should be decided by whom. In yet other contexts, certain decisions might in principle best occur without much in the way of democratic input – arguably certain central bank decisions about interest rates, et cetera (Erman and Follesdal, 2012).

Thirdly, it opens for a distinction between 'democratic agent' and 'agent of democracy' (and 'agent of justice'), which is crucial in light of the conceptual and normative framework defended here. This distinction is useful for theorising political agency in multilayered governance since it helps us avoid the misconceptions of democratic agency made by some contemporary theories of transnational democracy, such as those discussed in the previous section. Depending on context, citizens would have different rights and duties and thus be ascribed different legal statuses as agents of a democratic community, such as the nation state or to some extent the EU, compared to when acting on behalf of an NGO. In the role of the latter, they are not appropriately conceptualised as democratic agents with equal influence over the decision-making, which we have seen is commonly done, but, at best, as agents of democracy (unless, of course, this civil society activity takes place in a public space that is institutionally connected to an empowered space within an arrangement that fulfils political equality and political bindingness.

As agents of democracy, transnational non-state actors might push global governance institutions towards increased transparency or accountability or some other democratic value and as such improve the prerequisites for democracy beyond the nation-state. But democracy does not have to be their only normatively desirable objective. They may also plead to some ideal of justice and carry out the important tasks of detecting and revealing human rights violations, pressuring states to ratify human rights treaties, and so on, thus acting as agents of justice.

Finally, this manifold way of understanding political agency paves the way for distinguishing between different conceptions of legitimacy, which are often mistakenly used interchangeably in the debate. Admittedly, the concept of legitimacy is as widely used in the debate on democracy and justice in a transnational context as it is vague. Basically, to say that a political institution has legitimate authority is to say that the rules of the institution and its subjects have a certain kind of normative relationship. In political philosophy, the concept of legitimacy is commonly used to describe the normative aspects of this relationship. It refers to a rightful authority or a rightful powerholder. There have been many candidates for how to best ground rightful authority, for example in associative obligations (Dworkin), in reasonable consensus (Rawls), or in tacit consent (Locke). However, when concerned with democracy as an ideal, what is of interest is one kind of legitimacy, namely democratic legitimacy.

On the proposed account, the conditions of political equality and political bindingness must be fulfilled in order for an institution to generate *democratic legitimacy*. As I have argued elsewhere, it is important to distinguish democratic legitimacy from other relevant and useful conceptions of legitimacy in global governance, for example, drawing from theories of justice. However, as we have seen, we might value democracy for instrumental reasons too. Concerning the two instrumentally justified aims of democracy discussed here, it is argued that institutions generate legitimacy in their own right to the extent that they protect our interest in non-domination as well as secure the just distribution of other goods. However, here we are dealing with a notion of legitimacy that is less firmly tied to notions of democratic legitimacy, which we might call *political legitimacy* (Erman and Higgott, 2010, p. 463; see also Follesdal, 2011). In sum, multilayered governance structures can be made more legitimate by increasing both democratic and political legitimacy.

Winding up, we face a countless number of challenges in our political world. Starting out from the normative premise that human beings are rights-deserving subjects of equal moral worth, we ask what are the appropriate normative answers to globalisation, that is, to processes of widening and deepening of relations and institutions across space within which our actions and practices systematically and mutually affect others across territorial borders (Held, 1995, p. 21). As we have seen, these circumstances challenge perceived obligations of states, citizens and non-state/private actors such as NGOs and corporations, and give rise to normative and institutional solutions of a varied kind. For sure, many

of the questions raised in this debate are empirical and should not be addressed by political theorists and philosophers. However, concerning those questions that require normative political theory, the attempt in this chapter has been to offer a framework for how to fruitfully address citizenship as political agency under transnational circumstances in our efforts to meet some of these challenges.

Indeed, talk of citizenship beyond state borders is not new. For example, we find several competing conceptions in ancient Greek and Roman political thought. When asked which was his country, Socrates allegedly insisted that he was a citizen of the world, rather than an Athenian or a Corinthian.[7] Likewise, when asked where he came from, Diogenes answered that 'I am a citizen of the world'. But their notions of citizenship beyond the city state were meagre. For Socrates and Diogenes, citizenship of the world did not include *any* legal rights beyond borders. In contrast, as Athenian citizens – the privileged set of free men – they would enjoy active rights to political participation. Global citizenship was thus of a quite different kind than traditional citizenship rights and duties. In comparison, the Roman Empire recognised and even encouraged *dual* citizenship, with loyalty both to the local community and to Rome. This arrangement allowed citizens of Rome freedom of movement and trade within the Empire. Still, the Roman notion of dual citizenship had its drawbacks, both for the individual and for the political order. To be a citizen of Rome usually only provided status or passive citizenship in the form of *protection* – some of what we now think of as human rights – rather than *active* citizenship rights to political participation, enjoyed only by the patrician class. Dual citizenship also created dual loyalties in the populations of the Empire, which led to unresolved conflicts (Erman and Follesdal, 2012).

Several similar challenges face our own conceptions of citizenship, when we seek to respond to the changing role of the unitary nation state in the global legal, political, and economic order. The notion of multilayered governance is meant to capture two central changes to the capability set and responsibilities of the state, which merit concern among empirical political scientists and political theorists alike (Caporaso, 1996; Marks et al., 1996). First, we live as individuals under rules imposed by public authorities at several territorial levels: the state, regional political orders such as the EU, and international bodies such as the UN Security Council. How if at all can we sustain political obligations toward several such units, and maintain influence over them, as members of several 'commonwealths'? What happens when they

conflict, what 'shared identity' does each require? Can and do all of them need to be democratically accountable? Can this multiplicity of territorial sites of political authority enhance human rights, in ways that respect, protect, and promote these rights? Or do these developments hinder the prospects of democracy and human rights?

Second, as we have seen, multilevel governance is used to signify the increased formal and informal influence of non-state, private actors in public regulations. How should we assess these trends, for example, in the form of 'New Modes of Governance' in the EU (Héritier, 2002; Bellamy et al., 2010; Follesdal, 2011), or the role of multinational corporations in specifying their tax obligations in host countries? What risks and opportunities arise when entities with drastically diverging objectives, such as states vis-à-vis multinational corporations, negotiate the rules of the game? What should we make of 'responses' such as political consumerism (Micheletti et al., 2004; Micheletti and Follesdal, 2007) or 'corporate social responsibility' in response to globalisation (Nystuen et al., 2011)? Are they, as the sceptics claim, temporary, second-best Band-Aid solutions? Or are they, as optimists hope, components of new multi-pronged conceptions of citizenship, for our present circumstances where each one of us finds ourselves a member of several political commonwealths at different territorial levels, that is, with several political identities and loyalties; and where each of us is a national citizen, but also a consumer, and often employee and investor? In short: how can we best respond to the challenges of fragmentation, dispersion, or even evaporation of responsibility formerly squarely placed with the state; gaps in protection and promotion of others' vital interests; and deep conflicts among different sites of authority in the multilevel political order?[8]

In order to delineate the institutional challenges facing our different roles as citizens, I have proposed the strategy to return to some of the foundational normative and conceptual issues. What are the necessary conditions of democracy, and how can it be justified? What are the main aims of democratic arrangements? While new definitions and social functions must remain sufficiently close to 'traditional' usage applied to the 'special' domestic case (Erman, 2008), the challenge is to 'explicate' these normative standards for settings outside their 'origin' within the state.

Through the suggested triple-headed way of approaching democracy, identifying different aims of democratic institutions, we are able to 'test' the feasibility and desirability of these aims in a transnational and global context against the backdrop of the defended conceptual

and normative framework. The first two aims may apply at regional and global levels, to secure a fair share of control and influence and to prevent domination. However, in a multilevel world order, it may well be that only *some* issues and aspects of individuals' well-being need to be heeded globally while many concerns will be the tasks of regional, national, or sub-national political bodies. Indeed, some optimistically point to evidence that for some issues there are already signs of widespread if not global concern. Evidence ranges from tax payer – and political party – support for international development assistance, emergency relief, environmental measures, and political consumerism action, to emerging transnational civil society organisations in areas such as human rights and the environment (Keck and Sikkink, 1998; Price, 2003; Ruggie, 2004). Thus, the prospects for a sufficiently vibrant public debate that shapes individuals' preferences and sense of justice are not completely bleak.

However, it remains an open question whether similar empirical generalisations are true for democratic accountability mechanisms above the state. The task here is not to lay out such arguments, nor to dispute them. Rather, in light of the distinctions and the normative criteria that I have identified, the task is to note some of the issues that a satisfactory account must address. Indeed, defences of cosmopolitan democracy face several challenges, including how to determine which issue areas should be decided democratically among which groups of individuals. In particular, all the individuals upholding certain international institutions may not be affected by them, at least not to the same degree. And under conditions of globalisation, many individuals affected by the actions of others appear to not be participants in the institutions themselves (Abizadeh, 2007; Julius, 2003; Nagel, 2005). Further, the distribution of responsibility between domestic and foreign politicians remains debatable (Risse, 2005). Needless to say, any clear-cut division will be contested, and likely to be only approximately correct. Still, somebody must be charged with dividing and reallocating competences between those decisions that should be taken domestically, and those that should be taken by other demoi – guided, perhaps, by considerations of 'subsidiarity'. Furthermore, the standard case for majoritarian, one-person-one-vote norms may not hold within political orders characterised by small and large states, or by other cleavages that increase the risk that some segments of the population will remain persistently in the minority. Skewed voting rights, common in federations, may merit normative scrutiny – as will the standards for awarding any such unequal

political clout. One upshot is that the multilevel political order may be sufficiently democratic, and sufficiently legitimate, even though not all decisions are made democratically.

Likewise, consider the private–public dimensions of multilevel governance. Again we may note that there are efforts underway to strengthen mechanisms of accountability of economic actors such as transnational corporations to normative standards concerning human rights. Such measures might make global governance more politically legitimate by rendering corporations as agents of democracy or agents of justice. For example, we witness several developments concerning how to make multinational corporations more respectful of human rights: we see traces of the development of human rights regimes that affect expectations and minimum standards to hold corporations responsible, perhaps most notably John Ruggie's work within the UN (Ruggie, 2007, 2009). We can also observe other ways that 'citizenship norms' are discussed, to allow individuals to act not only as a responsible electorate, but also as responsible consumers and investors. For example, political consumerism argues that citizens should use their purchasing power to boycott corporations (Micheletti, 2004; Micheletti, Follesdal and Stolle, 2004; Micheletti and Follesdal, 2007). Likewise, Socially Responsible Investing has emerged as a significant trend (Sparkes and Cowton, 2004; Nystuen et al., 2011). Whether these efforts are likely to flourish and what conditions must be fulfilled to do so remain important research topics. In particular, which normative ideals should guide such regimes remain open and contested questions.

Notes

1. Such a definition of 'intrinsic' is sometimes labelled 'final value', see Korsgaard 1983.
2. On this point, compare Rawls's theory of justice as fairness, which insists on the 'equal *worth* of political rights' (Rawls, 2001).
3. Indeed, this authorisation must take place also on a more 'negative' account of democracy, in which electoral vote is seen as passive 'check' on government.
4. For the present purposes, we need not specify this sufficiency condition further. However, I think that something along the lines of a (non-fixed) majority would be uncontroversial on most conceptions of democratic legitimacy. Neither do we have to specify to what degree this participation in the political decision procedure is done directly or indirectly through representatives.
5. For a more developed discussion of Macdonald's model, see Erman (2012).
6. I am not suggesting that elections are the only way to achieve political bindingness (recall the example of the small group of people organising themselves democratically). But it is one way, and it is difficult to see how

any larger pluralistic arrangement could do without them if it is to fulfil this condition. For even if an electoral system does not itself guarantee any votes (unless voting is mandatory), it is an indirect warranty for bindingness in that we would know when an acceptable threshold had been reached and could do something about it if it hadn't. Thus, without it we wouldn't even know whether people in fact have had an influence over the decision-making.

7. This ascription is doubted, cf. Brown 2000.
8. For a more developed discussion of these challenges, see Erman and Follesdal (2012).

Bibliography

Abizadeh, A. (2007) 'Cooperation, Pervasive Impact, and Coercion: On the Scope (not site) of Distributive Justice', *Philosophy and Public Affairs* 35: 318–58.

Archibugi, D. (2000) 'Cosmopolitical Democracy', *New Left Review* 4: 137–50.

Archibugi, D. (2002) 'Demos and Cosmopolis', *New Left Review* 13: 24–38.

Bellamy, R., D. Castiglione, A. Follesdal and A. Weale (2010) 'Evaluating Trustworthiness, Representation and Political Accountability in New Modes of Governance', in A. Heretier and M. Rhodes (eds) *New Modes of Governance in Europe* (New York: Palgrave Macmillan).

Brown, E. (2000) 'Socrates the Cosmopolitan', *Stanford Agora* 1: 74–87.

Buchanan, A. and R. Keohane (2006) 'The Legitimacy of Global Governance Institutions', *Ethics & International Affairs* 20: 405–38.

Caporaso, J. A. (1996) 'The European Union and Forms of the State: Westphalian, Regulatory, or Post-Modern?', *Journal of Common Market Studies* 34: 29–52.

Charnovitz, S. (2006) 'Accountability of Non-Governmental Organizations in Global Governance', in L. Jordan and P. van Tuijl (eds) *NGO Accountability: Politics, Principles and Innovations* (London: Earthscan).

Christiano, T. (1996) *The Rule of The Many: Fundamental Issues in Democratic Theory* (Boulder, CO: Westview Press).

Christiano, T. (2008) *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press).

Dahl, R. (1989) *Democracy and Its Critics* (New Haven: Yale University Press).

Dahl, R. (2006) *On Political Equality* (New Haven: Yale University Press).

Dryzek, J. (2011) 'Global Democratization: Soup, Society, or System?', *Ethics & International Affairs* 25: 211–234.

Dryzek, J. and S. Niemeyer (2008) 'Discursive Representation', *American Political Science Review* 102: 481–93.

Erman, E. (2005) *Human Rights and Democracy: Discourse Theory and Human Rights Institutions* (Aldershot: Ashgate Publishing).

Erman, E. (2006) 'Rethinking Accountability in the Context of Human Rights', *Res Publica: A Journal of Legal and Social Philosophy* 12: 249–75.

Erman, E. (2008) 'On Goodhart's Global Democracy: A Critique', *Ethics & International Affairs* 22.

Erman, E. (2010) 'Why Adding Democratic Values is Not Enough for Global Democracy', in E. Erman and A. Uhlin (eds) *Legitimacy Beyond the State? Re-examining the Democratic Credentials of Transnational Actors* (New York: Palgrave Macmillan).

Erman, E. (2011) 'Human Rights Do Not Make Global Democracy', *Contemporary Political Theory* 10: 463–81.
Erman, E. (2012) 'In Search of Democratic Agency in Deliberative Governance', *European Journal of International Relations*, early online view. DOI: 10.1177/1354066111426622.
Erman, E. and A. Follesdal (2012) 'Multiple Citizenship: Normative Ideals and Institutional Challenges', *Critical Review of International Social and Political Philosophy* 15: 279–302.
Erman, E. and R. Higgott (2010) 'Deliberative Global Governance and the Question of Legitimacy: What can We Learn from the WTO?', *Review of International Studies* 36: 449–70.
Follesdal, A. (2011) 'The Legitimacy Challenges for New Modes of Governance: Trustworthy Responsiveness', *Government & Opposition* 46: 81–100.
Goodin, R. and C. List (2006) 'A Conditional Defense of Plurality Rule: Generalizing May's Theorem in a Restricted Informational Environment', *American Journal of Political Science* 50: 940–49.
Grant, R., and R. Keohane (2005) 'Accountability and Abuses of Power in World Politics', *American Political Science Review* 99: 29–43.
Habermas, J. (1996) 'Reply to Symposium Participants', *Cardozo Law Review* 17: 1477–557.
Held, D. (1995) *Democracy and the Global Order* (Cambridge: Polity Press).
Held, D. (2002) 'Law of States, Law of Peoples: Three Models of Sovereignty', *Legal Theory* 8: 1–44.
Héritier, A. (2002) 'New Modes of Governance in Europe: Policy-making without Legislating?' in A. Héritier (ed.) *Common Goods: Reinventing European and International Governance* (Lanham: Rowman & Littlefield).
Julius, A. J. (2003) 'Basic Structure and the Value of Equality', *Philosophy & Public Affairs* 31: 321–55.
Keck, M. (2004) 'Governance Regimes and the Politics of Discursive Representation', in N. Piper and A. Uhlin (eds) *Transnational Activism in Asia: Problems of Power and Democracy* (London: Routledge).
Keck, M. and K. Sikkink (1998) *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press).
Korsgaard, C. (1983) 'Two Distinctions in Goodness', *Philosophical Review* 92: 169–95.
Macdonald, K. and T. Macdonald (2010) 'Democracy in a Pluralist Global Order: Corporate Power and Stakeholder Representation', *Ethics & International Affairs* 24: 19–43.
Macdonald, T. (2008) *Global Stakeholder Democracy* (Oxford: Oxford University Press).
Marks, G., L. Hooghe and K. Blank (1996) 'European Integration from the 1980s: State-centric v. Multi-level governance', *Journal of Common Market Studies* 34: 341–78.
Micheletti, M. (2004) '"Put Your Money Where Your Mouth Is": The Market as an Arena for Politics', in C. Garsten and M. Lindh de Montoya (eds) *Market Matters Exploring Cultural Processes in the Global Market* (London: Palgrave Macmillan).
Micheletti, M. and A. Follesdal (2007) 'Shopping for Human Rights', *Journal of Consumer Policy* 30.

Micheletti, M., A. Follesdal and D. Stolle, eds (2004) *Politics, Products and Markets: Exploring Political Consumerism Past and Present* (New Brunswick, NJ: Transaction Press).
Nagel, T. (2005) 'The Problem of Global Justice', *Philosophy and Public Affairs* 33: 113–47.
Nystuen, G., A. Follesdal, and O. Mestad, eds (2011) *Corporate Complicity, Human Rights Violations and Disinvestment: Legal and Philosophical Perspectives* (Cambridge: Cambridge University Press).
Peruzzotti, E. (2006) 'Civil Society, Representation and Accountability', in L. Jordan and P. van Tuijl (eds) *NGO Accountability: Politics, Principles and Innovations* (London: Earthscan).
Price, R. (2003) 'Transnational Civil Society and Advocacy in World Politics', *World Politics* 55: 579–607.
Rawls, J. (2001) *Justice as Fairness. A Restatement* (Cambridge, MA: Harvard University Press).
Risse, M. (2005) 'Do We Owe the Global Poor Assistance or Rectification?', *Ethics & International Affairs* 19: 9–18.
Rostboll, C. (2008) *Deliberative Freedom: Deliberative Democracy as Critical Theory* (Albany: State University of New York Press).
Ruggie, J. G. (2004) 'Reconstituting the Global Public Domain: Issues, Actors and Practices', *European Journal of International Relations* 10: 499–531.
Ruggie, J. G. (2007) 'Business and Human Rights: The Evolving International Agenda', *KSG Faculty Research Working Paper Series 07/029*.
Ruggie, J. (2009) 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', *Human Rights Council* (A/HRC/11/13 22. April).
Scholte, J. A. (2005) 'Civil Society and Democratically Accountable Global Governance,' in D. Held and M. Koenig-Archibugi (eds) *Global Governance and Public Accountability* (Oxford: Blackwell).
Sen, A. K. and J. Dréze (1990) *Hunger and Public Action* (Oxford University Press).
Shapiro, I. (2003) *The State of Democratic Theory* (Princeton: Princeton University Press).
Sparkes, R. and C. J. Cowton (2004) 'The Maturing of Socially Responsible Investment: A Review of the Developing Link with Corporate Social Responsibility', *Journal of Business Ethics* 52: 45–57.
Steffek, J. and P. Nanz (2008) 'Emergent Patterns of Civil Society Participation in Global and European Governance', in J. Steffek, C. Kissling, and P. Nanz (eds) *Civil Society Participation in European and Global Governance* (New York: Palgrave Macmillan).
Van Rooy, A. (2004) *The Global Legitimacy Game: Civil Society, Globalization, and Protest* (New York: Palgrave Macmillan).

5

The Practical Conditions of Sovereignty of the People: The Status of Citizens in Multilevel Political Organisations

Christine Chwaszcza

Introduction

The institution of the democratic legal state is presently the dominant model for the organisation of legitimate political government in the liberal tradition. It is partly, though not exclusively, built on the idea of the sovereignty of the people, understood as the claim that the legitimacy of political government derives from the consent of the people. In what follows, I will take that model as a starting point for diagnosing certain practical conditions of political legitimacy that might serve as a platform for a critical assessment of the legitimacy of inter- and transnational levels of political decision-making as they exist, for example, in Europe. The purpose of the paper is exploratory. My aim is not to decide whether political conditions within for example, the European Union actually satisfy that model (nor is it to decide whether they should do so), but more modestly to outline the circumstances under which any political organisation can be expected to meet the conditions of legitimacy embodied in the idea of the sovereignty of the people. This leaves open to further discussion the question whether any multilevel political organisation should – or can, or must – be transformed in such a manner that it will meet those conditions or whether the ideal of attaining legitimacy within such organisations must be redefined.

In modern representative liberal democracies, the idea of the sovereignty of the people is transformed into procedural methods for the authorisation of political legislators through regular elections, and into procedural rules of public decision-making in parliament, and sometimes also into participatory forms of public decision-making (referenda), to which I shall in totality refer to as procedural methods of

public decision-making. In practice, almost all of those procedures are based to some extent on some form of majority rule. My main interest in the following will concern what I call the horizontal aspects of procedural legitimacy, that is to say, the practical conditions of socially shared acceptance of procedural decisions. Horizontal legitimacy in this sense explores 'civil' or 'civic' conditions of legitimacy that concern relations among citizens as members of the people, not relations between the people and members of the government. The first section begins with a brief outline of the idea of the sovereignty of the people. I will outline as to why I think that it expresses an irreducible idea of political legitimacy, and why procedural methods are an irreplaceable dimension of it. The major point in brief is an argument to the effect that procedural methods of public decision-making based on majority rule constitute a *sui generis* source of political legitimacy, an instantiation of pure procedural justice (Rawls 1971). The outline will serve as a framework for the investigation of the practical conditions under which that is the case. Three theses will be developed and defended: (1) The legitimatory potential of majority rule depends on its *general* acceptance as a *rule* that is applied to a series or sets of public decisions. (2) Because of (1), majority rule is acceptable only for politically interdependent persons that form a diachronically continuous group, and thus requires some form of institutional 'unity' of the people. (3) To the extent that general acceptance must be understood as mutual expectation that not only oneself but also one's co-citizens accept majority rule, citizens are confronted with a cognitive problem of how they can know that their mutual expectations are warranted. The solution to the cognitive problem, it will be proposed, consists in giving citizens the opportunity to *observe* that the people generally accept (and continue to accept) majority rule, which requires possibilities and occasions for actual exercise or performance of procedural methods. The second section will contrast the view of unity developed in the first section with two alternative accounts and defend it.

The idea of the sovereignty of the people and practical conditions of its acceptance

The scope of enquiry

Let me start with a brief clarification of the concept of the sovereignty of the people. The model of the democratic legal state is a complex institutional structure that integrates a multiplicity of ideas about what it is that makes political government legitimate. Most conspicuous

among these ideas are the liberal requirements of the rule of law and respect for individual rights on the one hand and, on the other, the modern idea of the sovereignty of the people, which makes citizens themselves the ultimate source of political government and legislation, mainly through periodic elections that authorise professional political representatives of the legislative branch of government. Both ideas are rooted in liberal conceptions of autonomy (Waldron, 1999; Christiano, 1996), but they nevertheless express two quite independent substrata of this normative idea.[1] Whereas the former determines what legal theorists call individual 'liberties' and 'claim rights', insofar as it demands respect by political powers for a sphere of personal autonomy, the latter is more aptly defined in legal theorists' terminology as a 'power', insofar as it concerns the authority to issue generally binding laws and decisions. This power, it has to be added, is to be collectively exercised – most commonly by granting each citizen an equal right to participate in political legislation or the appointment of legislators according to accepted rules. Sovereignty of the people, thus understood, manifests itself in the status of each fully fledged member of the political association as *citizen* when he is considered individually, and in the act of authorisation of political government if one considers citizens as a collective body.[2]

The difference between individual liberties and possession of an equal power to participate in political decision-making becomes apparent in the reminder that individual rights by themselves do not imply a right to interfere with the freedom and activities of others. Issuing generally binding laws and public decisions, however, is undoubtedly such an interference, and accordingly cannot be a right of any individual, but only of the collective body of the people, that is, the entirety of all citizens together. One might of course insist that political government is a necessary evil and that some constraints on each person's liberty are unavoidable, but the modern idea of legitimate government is (and remains) clearly connected to the idea that political legislators have the right to impose public laws because they have been authorised to do so. The normative point of the idea of the sovereignty of the people, accordingly, is tightly connected to the modern idea of sovereignty, and more specifically to the idea that sovereign competences are bound to offices and that their exercise is legitimate if officeholders are correctly authorised. It is therefore misleading to consider the idea of the sovereignty of the people to articulate an alternative 'republican' rather than 'liberal' strand in the tradition of democratic theory, as some authors suggest (Habermas, 2008, Nida- Rümelin, 2010), who

tend to identify the concept of the sovereignty of the people with an ideal of participatory democracy at the expense of individual rights.[3] Acknowledgement of the idea of the sovereignty of the people is fully compatible with liberalism. It has no connection to Constant's notorious contrast between 'the liberties of the ancient and the moderns'. What the idea of the sovereignty of the people requires is some form of actual authorisation of political government and democratic methods for public decision-making.[4]

To the extent that sovereignty is understood as the power to issue binding general norms (i.e., laws) and public decisions that affect the liberty and prospects of citizens, the idea of the sovereignty of the people combines three distinctively modern normative ideals. First is the idea that sovereignty is not a right or status of any natural person, but an institutional competence held by office-holders due to an act of authorisation. Second is the idea that the source of authorisation is 'the people', understood as the unity of all citizens. And third is the specifically modern commitment to treat all full-fledged members of the population equally by granting them equal political status as citizens.

The idea of the sovereignty of the people thus expresses a specifically modern account of the normative grounds of democracy. But it also articulates a theoretical *ideal* that cannot be realised one-to-one in practice, not least because 'the people' is not a unitary agent, or macro-agent, but a legal fiction. The theoretical ideal accordingly requires some form of 'insitutional implementation' if it is meant to guide *practice*. Most commonly the exercise of sovereignty of the people in practice consists in the adoption of certain procedural methods for assignment of public offices and public decision-making according to publicly accepted rules. Those rules – again, most commonly – take recourse to one or another version of majority rule. In the following, I will be mainly concerned with the status and role of majority rule in the practice of sovereignty of the people.[5] To the extent to which the idea of modern democracy is defined by recourse to the theoretical ideal of the sovereignty of the people transformed into methods of public decision-making in practice, I will regard methods of democratic decision-making as a (conceptually) necessary requirement of political legitimacy. Methods of democratic decision-making in this sense constitute a *sui generis* source of legitimacy for political decisions, which is to say that methods of democratic decision-making are not merely (apt or pragmatic) means for achieving a normatively valuable end, but have intrinsic normative value.

Notoriously, pure procedural justice is neither sufficient nor exhaustive for the achievement of legitimacy. Democratic decision-making must be

embedded in additional structures of normative constraints (individual rights, judicial review are mentioned most often). Nevertheless, all modern democracies give considerable weight to methods and procedures of democratic decision-making based on majority rule. Political representatives are considered authorised to exercise legislative powers *because* they have been elected. Their decisions are considered legitimate if and insofar as they have been reached by publicly accepted procedures. One may want to insist that procedural methods yield at best 'prima facie' legitimacy for public decisions, because they might violate non-procedural, substantive, standards of legitimacy. But that remainder does not amount to more than the insight that supplementary standards of legitimacy can collide or conflict in concrete cases. If that happens, one has to find a way to settle the collision or conflict of different requirements of legitimacy.

It is important to realise, however, that in modern pluralistic societies pure procedural justice receives special importance from the very fact that many political questions are underdetermined by substantive standards of legitimacy, and more importantly that many of those questions concern intrinsically normative issues. The reasons is that most democratic societies are also committed to normative pluralism, and grant citizens the right to disagree on a rather broad range of normative questions.[6] For this reason, majority rule is not only a genuine source of legitimacy but also an irreplaceable one, because it offers an accepted mechanism for settling conflicts not merely of interest but among justifiably diverging normative views of citizens.[7] From the perspective of philosophical liberalism, resort to accepted methods of democratic decision-making in combination with inclusive franchise is a fair method for settling conflicting and competing views of citizens not only towards decisions that affect their interests differently, but also towards normative questions, such as beliefs about social justice and collective aims of politics, and so on (Schumpeter, 1994; Przeworski, 1999; Waldron, 1999; Bellamy, 2007).

In what follows, I will bypass conflicts of supplementary requirements of legitimcay and – for analytical purposes – will focus on the idea of the sovereignty of the people, or more precisely on the specific conditions under which it gains, exhibits, and reproduces its legitimate potential in democratic practice.

That brings me to a second point that requires clarification. When I speak of 'democratic practice', I mean the institutional framework that confines everyday democratic agency of all relevant roles and actors who participate in the institution and whose actions constitute democratic

practice, in contrast to purely theoretical reflections on the abstract norms and theoretical reasons that justify that practice. In order to avoid a likely misunderstanding, I would like to point out that the contrast between abstract norms and theoretical reasons on the one hand and democratic practice on the other is not an ontological one, but one that concerns the epistemic interest of the present enquiry. According to a widely shared understanding of 'practice' in social, political, and legal philosophy,[8] democratic practice is understood to consist of the entirety of the rules that define democratic political agency plus the norms and ideals that justify the rules, plus the actions and behavioural dispositions of the relevant agents and their interpersonal expectations, plus the organisational manifestations of the norms and rules in the form of offices and their representatives. Like all complex social institutions, democratic practice is per se reflective and intrinsically normative, and accordingly democratic agency is per se to a considerable extent guided by rules and norms (and their reproduction in reflective discourse and practice), even though democratic agency also includes purely strategic moves and opportunistic manoeuvres within the limits of the rules of the game. To the extent, however, that democratic practice can be said to be socially accepted and 'well-functioning', it also manifests itself in more or less stable behavioural *everyday* routines, stratagems and interpersonal expectations that are the focus of concern in this article. For short, I will refer to these manifestations as 'the everyday practice of democratic agency'.

The institutional framework of the modern democratic legal state combines the two ideas of legitimate political government in a complex system of checks and balances – power sharing and division of powers – among different branches of state institutions and accompanied by a body of, at least theoretically, politically neutral and professional bureaucrats. Ideally, the institutional organisation guarantees that there exist dynamic mechanisms of self-monitoring and self-correction that prevent abuse of powers, repression of minorities, illegitimate interference with citizens' individual rights, and corruption among the class of professional politicians (Walker, 2008). Realistically, no institutional design can be better than the persons who handle it, but the mechanisms of self-monitoring and self-control make it at least more difficult for politicians and bureaucrats to abuse powers or to pursue illegitimate aims before the eyes of a critical public and body of citizens. For the purpose of my interest, though, it is useful to distinguish two strands of legitimacy, which I will call 'vertical' and 'horizontal' legitimacy. Whereas the former concerns the relations between the different branches of government and citizens, horizontal

legitimacy concerns the relations between citizens. The issue can also be addressed in a more agency-oriented language as the problem of civic trust, but in what follows I will speak mainly of the democratic attitudes of citizens, democratic agency, and the behavioural aspects of democratic practice.

The question of my inquiry can now be stated more precisely: under what conditions can citizens be expected to accept majority-rule-based decision-making as a source of legitimacy within democratic practice? What kind of democratic attitudes must citizens exhibit in order to lend legitimizing potential to majority rule? I am fully aware that there exists a plurality of other problems of legitimacy that are equally important or especially cumbersome when combined, but I will focus on the single issue of horizontal legitimacy in relation to the idea of the sovereignty of the people.

Majority rule and the unity of the people

In practice all viable mechanisms for democratic decision-making at present rely on majority rule. If one wants to identify the practical conditions of sovereignty of the people, one has to understand under what conditions majority rule can reasonably be expected to be accepted by citizens, where 'reasonable' means 'from an analytical point of view' rather than 'based on empirical evidence'. Since questions of legitimacy concern not only empirically ascertainable attitudes of citizens, but also attitudes that citizens 'ought' to have if they were to consider matters from a normative point of view, 'reasonable' expectations are themselves partly a normative construct. Majority rule requires from each citizen that she accept as legitimate those results of political decision-making that conform to procedural requirements and fall within the proper sphere of political decision-making (in contrast, for example, to questions that concern human rights or constitutional rights and their application and performance), and that she do so independently of her own opinion of the results. In fact, the most intriguing features of democratic decision-making are, firstly, that democratic procedures are accepted as constituting a source of legitimacy in their own right – a decision is justified *because* it was reached through a democratic process of decision-making – and, secondly, that outcomes of democratic decisions do not require consensus, or unanimity of individual opinions in order to be considered legitimate. The practice of democratic agency accordingly must include reasons along the following line: 'Although I personally prefer party B over A and continue to think it would have been better equipped to run government, I fully endorse and accept the

claim that party A has the right to form the government, *because* it won the election/was voted for by the majority of citizens.'

The picture of philosophical liberalism sketched here is of course not uncontested. It is closer to positions that emphasise the fact of pluralism than to those that defend an ideal of civil consensus. But lack of consensus is exactly the problem to which majority rule responds: if consensus were possible, one would not need majority rule. Given that pluralism of interests and normative opinions is a fact – and actually a fact that tends to become stronger the more topics are included in the political agenda – I see no alternative to majority rule.

If such a description of democratic attitudes is correct, it is obvious that democratic agency cannot be reduced to mere motives of self-interest but requires a normative underpinning, that is, a set of normative reasons and beliefs on the side of citizens – or, more appropriately, a set of normative reasons and beliefs that is shared by citizens, because it would be unreasonable to expect individual citizens to hold such reasons and beliefs unless they think other citizens share them. Accordingly, even liberal theories of democracy acknowledge that democracy requires some form of political virtue, not only among professional politicians and bureaucrats but also among citizens (Rawls, 1995; Christiano, 1996, Ch. 5).

Obviously, acceptance of the decision of the majority can be rather demanding for the minority. It has already been conceded that no procedure of majority decision-making can demand acceptance of its results exclusively by virtue of its procedural structure but is accepted only if methods of democratic decision-making are embedded in a broader institutional framework that satisfies additional requirements of legitimacy. For that reason, I will speak of democratic legitimacy when I am exclusively concerned with procedural aspects of public decision-making and its acceptance among the people. The point that I would like to stress in this essay is that procedural methods can be a source of legitimacy only in the context of a political–civic culture that reflects democratic attitudes.

A necessary condition for acceptance of majority rule is a shared expectation of its general acceptance. Citizens must hold a reasonable expectation that their fellow citizens will be as willing as they are themselves to accept majority rule as a fair method of settling conflicts of interest and normative opinions. Those who are outvoted must have the reliable expectation that if they were on the winning side, their fellow citizens would be equally willing to accept the result of their side's decisions as legitimate and fair. The acceptance of majority

rule, accordingly, is usually regarded as sustainable only against a background of a political culture and political practices that allow for changing majorities (Dahl, 1989; Bellamy, 2007), compensation of outvoted minorities (for instance, through the bundling of different proposals), and correction or revision of previous decisions. Those conditions for the acceptance of majority rule are significantly heightened by the fact that assessments of legitimacy concern not single decisions considered in isolation but entire sets of decisions, for example, all the decisions in a legislative period or all those that concern specific policy areas. Such links allow the introduction of compensation mechanisms, fair balancing of benefits and costs among different strata of society and so on (Buchanan, 1954a, 1954b).

The legitimacy of democratic decision-making, accordingly, concerns not so much the outcome of particular (single) decisions but the acceptance of the *rule* of majoritarian decision-making. This last point is of some importance, because it reveals that the legitimate potential of majority rule is not to be identified with its instrumental usefulness for arriving at 'right' or 'correct' outcomes, as defenders of an 'epistemic' justification of majority rule suggest. Notoriously, there is no convincing reason to assume that adoption of majority rule increases the likelihood or probability of epistemically 'right' outcomes or does better in epistemic terms than other procedural mechanisms (Lagerspetz, 2010), if one assumes that democratic decision-making is about 'rightness' or 'truth' in the first place. More importantly, there are good reasons to doubt that standards of rightness or truth actually apply to (all) political decisions in pluralistic societies, and as long as one believes that pluralistic societies are indeed confronted with the need to find general regulations for problems that allow for the defence of more than one uniquely justifiable outcome, the epistemic view of democratic decision-making remains insufficient. Obviously, if majority rule or any other procedural mechanism would lead consistently or even mainly to outcomes that were practically unstable or to severe violations of individual rights, majority rule would have little legitimate force to start with. But that does not mean that the acceptability of majority rule is to be assessed by its capacity to single out an acceptable solution to every problem considered in isolation. The legitimate merit of majority rule in that respect resembles the assessment of the virtue of persons. Someone who is judged virtuous (or vicious) is called so not because of any single act but because of his or her comparatively stable behavioural dispositions. Just as a virtuous person can make a mistaken judgement, behave negligently, yield to temptation, or simply have a

bad day but be still considered virtuous, the application of majority rule can yield bad results in some decisions but still be considered to have legitimate potential when considered as a general rule for decision-making. The first thesis to be proposed says that the legitimate potential of a majority vote depends on the application of majority rule *as a rule* that is applied to sets and series of decisions.

The first thesis yields immediately a second. For acceptance of majority rule – in contrast to isolated decisions – rests on the assumption that citizens form a continuous and stable group both in the sense of being diachronically tied together and in the sense of depending on each other in more than one policy area. If the mutual expectation of the general acceptance of majority rule is indeed a necessary condition of its acceptance, then one of the practical conditions of its acceptability is that citizens are in some sense 'united' and that they form an identifiable diachronically persisting group, called for short a 'people'.[9] Whatever further associations one might attach to the term 'people', one qualification of the relations among citizens that makes them a people apt to accept majority rule is that they stand in relation to each other in some form of diachronically continuous *political interdependence*. Acceptance of majority rule, in other words, presupposes some form of diachronic continuity and cross-issue affectedness of citizens.[10]

A performative view of public knowledge

Assuming that citizens constitute a 'people', one has to ask under what conditions citizens can reasonably expect majority rule to be *generally* accepted among them. My view can be expressed in a two-fold third thesis. The first part of the third thesis says that citizens must be in a position to know that their fellow citizens (continue to) accept majority rule. The second part of the third thesis says that 'knowledge', in contrast to mere speculation or hope, implies the possibility of error and correction, and accordingly requires some form of warrant, which in the present case can only be based on practical experience. Citizens accordingly must be able to participate publicly in democratic decision-making themselves, and they must be able to observe publicly that others do likewise and see how they react to democratic decisions in order to maintain or regenerate the reliability of their expectations. The third thesis thus can be summarised as follows: Maintenance and reproduction of democratic attitudes can only be achieved in and through democratic practice, because that is the only way to establish publicly observable evidence for the formation, existence, and reproduction of reciprocal attitudes.

Since the third thesis is somewhat abstract, I would like to support it through some considerations about the reciprocally conditional structure of the reasoning behind the formation of democratic attitudes. Assuming it would be unreasonable to accept majority rule if others do not, each citizen's willingness to do so must be backed by a belief that others are willing to do so too. Citizens might have additional reasons why they think it would be good (or desirable) if all of them exhibited the willingness to accept majority rule. But none of those reasons by itself makes it reasonable to accept majority rule *unless* citizens can expect their fellow citizens to do the same. The conditional 'that others are willing to do so too', formulated more precisely, implies that others' willingness to accept majority rule depends on their belief that all members (or a sufficient number of members) of the entire group share the same attitude *and* the shared belief that all (or a sufficient number) do so. Reciprocal conditionality thus implies that each citizen's willingness is at least partly motivated or justified or both by the belief that others in fact share the relevant attitudes *and* beliefs, because it would not be sufficient if others were in principle willing to accept majority rule but did not believe the conditions for doing so had actually been met.[11] If that line of reasoning is sound, it follows that options and occasions for public manifestations of 'the people's' willingness must exist in order to motivate and reproduce citizens' democratic attitudes. It should now be clear that the formation of democratic attitudes requires some form of *robust knowledge* about one's co-citizens' democratic attitudes and – since we consider not only original formation but also reproduction of democratic attitudes – the possibility of updating that knowledge. By 'robust', I mean that citizens must be in a position to find out whether their beliefs are in fact warranted, and since the only way to find out is to see how other citizens behave, such knowledge must be based on experience.

The reproduction of democratic attitudes, I conclude, requires participation in democratic practices. Since reasonable conditions of democratic agency, according to my analysis, require the actual performance of one's democratic attitudes in practice, I will call this understanding the 'performative view' of democratic attitudes. If the performative view is convincing, then some forms of participatory activity that include *all* members of the electorate are a necessary and irreplaceable building block for practical conditions of horizontal legitimacy.

In light of the performative view, the legitimacy-generating potential of regular elections or referenda consists not – or at least not exclusively – in the provision of information about citizens' interests and opinions that is transferred from citizens to professional politicians and administrators

but in these being reliable mechanisms for the communication and reproduction of socially shared knowledge about citizens' democratic attitudes. Since elections and referenda serve a cognitive function, I would like to emphasis that the performative view does not porpose an 'epistemic' theory of democracy. Although I would not reject outright the possibility that methods of democratic decision-making, public deliberation, and public political discourse can contribute to a better understanding of the issues under discussion and improve mutual acceptance of diverging points of view, I do not think that acceptance of decision-making rules *as rules*, that is, as a method for settling conflicts of interests and normative opinions, serves primarily an epistemic purpose. If such an account were true, the merit of democratic methods of decision-making would be purely instrumental, which is clearly not the case.[12] Since the epistemic view is often contrasted with an 'expressivistic' view of participatory activities, I would also like to emphasise that the performative view also differs from a mere expressivistic view, if the latter conceives of elections and referenda primarily as an occasion for citizens to 'express' their own political views. The performative view addresses a genuine problem of social knowledge, not of self-articulation. It articulates a thesis that concerns a cognitive aspect of democratic attitudes, and it emphasises their genuinely social quality. Independently of how citizens would describe their motives from their own perspective, the performative view assumes that one of the effects of elections and referenda consists in facilitating social communication and reproducing socially shared reflective attitudes. It is not necessary for citizens to believe that the facilitation of socially shared knowledge is the very purpose of regular elections and/or referenda. It would be more appropriate to assume that their contribution to the maintenance of mutual knowledge is rather a side effect than a directly intended result. In fact, if citizens were to intend participation as a method of communicating attitudes, problems of honesty and truthfulness would arise. The performative view therefore aims to give neither an exhaustive nor a unique account of the legitimate function or potential of regular elections and referenda. What it does is articulate a hypothesis concerning one of the systemic contributions of regular elections or referenda to the healthy functioning of democratic institutions.

How important the performative function is from the point of practical legitimacy can be a matter partly of empirical circumstances concerning the structure of political society and partly of the institutional version of democratic government under consideration. The reproduction of horizontal legitimacy might be more important in highly pluralistic societies than in more homogenous ones. It is likely to be more important in

societies that conceive of the state as an active agent for the promotion of social justice than for citizens of a minimal state. Also socially shared attitudes might be of greater concern in a highly individualistic society than in consociational democracies. In addition, the relevance of the performative view will also depend on the normative outlook citizens have towards democracy or specific subtypes of democratic government, for democratic attitudes are highly reflective attitudes, strongly influenced by normative ideals of democracy that are themselves open to change, criticism, and transformation. But I would like to insist that the practical conditions of formation and reproduction of democratic attitudes play at least some role in most modern political associations.

Turning to the matter of transnational democracy and assuming that we are interested in organisations of political government that respond to traditional ideas of political legitimacy (as manifested in the traditional model of the liberal democratic legal state) but are truly transnational, the crucial question is this: Suppose we can solve all the problems of vertical legitimacy in transnational political decision-making, finding analogies for checks and balances, division of powers, accountability, transparency, control of corruption, and protection of constitutional and individual rights. This question would remain: What would be a likely and feasible substitute for the horizontal dimension of democratic legitimacy outside the framework of the nation state (or 'super-nation' state)?

To make a long argument short, I think this is the crucial problem of genuinely *trans*national organisation of democracy, but I do not know how to respond to it. In order to address one possible objection immediately, I would like to insist that the exercise of legislative competences on any level of political organisation raises a problem of legitimacy. Although it might be true that the traditional idea of the sovereignty of the people might not apply because it is tightly connected to the institution of the (nation) state, and also that new forms and ideas of legitimate authorisation and control have to be invented (Macdonald, 2008), I am convinced that most citizens' and peoples' ideas of legitimate government are dominantly influenced by the tradition of democratic legitimacy. There might be more efficient or even more appropriate alternative ideas of political authorisation and control, but not within the traditional paradigm of democratic legitimacy.

A brief defence of the performative view

The performative view derives from an account of the unity of the people that is best characterised as institutionalist, because the practical condition of diachronically continuous political dependency stresses

the institutional bonds between citizens, that is, their co-membership in one and the same political organisation. According to the performative view, democratic attitudes are genuinely *political* attitudes. They are characterised as cognitive–reflexive attitudes that depend at least partially on reciprocal, experience-based beliefs about one's co-citizens' attitudes. They are genuinely social attitudes, insofar as persons cannot entertain democratic attitudes in isolation from one another. And finally, the cognitive beliefs that support democratic attitudes are understood as an unintended side effect of democratic practice. Although my argument for the performative view so far has been purely theoretical and a priori, the performative view is better characterised as an empirical hypothesis concerning specific social attitudes. The question whether it is convincing or not, or to what degree and in what respects, accordingly requires some support from empirical evidence that is still lacking. As a hypothesis, however, it is far from unique, because other theorists have developed alternative hypotheses, most of which differ from the performative view with respect to at least one of the four characterisations just mentioned. In defense of the performative view, I would therefore like to comment on three major alternative views and point to why I find the performative view *theoretically* more convincing.

The most common alternative hypothesis insists that democratic citizenship requires a degree of social cohesion that must be nourished or supported by some form of non-political attitudes, such as 'national solidarity' or some other category of affective bonds. Miller (1995) is probably the best-known proponent of such a view within the liberal tradition. Another account would regard shared normative beliefs as the most important aspect of democratic attitudes. Habermas's constitutional patriotism and Rawls's idea of an overlapping consensus fall into this second category. And finally, some theorists argue that democratic legitimacy can be reduced to mechanisms of accountability.

Focussing on politics as an instrument for the realisation of social justice, Miller stresses the point that liberal democratic politics unavoidably generates unequal distributions of burdens and benefits among citizens. Arguing against universalistic accounts of social justice, he insists that acceptance of unequal distribution must be supported by a sense of belonging together, which cannot be reduced to (or derived from) commitments to universal requirements of justice, because it is a product of historically contingent processes that cannot be intentionally constructed, but consists in reciprocal special relations of a more affective sort. Although the main targets of Miller's criticism

are universalistic theories of cosmopolitan social justice, his claim that concerns of social justice are – and ought to be – confined to co-nationals (co-citizens) yields a particularistic account of sociopolitical cohesion that gives special emphasis to non-political and non-cognitive mutual attitudes (Follesdal, 2000).

I find two aspects of Miller's position unconvincing. First, the emphasis on social justice, I think, underestimates the importance as well as the challenge of normative dissent in pluralistic liberal societies. Even if acceptance of measures of social justice were indeed supported by a feeling of national solidarity – which I doubt, but accept for the sake of the argument – such feelings seem not to be the right kind for the public pursuit of specific aims or goals of social justice because people disagree about its substantive content and scope. Even if Miller is right that feelings of social solidarity are a necessary prerequisite for the acceptance of duties of social justice, and that those feelings cannot be intended but are a product of (partly path-dependent) historical processes, nothing much follows from it for the legitimacy of specific public decisions. Certainly, Miller cannot simply assume (without any further argument) that co-nationality is an exclusive cause or trigger or mechanism for the development of solidaristic feelings. Whereas Miller's claim that most citizens would consider social justice a particularistic form of justice more or less confined to co-citizens seems not unwarranted, his explanatory thesis is far from uncontested. One alternative explanation of citizens' attitudes towards the scope of social justice would insist that it is mainly realised in and through state institutions and centralised state programmes, and is for that reason confined to fellow-citizens. The European model of the social state is especially 'statist' – and widely considered as a contributing mechanism or step towards the development of national cohesion. The statist explanation, however, is much closer to the idea of democratic legitimacy than to nationalism.

The second alternative to the performative view emphasises the role and influence of shared normative beliefs. As mentioned above, Habermas entertained the idea that democratic attitudes are fostered by universalistic normative beliefs ('constitutional patriotism'), and some interpreters of Rawls's idea of an 'overlapping consensus' think that acceptance of *political* liberalism must be based on shared public agreement concerning norms of fairness and public reasoning. Although I will not question the assumption that democratic attitudes require some form of consensus about the normative basis of the very principle of democracy, I would insist that the problem addressed by acceptance

of majority rule does not concern the normative justification of democratic attitudes but their existence and reliability in practice. The concepts of constitutional patriotism and overlapping consensus – as different as they are – respond to the question 'What ideals or values justify democratic procedures?' rather than the question 'How can citizens *know* that their co-citizens still share those ideals and values?', which is addressed by the performative view.

Finally, there is the objection that what democratic legitimacy 'really' requires are conditions of publicity, accountability and transparency – maybe in combination with some forms of civic representation of the people (by non-governmental organisations, social movements, lobbyists, corporative actors) – that guarantee a reliable flow of information about what citizens want and what politicians ought to care about. The reason I find such proposals unsatisfying is that they reduce democratic legitimacy to the vertical dimension and eliminate the horizontal dimension. Again, I certainly do not want to deny that the accountability view articulates important aspects of democratic legitimacy. However, it cannot replace the idea that *democratic* government receives its legitimacy partly from the idea of the sovereignty of the people. Accountability is an apt requirement of legitimacy for technocratic regimes, but not a substitute for the idea of the sovereignty of the people as outlined in section I.1.

To conclude: Whereas the performative view articulates an hypothesis that competes with accounts of sociopolitical cohesion in democratic societies that refer to non-political causes, triggers or mechanisms, such as Miller's liberal nationalism, it rather supplements accounts of democratic agency that focus on the justificatory beliefs and aspects of vertical legitimacy. If the performative view of the horizontal dimension of democratic legitimacy is correct, it seems that political decision-making in multilevel political organisations requires either considerable transformation of our ideas about the nature and process of democratic decision-making or about the relevant criteria and standards of political legitimacy, or both.

Notes

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1. There seems to be a tendency in ideal normative discourse to contrast these two ideas as liberal contra republican ideas of democracy (see e.g., Habermas,

2008), but I think such contrapositions draw a false contrast, because the genuine problem of contemporary theory of democracy concerns the how the two ideas are interlinked.

2. The term 'citizen' is not taken to be equivalent to (adult) human being, but refers to the normative status that is ascribed to individual members of the political association. Equally, the term 'the people' is not used as a mass term referring to a multitude of individual persons, but as a status term. Here and in the following, 'the people' refers to the totality of citizens that hold a right to vote, and thus coincides with the 'electorate'.
3. Such a picture does not even hold for Rousseau's version of republicanism, and certainly it misclassifies modern versions of republicanism such as those of Pettit (1997), Skinner (2008), or Bellamy (2007).
4. Evidently, public elections of members of a political body that is not invested with sovereign competences, such as the European Parliament, have little in common with the idea of sovereignty of the people.
5. For a more detailed treatment of both the normative structure of the abstract idea and the ideal-practice distinction, see Chwaszcza (2011).
6. Pre-eminent examples of the second type are questions such as those concerning abortion, physician-assisted suicide, and so on. Notorious examples of the first type concern the 'right balance' between competing values or ideals (such as security and liberty or fiscal prudence and provision of public goods), the allocation of scarce resources to equally accepted public services (health services versus education or pension funds), and the choice of among alternative policies for maintaining common goods (such as full employment, welfare, sustainable development).
7. Berlin (1999). In contrast to more recent versions of normative pluralism, such as Rawls's idea of an overlapping consensus (1995), Berlin's defence of normative pluralism very clearly points out that conflicts of normative opinions (different conceptions of liberty, different political ideologies, and diverging ideals of social justice) are part of the very essence of *democratic* politics and one of the marks that distinguishes democratic politics from mere social or utilitarian engineering (cf. also Rawls, 1982). The idea of an overlapping consensus, accordingly, is convincing only if it is understood not as normative neutrality but as non-dogmatism, and the acknowledgement that the legitimacy of public decisions is separate from normative commitments to which citizens subscribe as private persons.
8. A paradigmatic analysis of law as a social practice is Hart's seminal *The Concept of Law*. I understand Rawls's use of the term 'institution' as 'rule guided practices' to point in the same analytical direction (1955). In social science, such an understanding of sociocultural practices is probably most tightly connected with the approach of Berger and Luckmann (1967). For more contemporary versions see Lagerspetz (2001) and Weinberger's institutional view of democracy (Weinberger, 1992; MacCormick and Weinberger, 1986) or MacCormick's institutional account of law (MacCormick, 2007).
9. The qualifications of this group are contested among liberals. See, for example, Follesdal (2000); Miller (1995).
10. The requirement of continuous political interdependence and equal-affectedness is also stressed by Christiano (2010). Its importance raises doubts that majority rule is acceptable in political organisations that deal

only with fragmented or highly sectoral political issues and lack the ability to affect cross-issue compensation.

11. It may be useful here to illustrate the point in the language of game theory. The structure of the performative view of democratic attitudes resembles that of a coordination problem (probably similar to the structure of an assurance game – see below):

	A'	B'
A	3,3	1,2
B	2,1	2,2

There are two equilibria (A/A' and B/B') but no single individual strategy that qualifies as the best (or better than the other) *independently* of the choice of strategy by others. For a discussion of the intricate difficulty of coordination problems, see among others Schelling (1960), Lewis (1969), Hollis and Sugden (1993), Gilbert (1996), Skyrms (2004), Tuomela (2001). In contrast to most other proposals regarding how individuals deal with problems such as Lewis's account of common knowledge, Gilbert's account of collective intentions, and Tuomela's account of we-attitudes – all of which refer to other individuals' *intentions* – the performative view insists on the need for 'public observability' of behavioural manifestations of intentional attitudes that are cognitively accessible by experience and reflection.

12. See also Christiano (2001).

Bibliography

Bellamy, R. (2007) *Political Constitutionalism* (Cambridge: Cambridge University Press).

Berger, P. L. and Luckmann, T. (1967) *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (New York: Anchor).

Berlin, I. (1999) 'Does Political Theory Still Exist?' in I. Berlin (ed.) *Concepts and Categories* (London: Pimlico), 143–72.

Buchanan, J. (1954a) 'Social Choice, Democracy and Free Markets', *Journal of Political Economy*, 62, 114–23.

Buchanan, J. (1954b) 'Individual Choice and Voting in the Market', *Journal of Political Economy*, 62, 334–43.

Christiano, T. (1996) *The Rule of the Many* (Boulder, CO: Westview).

Christiano, T. (2001) 'Knowledge and Power in the Justification of Democracy', *Australasian Journal of Philosophy*, 79, 197–215.

Christiano, T. (2010) 'Democratic Legitimacy and International Institutions' in S. Besson, J. Tasioulas (eds) *The Philosophy of International Law* (Oxford: Oxford University Press), 119–38.

Chwaszcza, C. (2011) 'Kollektive Autonomie. Zum normativen Verhältnis von Volkssouveränität und individuellen Rechten in der liberalen Demokratie', *Zeitschrift für Philosophische Forschung*, 59, 917–35.

Dahl, R. A. (1989) *Democracy and Its Critics* (New Haven: Yale University Press).

Follesdal, A. (2000) 'The Future Soul of Europe: Nationalism of Just Patriotism? A Critique of David Miller's Defense of Nationality', *Journal of Peace Research*, 37, 503–18.
Gilbert, M. (1996) *Living Together* (Lanham, MD: Rowman and Littlefield).
Habermas, J. (2008) 'Hat die Demokratie noch eine epistemische Dimension? Empirische Forschung und normative Theorie' in J. Habermas (ed.) *Ach, Europa* (Frankfurt am: Suhrkamp Verlag), 138–91.
Hollis, M., and Sugden, R. (1993) 'Rationality in Action', *Mind*, 102 (405): 1–35.
Lagerspetz, E. (2001) 'On the Existence of Institutions' in E. Lagerspetz, H. Ikäheimo, and J. Kotavirta (eds) *On the Nature of Social Institutions and Reality* (Jyväskylä: University of Jyväskylä Printing House), 70–101.
Lagerspetz, E. (2010) 'Wisdom and Numbers', *Social Science Information*, 49/1, 29–59.
Lewis, D. (1969) *Convention* (Cambridge, MA: Harvard University Press).
MacCormick, N. (2007) *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press).
MacCormick, D. N., and Weinberger, O. (1986) *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: Springer).
Macdonald, T. (2008) 'What Is So Special about States? Liberal Legitimacy in a Globalising World', *Political Studies*, 56/3, 544–65.
Miller, D. (1995) *On Nationality* (Oxford: Oxford University Press).
Nida-Rümelin, J. (2010) 'Politische Theorie in der Demokratie', *Politsches Denken, Jahrbuch 2010* (Berlin: Duncker and Humblot), 21–9.
Pettit, P. (1997) *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon).
Przeworski, A. (1999) 'Minimalist Conception of Democracy: A Defense' in I. Shapiro (ed.) *Democracy's Value* (Cambridge: Cambridge University Press), 23–55.
Rawls, J. (1995) *Political Liberalism* (New York: Columbia University Press).
Rawls, J. (1982) 'Social Unity and Primary Goods' in A. Sen and B. Williams (eds) *Utilitarianism and Beyond* (Cambridge: Cambridge University Press), 159–86.
Rawls, J. (1971) *A Theory of Justice* (Cambridge, MA: Harvard University Press).
Rawls, J. (1955) 'Two Concepts of Rules', *Philosophical Review*, 64, 3–32.
Schelling, T. (1960) *The Strategy of Conflict* (Cambridge, MA: Harvard University Press).
Schumpeter, J. (1994) *Capitalism, Socialism and Democracy* (London: Routledge).
Skinner, Q. (2008) *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press).
Skyrms, B. (2004) *The Stag Hunt and the Evolution of Social Structure* (Cambridge: Cambridge University Press).
Tuomela, R. (2001) 'Collective Acceptance and Social Reality' in E. Lagerspetz, H. Ikäheimo, and J. Kotavirta (eds) *On the Nature of Social Institutions and Reality* (Jyväskylä: University of Jyväskylä Printing House), 102–35.
Waldron, J. (1999) *Law and Disagreement* (Oxford: Oxford University Press).
Walker, N. (2008) 'Taking Constitutionalism Beyond the State', *Political Studies*, 56/3, 519–43.
Weinberger, O. (1992) 'Der normativistische Institutinalismus und die Theorie der Gerechtigkeit, Gerechtigkeit als Leitidee der Demokratie' in O. Weinberger (ed.) *Moral und Vernunft* (Wien: Böhlau), 234–60.

6
The Limits of Post-Territorial Political Community

David Chandler

Introduction

The attenuation or hollowing out of territorial politics has created a crisis of traditional frameworks of political community. Territorially defined and constructed political communities are suffering from a generic lack of cohering values and sentiments, expressed in regular discussions of the meaning and relevance of different national values, symbols, and traditions. Governments have great difficulty in legitimating themselves in traditional ways. With the decline in party membership and voting, even holding elections every five years does little to legitimate governing elites or to cohere political programmes for which they can be held to account. Traditional framings of foreign policy in terms of the national interest appear problematic and are often buttressed with claims of ethical or values-based foreign policy, which seek to secure the interests of people elsewhere rather than collectively expressing the interests of their citizens. In the face of this crisis in, and transformation of, traditional ways of understanding and participating in politics it is of little surprise that discussion of the possibilities of post-territorial political community has taken centre stage – that is, ways of politically constructing communities that are not based on (or can overcome) the exclusions seen as integral to territorially constructed forms of political association.

There is a growing consensus that expressing political community in territorially bounded terms is inherently problematic because of its narrow, self-interested, and divisive framework, in which radical politics are sidelined. For many critics, territorial political allegiances are held to be the product of uncritical and unreflective understandings of the role of state-based political communities in interpellating subjects that

are submissive and uncritical. As the theoretical engagement with the problems or the failure of territorial politics develops, increasingly juxtaposed to this hollowed out, exclusivist, and hierarchical framework are the possibilities of being political and of doing and participating in politics, held to be opening up with global interconnectedness and new forms of media and communications. The traditional state arena, in which modern liberal frameworks of political community first appeared, is now considered to be much less relevant and, in its stead, it seems that the possibilities of post-territorial political community are now about to be realised.

Critical theorists seemingly agree that post-territorial political community is the only possibility for the reconstruction of meaningful political practice in today's globalised world. The possibilities of post-territorial politics became increasingly articulated in the 1990s, mainly by theorists who argued that liberal democratic politics could no longer be meaningful practiced within the confines of the nation state. Liberal cosmopolitan theorists, such as Mary Kaldor, David Held, Andrew Linklater, Richard Falk, and Daniele Archibugi, argued for the need for a new cosmopolitan political order, based on the extension of political community beyond the nation state (for overview, see Archibugi, Held, and Köhler, 1998). These theorists asserted that democracy and political community could no longer be equated with the territorial limits of nation states: 'Democracy must transcend the borders of single states and assert itself on a global level' (Archibugi, 2000, p. 144). Without this shift, cosmopolitans alleged that the dominant relations of power and inequality would be perpetuated. For Falk, Western states 'do not even purport to represent the great majority of women and men on the planet. Moreover such states represent only the dominant class, gender, and race within their own territorial space.' (1995, p. 50) To meet the needs of cosmopolitan or global citizens, it was necessary to extend democracy beyond the nation state. As Linklater stated:

> Transcending state sovereignty which remains the constitutive principle of modern political life is understood as essential to promoting narratives of increasing cosmopolitanism. Expanding the realm of dialogic commitments is regarded as necessitating measures to reduce or eradicate the asymmetries of power and wealth which exist within sovereign states and in the global economic and political system.
>
> (1998, p. 109; see also p. 192)

This chapter seeks to draw out the similarities in approach to post-territorial political community, as expressed by both the 1990s liberal cosmopolitans and the 2000s radical post-structuralists. Firstly, that both approaches derive their strengths from their rejection of state-based political community rather than from their capacity to demonstrate the existence or strength of alternative post-territorial political community. Secondly, that key to both approaches is the degradation of the modern liberal conception of the rights-bearing subject: once the connection between citizenship and political community is broken then political community lacks any clear conceptual grounding. Thirdly, the chapter seeks to highlight that discussions about post-territorial political community fail to recognise that particular individuals or struggles appear to directly confront power – either in the form of elite advocacy or oppositional protest – precisely because the mediating links of political community are so attenuated.

The political project of post-territorial political community

The debates around the constitution of post-territorial political community, in the 1990s and 2000s, revolve around different understandings of the emergence of an immanent universalising political subject, capable of overcoming exclusion and hierarchy in international relations. For the 1990s critics, this universalising power – which sought to undermine the power of state sovereignty and privilege the rights of cosmopolitan individuals – was often termed global civil society. This universal was grounded in a view of an emerging cosmopolitan, universalist, or global consciousness in the wake of the ending of the Cold War (for example, Shaw, 1994). The discourse of universal human rights challenged the prerogatives of state sovereignty; therefore it was assumed that states were not capable of originating and bearing this discourse. The leading agents of cosmopolitan political approaches were assumed to be non-state actors, primarily NGOs, often described as 'norm entrepreneurs' (Finnemore and Sikkink, 1998). The rise of this universalist discourse was often understood in a social constructivist framework, based on the 'power of ideas' and the importance of global information networks (Risse et al., 1999). For liberal cosmopolitans, such as Kaldor, since the end of the Cold War, we have been witnessing a fundamental political struggle between global civil society and state-based approaches (Kaldor, 2003, 2007).

For the 1990s critics, the universal discourse was driven by progressive agency 'from below' and therefore was a challenge to power.

In our more disillusioned 2000s, particularly since 9/11, there has arisen an alternative critical reading of the discourse of cosmopolitan universality and the nature of post-territorial political community. Often a starting point for these critics is the work of German legal theorist Carl Schmitt, who, writing in the mid-twentieth century, was highly critical of US claims to uphold universal cosmopolitan rights in opposition to what he saw as the European view of international law, which privileged sovereign rights (see Schmitt, 2003). Schmitt claimed famously that 'whoever invokes humanity wants to cheat' (Schmitt, 1996, p. 54). Rather than a new progressive liberal universal subject arising from below, critical theorists in the 2000s saw the dangers of the liberal discourse as one that uncritically legitimated new totalising mechanisms of intervention and regulation from above.

In a direct challenge to the advocates of liberal cosmopolitan approaches, these critical approaches have been primarily constructed within post-structuralist frameworks, suggesting that a new universal subject may be emerging from below but in opposition to the cosmopolitan discourse of power promoted by the liberal advocates of the 1990s. In the recent work of Mark Duffield (2007) Vivienne Jabri (2007a) and Costas Douzinas (2007) this framework is melded with post-Foucaultian readings of cosmopolitan rights as an exclusionary and hierarchical exercise of liberal power and the constitution of an alternative political community in the struggle against the universalising power of liberal global governance.

In this framework, new global governmental practices, which are legitimised through the privileging of declarations of the rights of the human over and above the formal rights framework of sovereignty and non-intervention, are highlighted. For Duffield, the focus on cosmopolitan human rights, expressed in the discourses of state failure and the merging of security and development, creates a blank cheque for power to override the formal rights of sovereignty on the basis of the needs of securing the human. For Jabri, the recasting of military intervention in terms of the human undermines the state-based order and the line between domestic and global politics constituting a new global biopolitical order. For Douzinas, human rights discourses undermine territorial forms of sovereignty but enable the emergence of a new 'super-sovereign' of global hegemonic power.

Here, the universalism of liberal cosmopolitan theorists is 'stood on its head' to argue that it is the universalising interests of power, understood in vague terms of biopolitical, neo-liberal, global governance, rather than the genuinely cosmopolitan ethics of empowerment, which

drives the discursive practices of regimes of regulation and intervention in the international sphere. As the 1990s liberal discourse has been challenged by the 2000s post-structuralist discourse, we seem to be caught up in a contestation over which academics have the most progressive or radical understandings: of hierarchies of power – as a product of 'statist' exercises of national self-interest or as a product of new global governmentalities; and of post-territorial political community – as a response and opposition to these hierarchies, either in the form of global civil society or multitude.

However, it is not clear whether the contestation – in terms of the ontological framings of the relations and dynamics of power or of alternative political subjects of post-territorial political community – reflects much more than the starting positions of the critical academic theorists concerned. It seems that the radical differences between those who espouse and those who critique global liberal ontologies – and thereby read post-territorial community in liberal or post-structuralist framings – are derived less from empirical investigations than from their own normative aspirations. For cosmopolitan theorists, their normative aspirations for a more ethical and engaged foreign policy agenda were given added legitimacy through linking their demands with those of activist NGOs and assertions of global civil society's immanent existence. As Kaldor asserts, the concept of global or transnational civil society is used on the one hand as an analytical device, but on the other hand, it is also used to express 'a political project' (1999, p. 195).

Similarly, for post-structuralist critics, the struggle against 'empire' is alleged to be more than mere philosophical idealism precisely because it is founded upon the immanent existence of the 'multitude'. Just as with the concept of global civil society, Hardt and Negri's multitude is partly framed as an abstract heuristic device (2006, p. 221). But more importantly it is also a normative project: 'The multitude needs a political project to bring it into existence' (2006, p. 212). As they state: 'The proletariat is not what it used to be' (2001, p. 53). Their task, therefore, is to discover a new form of global agency. They describe this mixture of academic investigation and normative aspiration as illustrating that multitude 'has a strange double temporality: always-already and not-yet' (2006, p. 222). It appears that the new post-territorial political communities, held to be coming into existence, conflate empirical and normative aspirations in the critique of the perceived hierarchies of power: either being seen as constituted against the narrow state interests dominating international politics or against the biopolitics of the global 'empire'.

At the level of discursive analysis (as we shall see) the choice between these two approaches can easily appear to be a purely subjective one. Neither one appears to satisfactorily ground the existence of a new emerging universal subject capable of constituting post-territorial political community – as the agent of cosmopolitical regimes or of post-cosmopolitical resistance to these regimes. In neither does the subject possess the constitutive rights of liberal–democratic forms of territorialised citizenship. In both, the subject – which is alleged to demonstrate both the lack *and* the presence of post-territorial political community – is grounded in a way that confuses normative political critique with empirical analysis. Both approaches suggest that traditional territorial political communities have been fundamentally undermined by the changing nature of social relations – by globalisation or by neo-liberal or biopolitical production processes. These changing social relations are held to have undermined territorial political community through the deconstruction of the unitary assumptions involved in modern liberal democratic political theory. However, they have been much less successful in demonstrating that new post-territorial forms of political community have been constructed in their stead.

What is clear is that, in the name of post-territorial political community, cosmopolitan and radical critics have sought to represent the crisis of legitimacy of representative political bodies as a product of political contestation emerging from post-territorial actors. In these frameworks of understanding global politics, the shift towards post-territorial community is seen as indicative of new lines of political struggle that have replaced those of the territorialised framework of Left and Right. For cosmopolitan and critical theorists, this is the struggle for cosmopolitan and human rights and for emancipation against the sovereign power of states. For post-structuralist theorists, this is seen as the struggle for autonomy and difference against the universalising war waged 'over ways of life itself' by neo-liberal biopolitical governance (Reid, 2006). However, these struggles remain immanent ones, in which global political social forces of progress are intimated but are yet to fully develop. There is a problem of the social agency, the collective political subject, which can give content to the theorising of global struggle articulated by academic theorists. It seems that neither cosmopolitan nor post-structuralist theorists are able to envisage the possibility that we could live in a world where politics appears to have become deterritorialised, not as a result of the expanded nature of political community, but precisely because of the absence of political community (see further Chandler, 2009).

Political community without political subjects

Neither the liberal nor the post-structuralist visions of post-territorial community contain modern liberal rights-bearing subjects. For there is neither a universalising sphere of legal nor political equality constituted by autonomous rights-bearing subjects. The cosmopolitical critique of liberal democratic frameworks of political community is precisely that they are not able to empower and protect minorities and the marginal or excluded and that, therefore, there needs to be an external level of regulatory rights enforcement of cosmopolitan rights. As Falk argues:

> It is now evident that democracy, at least as constituted in liberal democratic societies, is not by itself a sufficient precondition for a peaceful and just world. Democracy as an operative political form seems quite compatible with certain types of militarism and racism, perhaps resting in turn on patriarchal practices and hidden assumptions.
>
> (1995, p. 24)

The cosmopolitan project seeks to legitimise liberal policy-frameworks without engaging with the electorate, increasingly seen to be too 'egoistic' or 'apathetic' and distanced from liberal policy elites, and, under 'reflexive modernity', lacking commonality (for example, Beck, 1998). The challenge to the liberal rights framework is based on the belief that progressive ends – such as the protection of human rights, international peace, or sustainable development – would be more easily achieved without the institutional constraints of democratic accountability. In Falk's words, the problem is: 'the reluctance of national citizenries for emotive and self-interested reasons to endorse globalizing initiatives' (1995, p. 216).

The cosmopolitan, or post-territorial, democratic subject is defined through being freed from any political framework that institutionalises liberal democratic norms of formal accountability. The bearer of human rights or rights of global citizenship, by definition, has no fixed territorial identity and thereby no place within any institutionalised framework of legal and political equality from which to hold policy actors to formal account. Because they are freed from any such framework, the 'rights' of the cosmopolitan citizen are dependent on the advocacy of an external agency. By default, the cosmopolitan subject becomes concrete only through 'representation' on a particular issue through the agency of global civil society advocates who also have an existence 'free' from the institutionalised political framework of the nation state.

Without the institutionalisation of mechanisms of accountability, global civil society claims to 'represent the people' remain unsubstantiated (Edwards, 1999, p. 180). Whereas the claim for representation is inevitably contested, global civil society actors and movements often assert that the crucial role which they perform is that of 'articulation' of the needs of global citizens. Because the global citizen cannot directly hold policymakers to account, the role of global civil society interlocutors becomes central to give content to claims of democracy without formal representation. Kaldor, for example, argues that 'the role of NGOs is not to be representative but to raise awareness', adding that the 'appeal is to moral conscience' not to political majorities (2001). Johan Galtung, similarly, gives support to this form of 'empowerment', which he terms 'democracy by articulation, not by representation' (2000, p. 155).

Having rejected the conventional modes of representation and authority, the cosmopolitan advocates explicitly root their authority in the ethical legitimacy predicated on the *absence* of any expressed will. This is what allows human rights advocate Michael Ignatieff to argue that, thanks to global civil society, 'international politics has been democratized', while acknowledging in the same breath that civic actors 'are not elected by the victim groups they represent, and in the nature of things they cannot be' (Ignatieff, 2001, pp. 10–11). As Slavoj Žižek notes, the politics of ethical advocacy is based on 'interpassivity', the virtuous activity of a minority that presupposes the passivity of others, who are spoken for (2003). In short, the model of advocacy in global civil society is ethical, not representative.

The dangers in this altruistic, rather than representative advocacy, lie in the fact we can never be sure that the global civic actors really articulate the interests of the groups they claim to speak for. With no representative links to mediate their mutual relationship, the oppressed groups have no formal means of holding their self-appointed advocates, claiming to speak on their behalf, to account. It is revealing of the inner limits of global civil society that its members are so often drawn to the most marginalised groups – indigenous peoples, children, victims of human rights abuses and famines, et cetera. That is to say, precisely those with the least social power to hold the advocates of global civil society to account. Those social groups who are sufficiently organised to mount independent political action and speak for themselves would, not of course, require global civil society.

In this way, cosmopolitan frameworks inverse the grounding liberal relationship between rights and their subjects in their construction of rights independently of their subjects (see Chandler, 2003). These

rights are fictitious – in the same way as animal rights or the rights of the environment or of future generations would be – because there is a separation between the subjects of these rights and the political or social agency giving content to them. The proposed framework of cosmopolitan regulation is based on the fictitious rights of the 'global citizen' or of the 'human' not the expression of rights through the formal framework of political and legal equality of citizen-subjects. This framework recognises neither the democratic rights of citizens nor the collective expression of these rights in state sovereignty. It is important to stress the qualitative difference between the liberal–democratic approach, which derives rights from the autonomous capacities of human subjects, and the cosmopolitan approach of claiming rights on the behalf of others, who can only be constituted as non-subjects (see further, Chandler, 2002, pp. 103–5).

In reinterpreting 'rights' as moral or discursive claims, a contradiction appears between the enforcement and guarantee of cosmopolitan rights and the formal equality of the liberal democratic legal and political framework. Within the normative framework of cosmopolitan theory, vital areas of formal accountability, at both the domestic and international level, are questioned while new and increasingly ad hoc frameworks of decision-making are seen to be positive and 'emancipatory'. Firstly, the formal right of sovereign equality – the constitutive basis of international law and founding principle of the UN Charter (Article 2.1) – would be a conditional or residual right under the cosmopolitan framework. As Held notes: 'sovereignty *per se* is no longer a straightforward guarantee of international legitimacy' (2000, p. 24). Archibugi argues that it is a matter of urgency that 'democratic procedures should somehow be assessed by external agents' (1998, p. 210) effectively transferring sovereign power elsewhere. In this framing, states that failed these external assessments of their legitimacy would no longer have equal standing or full sovereign rights and could be legitimately acted against in the international arena.

More fundamentally, the domestic rights of citizens to democratic self-government would be removed. Cosmopolitans assert that, despite adherence to all internationally accepted formal democratic procedures, a state's government may not be truly democratic. In the cosmopolitan framework the formal demos is no longer necessarily the final arbiter of democratic outcomes because:

> The choices of a people, even when made democratically, might be biased by self-interest. It may, for example, be in the interests of

> the French public to obtain cheap nuclear energy if they manage to dispose of radioactive waste in a Pacific isle under their control, but this will obviously be against the interests of the public living there. (Archibugi, 1998, p. 211)

For cosmopolitan theorists the ethical ends for which they advocate are privileged above the sphere of democracy. As Linklater argues, this means a 'break with the supposition that national populations have the sovereign right to withhold their consent' if cosmopolitan demands 'clash with their conception of national interests' (1998, p. 192). In this framework, a small minority may be more 'democratic' than a large majority, if they have an outlook attuned to cosmopolitan aspirations. Kaldor draws out the implications of the argument when she suggests that the international community should not necessarily consult elected local representatives but seek 'to identify local advocates of cosmopolitanism' where there are 'islands of civility' (1999, p. 120). Just as states can not be equally trusted with cosmopolitan rights, neither can people. Instead of the 'limited' but fixed and formally equal demos of the nation state, there is a highly selective 'demos' identified by international institutions guided by the cosmopolitan impulse.

The limits of the biopolitical critique

The biopolitical critique of the discourse of cosmopolitan rights is that rather than a mechanism of empowerment it is an exercise of power. So far, so good. But, rather than critique cosmopolitan rights for the fictional nature of the rights claimed, the post-structuralist critics wish to portray all rights constructions – whether posed in terms of the territorialised 'citizen' or the deterritorialised 'human' – as equally oppressive and hierarchical. The post-structuralist critique, in fact, reflects a very similar view of citizen rights as the liberal cosmopolitan vision: expressing a similar aspiration to evade the problematic question of political representation and the formal constitution of political community. For cosmopolitan human rights advocates, there is no distinct difference between global, deterritorialised, human rights, and territorial, sovereignty-bounded, democratic, and civil rights. All rights claims are seen to be equally empowering and able to tame power in the name of ethics and equality. Here, the extension of cosmopolitan frameworks of global governance is read to be the extension of the realm of freedom and a restriction on state sovereign power. The post-structuralist response is to argue that the liberal discourse reveals the truth in its

blurring of rights claims: the hidden relationship between democracy and dictatorship; law as an ad hoc and arbitrary power is therefore the inner truth of the appearance that law is a reflection of the autonomy and agency of legally constituted subjects (Agamben, 1998, p. 10).

For the critics of cosmopolitan rights regimes, the extension of a discourse of rights and law merely enhances the power of liberal governance. Indeed, Giorgio Agamben has captured well the ethico-juridical blurring of human rights regimes as a 'state of exception', by which he means not a dictatorship but a hollowing out or emptying of the content of law:

> The state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law.
>
> (2005, p. 87)

Cosmopolitan claims do, in fact, advocate for a 'permanent state of exception'. However, in reading the state of exception as the essential nature of the sovereign state and law, Agamben argues that the lesson is that progressive politics can never operate within the modern state form: 'Politics has suffered a lasting eclipse because it has been contaminated by law, seeing itself, at best, as constituent power (that is violence that makes law), when it is not reduced to merely the power to negotiate with the law.' (2005, p. 88) In his earlier work, *Homo Sacer*, he argued:

> It is almost as if … every decisive political event were double-sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of the individual's lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.
>
> (1998, p. 121)

For both the liberal cosmopolitan advocates of human rights and their radical post-structuralist critics, there is no specific understanding of the problem of cosmopolitan rights as based on non-socially constituted legal subjects (Lewis, 1998). For both liberal cosmopolitan theorists

and post-structuralists, rights regimes are understood to be constituted independently of and prior to the rights subjects. For cosmopolitan advocates, it is precisely because the poor and excluded cannot autonomously enforce their rights that an external agency needs to step in to empower them and constitute them as rights holders. For post-structuralists, rights are also constituted independently and prior to their subjects: it is the declaration of rights that constitutes the subject; rights therefore are understood as preceding and interpellating their subject (Douzinas, 2007, p. 92). Douzinas therefore stresses the darker side of rights: 'the inexorable rise of registration, classification and control of individuals and populations' (2007, p. 129). Post-structuralist critics exaggerate the cosmopolitan claim that rights are independent from subjects in order to view all rights claims as fictions and all rights-subjects as non-subjects (Agamben's 'bare life').

For radical post-structuralists, the ambiguity of cosmopolitan frameworks of political community – which can only empower those who decide on the content and ad hoc implementation – are read to be, not an attack on modern liberal democratic frameworks of rights and law, but instead essentialised as the key to understanding the hegemonic power of liberal framings of rights and representation. The radical critics critique the claims of the liberal cosmopolitans by essentialising them as modern liberal rights claims per se. This one-sided understanding of rights, through breaking their connection to rights-subjects, produces in an exaggerated form the cosmopolitan critique of the political sphere of representation. For liberal advocates of cosmopolitan rights, representational claims are problematic because they may undermine rights protections and therefore regulatory power needs to exist above the nation state; for post-structuralists, any participation in the political sphere of the territorial state is inherently disempowering, necessitating a 'flight from sovereignty' and the formal sphere of representation (Hardt and Negri, 2006, p. 341).

The flight from the sphere of the rights-bearing subject of liberal modernity, in both cosmopolitan and post-structuralist frameworks, is crucial to enable the move to post-territorial constructions of political community. For modern liberal political theory, it was the rights framework that reflected and institutionalised the existence of a political community of equal rights-bearing subjects. The liberal political ontology has the autonomous rights-bearing individual as the foundational subject of legal and political spheres of formal equality. The rule of law and the legitimacy of government were derived from the consent and accountability of rights-holding citizens.

In the frameworks of cosmopolitan and post-structuralist theorists of post-territorial political community, political community is no longer constituted on the basis of a rights framework of autonomous subjects. Formal frameworks of politics and law are held to be independent of the political subject (which is reinterpreted as the object of administration and regulation rather than as a rights subject). For liberal cosmopolitans, the existence of rights (law) prior to and independently of political subjects is held to legitimise regimes of international intervention and regulation, while for post-structuralists the autonomy of law is read as the autonomy of power to interpellate and create the ruled subject. In both frameworks, by theoretical construction, there is no longer a distinction between the citizen and the non-citizen as rights claims are merely a reflection of the claims of rule made by (benign or oppressive) power.

Once the construction of political community is freed from political and legal frameworks of liberal rights, both cosmopolitan and post-structural approaches are free to establish the existence of a political community at the global level, as a post-territorial construction. The only problem with this construction is the question of how political community can be constituted without the rights and duties of citizenship. The approaches to this problem will be briefly addressed below.

Individuals and the 'community'

In modern liberal theorising, it is the rights and duties of citizenship that constitute the shared bonds of political community. The political sphere is clearly distinct as the public sphere of law and politics from the private sphere of particularist identities, hobbies, and interests. Political community is therefore distinct from the bonds of family, friendship, or groupings of special interests. What makes political community distinct is its public nature, which forces people to engage with others, whom they do not necessarily know or agree with in order to contest representational alternatives. It seems clear that the attenuation of political contestation, of the struggle between Left and Right, has meant that political community has less meaning for many of us than other (non-political) communities with which we may participate or identify.

The advocates of post-territorial political community dismiss the bonds of citizenship, constituted by modern liberal rights frameworks; this means that the bonds that constitute post-territorial community are much more difficult to locate. For cosmopolitan theorist, John Keane,

global civil society, constituted by networked actors, constitutes a form of political community, albeit a 'paradoxical' one:

> It refers to a vast, sprawling non-governmental constellation of many institutionalised structures, associations and networks within which individual and group actors are interrelated and functionally interdependent. As a society of societies, it is 'bigger' and 'weightier' than any individual actor or organisation or combined sum of its thousands of constituent parts – most of whom, paradoxically, neither 'know' each other nor have any chance of ever meeting each other face-to-face.
>
> (2003, p. 11)

The idealised view of global civil society relies on claims about the communicative interaction of global civic actors, which have little connection to reality. Similarly, William Connolly has to go through some contortions to substantiate his claim that 'network pluralism sustains a *thick* political culture', as he adds by way of parenthesis:

> But this is a thickness in which the centre devolves into multiple lines of connection across numerous dimensions of difference… such as ethnicity, religion, language, gender practice and sexuality. These lines of flow slice through the centre as diverse constituencies connect to one another, pulling it from concentric pluralism toward a network pattern of multidimensional connections.
>
> (2001, p. 352)

The line between a complete lack of social or political interconnection and having a 'thick political culture' seems to be in the eye of the beholder. It is important to highlight the abstract and socially disengaged nature of the post-territorial project. Advocates of global civil society, such as Kaldor, are keen to assert that global civil society is actively engaged in debating global issues, but they are much less specific when it comes to detailing the concrete nature of these 'debates': the content or ideas generated; if a record was kept; or if the debate had any consequences. It appears that, in making these assertions of communicative debates, these advocates repeatedly use the concept of 'public/global/ethical *debate*' in an intellectually dishonest way. The dictionary definition of 'debate' is a formal form of argument in which parties attempt to persuade an audience of their position and there are rules enabling people to discuss and decide on differences. Public debate

inside or across national boundaries is, of course, a positive exercise but this does not mean that there is any form of public debate in deterritorialised 'global space'. Debate is a purposive human activity: websites do not talk to themselves – or personal blogs – just as diaries that we keep under our beds do not communicate with each other.

The question of community interconnection between the multitude of networked actors constituting the alternative framework for post-territorial political community is a problematic one, which reveals the lack of mediation between the particular and the ostensible political 'community' or the 'many'. This lack of mediation is highlighted in Hardt and Negri's description of the multitude as neither one nor many. They assert that the multitude 'violates all such numerical distinctions. It is both one and many' thereby allegedly threatening all the principles of order (2006, p. 139). In fact, it is the lack of social or political connection between the various struggles, from those of Los Angeles rioters to Chiapas rebels, which defines the multitude. This lack of connection is described by Hardt and Negri as 'incommunicability': 'This paradox of incommunicability makes it extremely difficult to grasp and express the new power posed by the struggles that have emerged' (2001, p. 54).

However, the more isolated and marginal these struggles are then the more transgressive and 'global' they become, in their 'direct' challenge to 'power' or 'empire'. For example, the Los Angeles rioters are held to challenge racial and hierarchical forms of 'post-Fordist' social control, or the Chiapas rebels are seen as challenging the regional construction of world markets. The key assertion is that: 'Perhaps precisely because all these struggles are incommunicable and thus blocked from travelling horizontally in the form of a cycle, they are forced instead to leap vertically and touch immediately on the global level' (2001, p. 56). These struggles are immediately global because of their lack of interconnection in the same way that they are 'deterritorialised' because they lack the capacity to strategically or instrumentally challenge power. It is their lack of social or political connection that makes these struggles non-territorial or 'global'.

The multitude no more constitutes a political community than liberal cosmopolitan constructions of global civil society (Chandler, 2004b, p. 2007). In both frameworks, there is no mediation between the particular, at the level of the individual or the particular struggle, and any collective political subject. Post-territorial political community is therefore constructed precisely on the basis of prioritising an abstract universal, which preserves the individual and the particular. Any declaration of 'community' can only be a highly abstract one.

As Jabri argues, in expressing the post-territorial alternative of 'political cosmopolitanism': the alternative is 'a conception of solidarity without community'; one which does not assume any shared vision or views and, in fact, seeks to deconstruct universal perspectives as merely the project of hegemony (2007b, p. 728).

It is not clear what the theorists of post-territorial political community – whether in its liberal cosmopolitan or post-liberal post-cosmopolitan forms – have to offer in terms of any convincing thesis that new forms of political community are in the process of emerging. Political community necessarily takes a territorial form at the level of the organisation for political representation on the basis of the nation state (in a world without a world government) but has a post- or non-territorial content at the level of ideological and political affiliation, which has meant that support and solidarity could be offered for numerous struggles taking place on an international level (given formal frameworks in the nineteenth- and twentieth-century internationals of anarchists, workers, women, and nationalists) (see, for example, Colas, 2002).

Giving meaning to political community

For the content of territorial political community to be meaningful does not mean that politics can be confined to territorial boundaries: the contestation of ideologies, ideas, and practices has never been a purely national endeavour. However, without a formal focal point of accountability – of government – there can be no political community; no framework binding and subordinating individuals as political subjects. The critique of territorial political community and assertion of the immanent birth of post-territorial political community, in fact, reflects and seeks to evade the problem of the attenuation of traditional Left/Right forms of political contestation and the concomitant lack of clarity over the location of political accountability. If political contestation is constitutive of political community then it seems quite possible that 1990s cosmopolitans and 2000s post-structuralists are both seeking to displace, overcome, or substitute the problem of the lack of political contestation through an exaggerated emphasis on the 'post-territorial' or the 'global'.

Without the collapse of political community there would be little discussion of the meaning of post-territorial politics. Hardt and Negri highlight this when they counterpose post-territorial, networked struggles of the multitude to territorial struggles, revealing that: 'Many of these [territorial] movements, especially when they are defeated, begin

to transform and take on [post-territorial] network characteristics.' (2006, p. 83) So, for example, it was the defeat of the Zapatistas that freed them to take up life as a virtual Internet struggle. It was political defeat and marginalisation that meant that they could take up an even more radical challenge than confronting the Mexican government, that of the postmodern subject, attempting to 'change the world without taking power' (2006, p. 85). The failure of modernist political projects based on the collective subject is clear; as Hardt and Negri observe: 'The people is missing' (2006, p. 191). But unlike Paolo Virno's theorising of the multitude (2004) as reflecting merely the crisis of the state form in terms of the plurality and incommensurability of political experiences – that is, the lack of political community – Hardt and Negri seek to see the multitude as the constitutive agent of the postmodern and post-territorial political world.

Many authors have understood the rejection of territorial politics as the rejection of the ontological privileging of state power, articulated in particularly radical terms by Hardt and Negri as 'a flight, an exodus from sovereignty' (2006, p. 341). Fewer have understood that this implies the rejection of political community itself. Politics without the goal of power would be purely performative or an expression of individual opinions. Politics has been considered important because community was constituted not through the private sphere but through the public sphere in which shared interests and perspectives were generated through engagement and debate with the goal of building and creating collective expressions of interests. Without the goal of power, that is, the capacity to shape decision-making, political engagement would be a personal private expression rather than a public one. There would be no need to attempt to convince another person in an argument or to persuade someone why one policy was better than another. In fact, in rejecting territorial politics it is not power or the state which is problematised – power will still exist and states are still seen as important actors even in post-territorial frameworks.

The essential target of these critical theorists of post-territorial community is political community itself: the engagement with fellow citizens, that is, the necessity to legitimise one's views and aspirations through the struggle for representation. As Falk describes:

> Transnational solidarities, whether between women, lawyers, environmentalists, human rights activists, or other varieties of 'citizen pilgrim' associated with globalisation from below … [have] already transferred their loyalties to the invisible political community of

> their hopes and dreams, one which could exist in future time but is nowhere currently embodied in the life-world of the planet.
>
> (1995, p. 212)

The interconnectedness that is celebrated is, in fact, the flip side of a lack of connection domestically: 'Air travel and the Internet create new horizontal communities of people, who perhaps have more in common, than with those who live close by' (Kaldor, 2003, pp. 111–12). What these 'citizen pilgrims' have in common is their isolation from and rejection of their own political communities. The transfer of loyalties to an 'invisible political community' is merely a radical re-representation of their rejection of real and visible political communities – the electorate.

For both liberal and radical views of post-territorial political community, political community – and the contestation this involves – is unnecessary. Political views are considered self-legitimating without the need to engage in politics – that is, bypassing society or the masses – and directly expressing the claims to power in radical protests at world summits or in the power of NGO lobbying. This evasion of society, this retreat from political community, is expressed in radical terms as the fundamental 'right to difference' (Hardt and Negri, 2006, p. 340) or 'freedom from a singular Universal Ethic' (Keane, 2003, p. 196). Radical approaches became 'globalised' at the same time as their political horizons became more and more parochial and limited and they drew back from seeking to engage instrumentally or strategically with the external world. For Alberto Melucci, these new social movements existed outside of the traditional civil society–state nexus, submerged in everyday life. Without reference to a political community, Melucci argues traditional measurements of efficacy or success miss the point: 'This is because conflict takes place principally on symbolic ground. … The mere existence of a symbolic challenge is in itself a method of unmasking the dominant codes, a different way of perceiving and naming the world' (1988, p. 248). This, in Melucci's words is the 'democracy of everyday life', where legitimacy and recognition stem from 'mere existence' rather than the power of argument or representation (1988, p. 259). Rather than the struggle for representation, the post-territorial struggle of 'globalisation from below' is framed as one of autonomy and held to be self-constituting.

The radical self-constitution of the political subject avoids the mediating link of the political community. Political legitimacy is no longer derived from the political process of building support in society but

rather from recognition and acceptance of social isolation. This is a logical consequence of the New Left's rejection of any legitimate collective political subject. As Laclau and Mouffe assert in their summation of the essence of 'radical democracy':

> Pluralism is *radical* only to the extent that each term of this plurality of identities finds within itself the principle of its own validity. … And this radical pluralism is *democratic* to the extent that the auto-constitutivity of each one of its terms is the result of displacements of the egalitarian imaginary. Hence, the project for a radical and plural democracy, *in a primary sense*, is nothing other than the struggle for a maximum autonomization of spheres on the basis of the generalization of the equivalential-egalitarian logic.
>
> (2001, p. 167)

The claim is not for equality but for autonomy; for recognition on the basis of self-constituted difference rather than collective or shared support. The focus upon the marginal and the subaltern appears to provide a radical critique of power but, without a transformative alternative, can easily become a critique of political community itself. Here, the critique of 'power' or 'the state' becomes, in fact, a critique of political engagement. Political community is only constituted on the basis of the potential to agree on the basis of shared, collective interests. The refusal to subordinate difference to unity is merely another expression for the rejection of political community. Political community can not be constituted on the basis of post-territorial politics in which there is no central authority and no subordination to any agreed programme. For Hardt and Negri: 'The multitude is an irreducible multiplicity; the singular social differences that constitute the multitude must always be expressed and can never be flattened into sameness, unity, identity, or indifference' (2006, p. 105).

Beyond the territorial boundaries of the nation state, it is precisely the missing essence of political community (the formal political sphere of sovereignty and citizenship) that becomes constitutive of post-territorial political community. Without the need to worry about the constitutive relationship between government (sovereign) and citizen, political community becomes entirely abstract. There is no longer any need to formulate or win adherence to a political programme and to attempt to challenge or overcome individual, sectional, or parochial interests. Engagement between individuals no longer has to take a political form: all that is left is networked communication. For Hardt

and Negri: 'The common does not refer to traditional notions of either the community or the public; it is based on the communication among singularities' (2006, p. 204). While communication is important there is little point in communication without purpose, what the multitude lacks is precisely this subjective purpose that could bind them and constitute political community.

Conclusion

The attenuation of politics and hollowing out of the meaningful nature of representation constitutes the collapse of any meaningful political community. In the 1990s, the inability of political elites to create projects of political meaning, able to cohere their societies or offer a programme of shared values, led to attempts to evade the problems of legitimising political programmes on the basis of electoral representation alone. The advocates of cosmopolitan political community in the 1990s were the first to distance themselves from state-based politics, finding a freedom from political community in the free-floating rights of global advocacy. It was under this banner of global liberalism and ethical policymaking that political elites sought their own 'exodus from sovereignty' – justified on the basis of a critique of the liberal rights subject – and, in the process, further attenuated the relationship between government and citizen. This was a discourse that sought to respond to the collapse of political community rather than one that reflected the birth of a newer or more expansive one at a global level.

In the 2000s, the hollow nature of liberal cosmopolitan claims appeared to be clearly exposed in the Global War on Terror. The radical discourse of post-structuralist post-territorial political community sought to critique this international order as a product of global liberalism, however the nature of the critique, was in content and form little different from that of 1990s cosmopolitanism. There is little difference between the frameworks of the post-structuralist critics and the liberal cosmopolitans because the ground work of the critique was already laid by the crisis within liberal thinking. It was the work of the self-proclaimed 'liberal' cosmopolitan theorists that fundamentally challenged the foundational liberal ontology, which established the modern liberal order through deriving political legitimacy from the rights of autonomous individual subjects. The liberal basis of political order and of political community on the basis of shared rights and duties had already corroded from within. The radical critique of the cosmopolitan discourse of global rights offers a critique of sovereign

power, representational politics, and its grounding liberal ontology, but one that merely echoes, to the point of parody, that of its ostensible subject of critique.

Bibliography

Agamben, G. (1998) *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press).

Agamben, G. (2005) *State of Exception* (Chicago: University of Chicago Press).

Agnew, J. (1999) 'Mapping Political Power Beyond State Boundaries: Territory, Identity, and Movement in World Politics', *Millennium: Journal of International Studies* 28, 499–521.

Archibugi, D. (1998) 'Principles of Cosmopolitan Democracy', in D. Archibugi, D. Held, and M. Köhler (eds) *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity).

Archibugi, D. (2000) 'Cosmopolitical Democracy', *New Left Review* 2, 137–50.

Archibugi, D., D. Held, and M. Köhler (eds) (1998) *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity Press).

Baker, G. (2002) *Civil Society and Democratic Theory: Alternative Voices* (London: Routledge).

Baker, G. and D. Chandler (eds) (2005) *Global Civil Society: Contested Futures* (London: Routledge).

Baudrillard, J. (1983) *In the Shadow of the Silent Majorities* (New York: Semiotext(e)).

Baudrillard, J. (1987) *Forget Foucault* (New York: Semiotext(e)).

Beck, U. (1998) *Democracy without Enemies* (Cambridge: Polity).

Beetham, D. (1999) *Democracy and Human Rights* (Cambridge: Polity).

Booth, K. (2001) 'Ten Flaw of Just Wars', in K. Booth (ed.) *The Kosovo Tragedy: The Human Rights Dimensions* (London: Frank Cass) pp. 314–24.

Chandler, D. (2002) *From Kosovo to Kabul: Human Rights and International Intervention* (London: Pluto Press).

Chandler, D. (2003) 'New Rights for Old? Cosmopolitan Citizenship and the Critique of State Sovereignty', *Political Studies* 51, 339–56.

Chandler, D. (2004a) *Constructing Global Civil Society: Morality and Power in International Relations* (Basingstoke: Palgrave Macmillan).

Chandler, D. (2004b) 'Building Global Civil Society "From Below"', *Millennium: Journal of International Studies* 33, 313–39.

Chandler, D. (2007) 'Deriving Norms from "Global Space": The Limits of Cosmopolitan Approaches to Global Civil Society Theorizing', *Globalizations* 4, 283–98.

Chandler, D. (2009) *Hollow Hegemony: Rethinking Global Politics, Power and Resistance* (London: Pluto).

Colas, A. (2002) *International Civil Society: Social Movements in World Politics* (Cambridge: Polity).

Connolly, W. (2001) 'Cross-State Citizen Networks: A Reply to Dallmayr', *Millennium: Journal of International Studies* 30, 349–55.

Douzinas, C. (2007) *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (London: Routledge Cavendish).

Duffield, M. (2007) *Development, Security and Unending War: Governing the World of Peoples* (Cambridge: Polity).
Edwards, M. (1999) *Future Positive: International Co-operation in the 21st Century* (London: Earthscan).
Falk, R. A. (1995) *On Humane Governance: Toward a New Global Politics* (Cambridge: Polity).
Finnemore, M. and K. Sikkink. (1998) 'International Norm Dynamics and Political Change', *International Organization* 52, 887–917.
Foucault, M. (2003) *Society Must Be Defended: Lectures at the Collège de France 1975–1976* (London: Allen Lane/Penguin).
Foucault, M. (2007) *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Basingstoke: Palgrave Macmillan).
Foucault, M. (2008) *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979* (Basingstoke: Palgrave Macmillan).
Galtung, J. (2000) 'Alternative Models for Global Democracy', in B. Holden (ed.) *Global Democracy: Key Debates* (London: Routledge).
Habermas, J. (1999) '*Bestialität und Humanität*', *Die Zeit*, 54, 29 April. Franz Solms-Laubach trans available at http://www.theglobalsite.ac.uk/press/011habermas.htm.
Hardt, M. and A. Negri. (2001) *Empire* (New York: Harvard University Press).
Hardt, M. and A. Negri. (2006) *Multitude: War and Democracy in the Age of Empire* (London: Penguin).
Held, D. (1998) 'Democracy and Globalisation', in D. Archibugi, D. Held, and M. Köhler (eds) *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity).
Held, D. (2000) 'The Changing Contours of Political Community: Rethinking Democracy in the Context of Globalization', in B. Holden (ed.) *Global Democracy: Key Debates* (London: Routledge).
Ignatieff, M. (2001) 'Human Rights as Politics and Idolatry', in A. Gutmann (ed.) *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press).
Jabri, V. (2007a) *War and the Transformation of Global Politics* (Basingstoke: Palgrave Macmillan).
Jabri, V. (2007b) 'Solidarity and Spheres of Culture: The Cosmopolitan and the Postcolonial', *Review of International Studies* 33, 715–28.
Kaldor, M. (1999) 'Transnational Civil Society', in T. Dunne and N. J. Wheeler (eds) *Human Rights in Global Politics* (Cambridge: Cambridge University Press).
Kaldor, M. (2001) *Analysis*, BBC Radio Four, 29 March.
Kaldor, M. (2003) *Global Civil Society: An Answer to War* (Cambridge: Polity).
Kaldor, M. (2007) *Human Security* (Cambridge: Polity).
Keane, J. (2003) *Global Civil Society?* (Cambridge: Polity).
Laclau, E. and Mouffe, C. (2001) *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, 2nd edn. (London: Verso).
Lewis, N. (1998) 'Human Rights, Law and Democracy in an Unfree World', in T. Evans (ed.) *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press).
Linklater, A. (1998) *The Transformation of Political Community* (Cambridge: Polity).
McGrew, A. (1997) 'Conclusion: Democracy Beyond Borders?: Globalization and the Reconstruction of Democratic Theory and Politics', in A. McGrew (ed.)

The Transformation of Democracy? Globalization and Territorial Democracy (Cambridge: Polity Press/ Open University).
Melucci, A. (1988) 'Social Movements and the Democratization of Everyday Life', in J. Keane (ed.) *Civil Society and the State: New European Perspectives* (London: Verso).
Reid, J. (2006) *The Biopolitics of the War on Terror: Life Struggles, Liberal Modernity, and the Defence of Logistical Societies* (Manchester: Manchester University Press).
Risse, T., S. C. Ropp, and K. Sikkink. (eds) (1999) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press).
Rosenberg, J. (2000) *The Follies of Globalisation Theory: Polemical Essays* (London: Verso).
Ruggie, J. G. (1993) 'Territoriality and Beyond: Problematizing Modernity in International Relations', *International Organization* 47, 139–74.
Scholte, J. A. (2002) 'Civil Society and Democracy in Global Governance', *Global Governance*, 8, pp. 281–304.
Schmitt, C. (1996) *The Concept of the Political* (Chicago: University of Chicago Press).
Schmitt, C. (2003) *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum* (New York: Telos Press).
Shaw, M. (1994) *Global Society and International Relations: Sociological Concepts and Political Perspectives* (Cambridge: Polity).
Virno, P. (2004) *A Grammar of the Multitude* (New York: Semiotext(e)).
Žižek, S. (2003) 'The Interpassive Subject', 20 May. Accessed at http://www.lacan.com/interpass.htm.

7

Making Global Governance Public? Habermas's Model for a Two-track Cosmopolitan Order

Kenneth Baynes

Introduction

Over the past decade or so there have been various calls for 'global' or 'cosmopolitan' democracy – most notably, perhaps, by David Held (Held, 1995 and 2004). Sometimes these calls are based on empirical and quasi-functional claims about the supposed trends of globalisation, the increasing obsolescence of the nation state and Westphalian order, and the need for democratic politics to 'catch-up' (Habermas, 2001, 58–112). One influential theorist, Alexander Wendt, has even spoken in this context of the 'inevitability of a world-state' (Wendt, 2003). More often, however, the calls for global democracy invoke various normative arguments – about justice, fairness, autonomy, or the further expansion of democratic rights (Brock, 2009). Some of these normative approaches look more promising than others. However, here I want to bracket these normative considerations in order to consider a different argument for cosmopolitan democracy – one that explores its relation to an emergent international (or global) rule of law, on the one hand, and a rapidly developing global public sphere, on the other.

In fact, the idea of cosmopolitan democracy covers a wide variety of institutional proposals and, contrary to some of its critics, rarely calls for replicating at a global level the institutional design of democratic governance in the nation state or for establishing a world state (see Archibugi, 2008; Bohman, 2007). David Held has been the most specific in his proposals. He distinguishes between short-term and long-term reforms (Held, 1995, c. 12). For the short-term, his proposals concerning political governance include reform of the UN Security Council, the creation of a second chamber within the UN that would not be limited to representation of nation states, enhanced regional representation, and

use of transnational referenda, the establishment of a new international Human Rights Court that would include a broad set of basic rights and compulsory jurisdiction for their implementation (Held, 1995, p. 279). Longer term reforms include the entrenchment of cosmopolitan democratic law within national and supranational constitutions, a global parliament with limited revenue-raising capacities, and the creation of an interconnected global legal system.

As William Scheuerman has pointed out, Held's proposals depend heavily not only upon global networks of intergovernmental organisations (IGOs) and non-governmental organisations (NGOs) of various sorts, but perhaps even more importantly upon transnational courts and judicial bodies to which these other agencies would in some sense be accountable and 'so that groups and individuals would have an effective means of suing political authorities for the enactment and enforcement of key rights' (Scheuerman, 2002a, p. 446). Moreover, according to Scheuerman, since global governance on Held's model would require relatively flexible forms of regulation, such reforms also mark a significant departure from the classical conception of the rule of law. In his own work, Scheuerman suggests that Held's proposals must be supplemented by closer attention to the role of reflexive law within a framework of more traditional rule of law virtues (e.g., the demand that procedural and organisational norms are relatively clear and cogent).[1] In short, as I shall argue, while cosmopolitan democracy may demand more flexible forms of legal regulation as Held suggests, the new paradigm of reflexive or procedural law to which it appeals must itself be situated within a constitutional framework of relatively transparent, stable, and accountable procedures, even absent a central state authority. This, I suspect, constitutes one of the major challenges confronting advocates of institutional (as opposed to moral) cosmopolitanism.

In this chapter I wish to consider the possibility that Jürgen Habermas's recent proposal for a form of cosmopolitanism (or what he calls a 'constitutionalization of international law') can be supported in connection with two recent phenomena: an emergent 'anomalous administrative law' (Kingsbury) on the one hand; and a growing global civil society that might encourage more transparent and accountable forms of global governance on the other. The underlying thesis is that new understandings (and new practices) of the rule of law in terms of procedures of public reasoning and adjudication together with new modes of governance without a centralised government through a growing global civil society (and corresponding transnational public sphere) make it possible to speak of an emergent global democracy even

in the absence of a world state or world government. The chapter claims that both of these deeply contestable concepts – the rule of law and democracy – must be understood more abstractly than has traditionally been the case (e.g., primarily in connection with the ideas of 'predictability' and 'a sovereign body', respectively) *and* that such a conceptual change is in fact actually taking place at the global level in connection with the process of globalisation. The consequence is that it may be possible to envision a form of cosmopolitanism, or 'constitutionalization of international law' (Habermas), that is able to secure important democratic elements.

Habermasian reflections on democratic global governance

In an essay marking the 200th anniversary of Kant's essay 'Perpetual Peace', Habermas invokes Kant's call for a 'cosmopolitan order' (*Weltbürgerliche Zustand*) that would bring about a definitive end to the bellicose 'state of nature' between nation states (Habermas, 1997). In fact, in this essay Habermas faults Kant for equivocating between a commitment to a global constitutional order or 'world republic' and a weaker voluntary federation among sovereign states. If states are to be subject to enforceable law and obligated by more than (largely impotent) moral norms, a loose federation will not suffice and Habermas seems to support calls for a 'cosmopolitan democracy' that include a reformed and strengthened United Nations (including a 'world parliament' with directly elected representatives in a 'second chamber') (Habermas, 1997, p. 134). Changes on the international scene since Kant's time also provide this utopian vision a greater degree of realism: The variety of phenomena that, taken together, have recently been grouped under the heading 'globalisation' raise important questions about the possibility of achieving democracy within the limited framework of the nation state. The increased number and expanding influence of multinational corporations, growing international flow in labour and capital, expanding population migration, and large-scale ecological threats challenge in new ways the nation state's claim to legitimacy, even on the domestic front. In short, can the nation state, given its apparently diminished capacity to act, maintain its legitimacy in the face of growing demands of its citizenry? At the same time, the widening (if fragile) recognition of human rights, the more active role of the United Nations and other international organisations, and a developing global civil society (including worldwide informational media) make it meaningful at least to ask whether a 'post-national constellation' is not emerging in which

the locus of democratisation is no longer centred exclusively on the territorial nation state.

In several important essays published since *Between Facts and Norms* Habermas has joined the growing debate concerning the possibility – and shape – of a cosmopolitan democracy. Indeed, there is much in his 'two-track' model of democracy, with its strong division of labour between 'weak' and 'strong' publics, that suggests why this might be so. On the one hand, there is no inherent reason why his idea of a weak public sphere cannot also be realised in the context of a global civil society and, on the other, there are also some reasons for extending his discursive account of strong publics – the formal institutions of decision-making – in connection with the idea of a more multi-layered and dispersed conception of sovereignty and the related idea of 'subsidiarity' and an emergent 'anomalous' administrative law. Similarly, his claim that there has been at most only a historical (not a necessary) convergence between the political *demos* (or state) and a relatively homogenous nation or people (*Volk*) also supports the claim that the former need not be limited to the traditional (territorial) idea of the nation state. At the same time, however, Habermas has modified his earlier cautious endorsement of a 'world republic' and now prefers to speak of a 'constitutionalization of international law' or 'global governance without a world government' (Habermas, 2001, p. 109; Habermas, 2006, p. 139f.). He thus also distances himself from the views of some cosmopolitan democrats who argue for a more unified federal world order (Habermas, 2008, p. 323). In these later essays, Habermas advocates a 'multilevel federal system' that distinguishes among three global actors according to their respective functional roles and tasks: a supranational political body (or reformed UN) limited to the maintenance of peace and protection of basic human rights; an intermediate level occupied by regional bodies devoted to a 'global domestic politics', including large-scale economic and environmental policies and which he refers to as a 'transnational negotiating system'; and nation states that have acquired a more modest and self-limiting identity (Habermas, 2006, pp. 134f. and 174f.; Habermas, 2008, p. 322f.) In this context Habermas has also voiced support for strengthening the role of the United Nations (though now limited to the two goals of maintaining peace and protecting human rights) and for the further strengthening of the international criminal court (ICC) with a mandate to prevent at least gross violations of human rights. At the same time, however, he is more cautious than some advocates of cosmopolitan democracy about the likelihood of achieving on a global scale the kind of civic solidarity (as a 'solidarity among strangers') that is for him a necessary condition for a robust deliberative politics (Habermas, 2006, p. 177; Cronin, 2011).

In this respect, he reflects a limited agreement with some of his more civic republican critics such as Charles Taylor or Benjamin Barber. His own constructive proposal (in addition to his support for a European constitution) calls for the development of 'transnational negotiating systems' in which various players (including nation states, international governmental institutions, and NGOs) would fulfill the function of a 'strong public,' while citizens motivated by a cosmopolitan consciousness and active in various ways in a cosmopolitan civil society, together with a more vigilant global mass media, would constitute a 'weak public'. As with the two-track model introduced at the level of the nation state, the challenge again is for imaginative institutional design leading to a more responsive and accountable 'strong public' than is possible today at the level of the nation state alone. However, the basic structure of this proposal for cosmopolitan democracy remains the same: a dynamic division of labour between a free-wheeling public sphere that functions as a kind of 'receptor' for identifying and thematising social problems – and ensuring that they are placed on the political agenda – and the more formally organised (though multilayered and dispersed) strong publics responsible for 'translating' publicly generated reasons into socially effective policies via accountable administrative bodies (Nanz and Steffek, 2007). This is certainly an extremely abstract model of democracy and many of its more specific institutional details are missing, but, contrary to some of his critics, Habermas's vision of a renewed public sphere is by no means simply an abdication either to the triumph of liberalism as traditionally conceived or to capitalism in its latest 'global' phase (Scheuerman, 2008; Tinnevelt and Mertens, 2009).

From an emergent administrative law to democratic global governance?

The responses to calls for cosmopolitan democracy have also been quite varied. Some have been highly critical of proposals to move beyond the Westphalian order suggesting that they are either premature, since there is no corresponding demos at the global level, and/or inherently dangerous, since they seem to open the way for a centrist and bureaucratic legal order that may prove to be rather despotic (Zolo, 2000; Saward, 2000). Still others have argued that, however attractive in theory, global democracy is practically speaking both implausible and unnecessary (Saward, 2000). For example, the international legal theorist, Benedict Kingsbury, has importantly argued that, short of a world government still conceived more or less along the lines of the

democratic nation state, there are other developments at the global level, particularly developments within international law, that may be able to address some of the concerns about globalisation noted by cosmopolitans. Kingsbury mentions several important conceptual innovations that have shaped the character of international law and might play a role here: for example, the emergence of a concept of sustainable development among the OECD nations that has influenced the formation of both environmental law and economic regulation, the concept of international criminal responsibility (and final ratification of the International Criminal Court in 2003), and the concept of 'transnational civil responsibility', expressed, for example, in the increasing ability of foreign plaintiffs to pursue damage awards for human rights abuses in domestic courts – primarily in the United States. It also is in this context that Kingsbury points to the increasingly *public* character of international law. These and other developments suggest to Kingsbury an expanding if precarious international legal system that is gradually establishing the rule of law at the international level. However, rather than buttressing calls for cosmopolitan democracy along the lines proposed by Held, Kingsbury suggests that the emerging international society is more likely to be pluralist or *Grotian* in character (Kingsbury, 2003a).

I believe that Kingsbury points to some interesting and important developments and that he is right to draw attention to the emerging forms of global governance that nonetheless stop short of some of the proposals associated with more robust forms of cosmopolitan democracy. However, if he is right about the various ways in which aspects of the rule of law are being realised at the international level, then I think there is also a basis for expecting the emergence of cosmopolitan democratic institutions as well. This is primarily because, as I shall suggest in a moment, just as there is a relation of mutual presupposition between the ideas of democracy and the rule of law at the level of the nation state, I see no particular reason for not assuming that this should be true at the global level as well—at least in some measure. The challenge could then be re-formulated as one about forms of democratic governance absent a centralised political authority.

Let me begin with a review of Kingsbury's main argument. According to Kingsbury, recent reflection on the character of international law has been insufficiently attentive to its distinctively public character or what he calls its 'publicness.' This failure, in turn, has impeded an interpretation of international law that is distinct from both sceptical or realist models, on the one hand, and excessively normative ones or, in his phrase, 'fanciful cosmopolitanism,' on the other. The realist model,

I gather, strictly speaking reserves the label 'public' for laws created by the sovereign of the respective nation state and so denies that international law could have a truly 'public character' – much as it also denies there could even be any genuine international law. The normative or cosmopolitan model, on the other hand, might similarly argue that the public character of international law would require a global democratic sovereign and, accordingly, real steps toward supranational democratic institutions. The originality of Kingsbury's proposal lies in a refashioned notion of the 'public' that is detached from a claim about its source in a sovereign legislator (whether a nation state or world state) – it concerns most broadly and most generally, 'the relationship of governors and governed' (Kingsbury, 2009, p. 174). For Kingsbury, 'Public law is here understood as the law that empowers the state and that regulates state power. National public law usually has its locus within the state, but it is internationalized insofar as it is shaped by, and shapes, traditional international legal rules, international public policy, and transnational ethical norms' (Kingsbury, 2003a, p. 403). He then further links this notion of (international) public law with the idea of a dispersed sovereignty or exercise of law from multiple and overlapping sites. As he describes it, 'the relevant normative practices are conducted at multiple sites, each site subject to local considerations as to legal principles, institutional meshing, and sources of authority, so that there is neither a simple unified global hierarchy on the internationalist model, nor a complete disjunction between different sites of law' (Kingsbury, 2009, p. 175). The result is accordingly a return to the Grotian *jus gentium*, but at the same time it is a modest proposal that stops short of a call for a more robust cosmopolitan democracy.

I would first like to unpack Kingsbury's idea of the *publicness* of international law and suggest that, in contrast to Hobbes and Kant, respectively, it parallels at least in some respects Rawls's strategy in *The Law of Peoples*. This is most evident in Kingsbury's emphasis on the 'political' character of public law and the contrast he draws, for example, between his own and Dworkin's justice-based approach.[2] I will then suggest that it also shares some of the same weaknesses of Rawls's approach. Finally I will suggest that his embrace of a (restricted) pluralism is not unique to his particular approach but also finds support among at least some cosmopolitans if only as one element in a more explicitly democratic approach.

There are, of course, a number of senses in which one might speak of the publicness or public character of law. Traditionally, public law deals with the powers and limits of the state or political rule or with what

concerns the 'commonweal' (see Loughlin, 2003). In Hobbes, it refers more directly to the law (or will) of the political sovereign, such that all law is public that, with only a few constraints, issues from the established sovereign power (Gauthier, 1995). This traditional account of public law can also be found in Kant. However, Kant also introduced his own novel conception of publicity and public reason that goes beyond this traditional account. In 'What is Enlightenment?' Kant proposed an idiosyncratic account of the public and private uses of reason. A public use of reason refers, not to the reasoning of citizens in their role as civil servants or state bureaucrats, but to the reasoning of citizens directed at the enlightened ('reading') public. Thus, in something of a reversal of familiar terminology, a private use of reason is 'that which a person may make of it in a particular civil post or office,' where the audience is restricted, while a public use of reason occurs when the same person 'as a scholar addressing the real public (i.e., the world at large) … speaks in his own person' (Kant, 1995, p. 55f.). As Onora O'Neill points out, what distinguishes the public use of reason is its appeal to an unrestricted audience in which, to borrow a phrase, nothing but the force of the better argument prevails (O'Neill, 1989). For Kant, this notion of public reason could in turn serve as a check on the exercise of legislative power and, in that context, Kant introduces a variant of the categorical imperative that he calls 'the transcendental principle of public right': 'All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public' (Kant, 1995, p. 126). Public reason (and hence the further 'publicness' of public law sanctioned by it) can thus claim its public character on three grounds. Its publicness arises from the specific actors exercising it, its particular content, and the practices associated with it: namely, private citizens deliberating collectively about the common good via both formally and informally instituted practices. Indeed, Kingsbury appears to endorse a similar view when he states that 'publicness is a way of describing that quality of law which entails law claiming both to stand in the name of the whole society, and to speak to that whole society' (Kingsbury, 2009, p. 180). For Kant, the principle of public right or publicity, together with the widening scope of the public use of reason, is arguably also one basis for his call for cosmopolitan law and a confederation of free republics oriented to perpetual peace (Kant, 1995; Habermas, 1997).

Kingsbury's conception of the public character of law, however, is in the last analysis neither Hobbesian nor Kantian. He proposes a third model that has its roots in the political thought of Grotius and, more recently, in Hedley Bull's notion of an international society. The public

character of law does not have its source exclusively in the political sovereign (who acts in a unitary and rational manner) nor is it the same as that associated with Kant's notion of the public use of reason by private citizens seeking the common good. Kingsbury proposes a more pragmatic and 'political' approach that fashions a notion of public from the practice of international law and from customary norms and values that have taken shape in international society. The public character of international law arises from an 'inter-public process' that includes multiple actors in addition to states and draws on principles and norms not limited to universal moral norms. 'The key point is that the normative content of law arises not in its derivation from or consonance with universal moral principles, nor in the self-governing power of each and every politically-organized community, but in the public nature of law itself' (Kingsbury, 2009, p. 173). Among the various elements that comprise this alternative notion of publicness, Kingsbury mentions its 'political character', (p. 174) its 'claim to speak to the whole society', (p. 180) its inclusion of fundamental human rights (p. 179), its integrative role in a conception of 'world political order', and its relation to a notion of social solidarity or a 'solidarism of public values' (p. 197). However, these elements are not all given equal weight or attention. Kingsbury, for example, says little about the connection between the public character of law and the basic rights and liberties of citizens. He emphasises more than once the claim that public law speaks to (and on behalf of) society as a whole (pp. 174 and 180). However the principal feature seems to be that it is law that defines and enables the complex relationship between the governors and the governed. He also stresses at several points that it builds on a solidarism of public values rather than a narrower conception of instrumental rationality.

Kingsbury's approach to international law shares a number of similarities with Rawls's account in *The Law of Peoples* (Rawls, 1999). For example, both emphasise the importance of a 'free-standing' political conception that, unlike Kantian accounts, does not depend on a single, comprehensive moral doctrine. However, the similarities with Rawls also point to some potential weaknesses in Kingsbury's position. In particular, it is difficult to assess the role played by the corresponding empirical and normative claims, and the call for a 'realistic utopia' – or dismissal of 'fanciful cosmopolitanism' – can operate in ways that undermine normative commitments. For example, Kingsbury writes, 'Inter-public law consists in part of the internationalization of public law, and in part of the response of different public law systems to each other and to international law' (Kingsbury, 2009, p. 175). To repeat, Kingsbury surely considers the

increase in the public character of law a positive trend. However, it is less clear what more specific public values are to be included and what the normative limits of publicity are – why, for example, does it not include a demand for greater democratisation? Kingsbury's own position – like Rawls's – seems to be more political or pragmatic at this point. However, again like Rawls, it is at just this point that a clearer distinction between empirical interpretation and normative commitments would be helpful (see McCarthy, 2002).

Kingsbury suggests that the public (and 'interpublic') character of law advances pluralism but not necessarily democracy (Kingsbury, 2009, p. 193). By pluralism, I assume, he means more or less the trend to dispersed and multi-level sovereignty. However, this trend has been recognised and embraced by many cosmopolitans as well. As David Held points out, modern republican theory, including recent democratic theory, generally works with an unquestioned conception of political sovereignty in which the state is conceived as 'a circumscribed structure of power with supreme jurisdiction over territory accountable to determined citizen body (Held, 1991, p. 223). Democratic theory in particular traditionally assumes a remarkably unitary conception of sovereignty in its commitment to what Held calls a 'symmetrical' and 'congruent' relationship between political decision-makers and the recipients of political decision or 'stakeholders: 'In fact, symmetry and congruence are assumed at two crucial points: the first between citizen-voters and the decision-makers whom they are, in principle, able to hold to account; and secondly, between the output (decisions, policies, etc.) of decision-makers and their constituents – ultimately, 'the people' in a delimited territory' (Held, 1991, p. 198). Yet, as Held notes, this conception of sovereignty is barely recognisable in the contemporary world. Trends toward global interconnectedness have both modified and constrained the exercise of sovereignty and called into question its assumptions about symmetry and congruence. Processes of globalisation have produced structures of decision-making that are less tied to the legal jurisdiction of the nation state and hence also less accountable; at the same time those decisions still made within the legal framework of the nation state frequently have consequences that go well beyond national territorial borders.

Following a suggestion of Hedley Bull, Held describes the results of these trends as a kind of neo-medieval international order – 'a modern and secular counterpart to the kind of political organization that existed in Christian Europe in the Middle Ages, the essential characteristic of which was a system of overlapping authority and multiple loyalties'

(Held, 1991, p. 223). In apparent contrast to Bull, however, Held suggests that the model of overlapping authorities and criss-crossing loyalties continues to offer some normatively attractive features.

Similarly, Thomas Pogge has also proposed a model of differentiated or dispersed sovereignty in connection with the cosmopolitan ideal:

> What I am proposing instead is not the idea of a world State, which is really a variant of the preeminent state idea. Rather, the proposal is that governmental authority – or sovereignty – be widely dispersed in the vertical dimension. What we need is both centralization and decentralization – a kind of second-order decentralization away from the now dominant level of the state.
>
> (Pogge, 2002, p. 178)

As Pogge goes on to point out, differentiated or dispersed sovereignty is not simply the product of actual social, political, and economic trends; considerations of peace and security, global economic justice, and environmental preservation provide reasons for preferring such dispersed sovereignty from a normative point of view as well. Equally important for Pogge is the consideration of democracy itself: 'Persons have a right to an institutional order under which those significantly and legitimately affected by political decision have a roughly equal opportunity to influence the making of this decision – either directly or through elected delegates or representatives' (Pogge, 2002, p. 184). For Pogge, as for Held, increasing global interdependence requires that new forms of decision-making be developed that are able to secure simultaneously mechanisms for local autonomy *and* effective input and accountability on global issues that impact individual lives – in other words, both centralisation and decentralisation in a dispersal of state sovereignty.

I mention the views of Held and Pogge to suggest that cosmopolitans too have looked favourably on this idea of pluralism yet, apparently in contrast to Kingsbury, do not see it as conflicting with democracy. Rather, many of them see it as the basis for a new and emerging form of cosmopolitan democracy and alternative form of global governance.[3] Archibugi, for example, locates cosmopolitan democracy 'midway' between a confederation of states and a global federal system and Habermas too, in his reflections on the 'postnational constellation,' describes not a centralised world state, but multi-level forms of governance within an 'international negotiating system' (Archibugi, 2008). This leads me to propose an alternative interpretation of the various phenomena that Kingsbury has identified. To repeat my earlier conjecture, if there

is indeed an emergent rule of law at the international level, then this equally both encourages and demands the development of democratic institutions at the global level. This suggestion has been pursued most recently by Cohen and Sabel, in connection with their own extension of the idea of a 'deliberative polyarchy' beyond the level of the nation state. The aim is to identify mechanisms for informed or knowledgeable accountability within the context of the 'anomalous' administrative law discussed by Kingsbury (see Cohen and Sabel, 2005).

The central claim I wish to defend then, as an alternative to Kingsbury, is that there is an important normative connection between democracy and the rule of law.[4] At the level of the democratic *Rechtsstaat*, Habermas has described this connection as 'gleichursprunglich' (co-original) or one of mutual supposition. It is not immediately obvious what the force or basis of this claim is: clearly, not all democracies consistently adhere to the rule of law; and the rule of law – at least in one or another of its narrower senses – can be found in non-democratic regimes. It is also not obvious that there is a strong analytic or conceptual connection between these two ideas – and at least some theorists have resisted that proposal (Raz, 1979). My own suggestion is that the best way to understand this claim about the reciprocal dependence or mutual supposition of democracy and the rule of law is in terms of a kind of immanent developmental tendency contained in each of these ideals – somewhat along the lines of Hegel's views about the inner logic of a '*Begriff*'. More specifically, in an increasingly 'rationalized' world (in Weber's sense), the virtues traditionally associated with the rule of law can only be secured procedurally through processes of democratic will-formation. In short, a more robust interpretation of the rule of law in terms of transparent and public reasoning now requires the processes associated with a demanding idea of democratic deliberation. Let me offer, first, a few remarks in support of this hypothesis and then briefly note its relevance for cosmopolitan democracy.

It is sometimes supposed that the rule of law is in conflict with the idea of democratic rule or 'popular sovereignty.' Similarly, it is also argued that the related idea of legal adjudication is undemocratic, at least if judges are not subject to direct means of democratic accountability.[5] However, I believe this is a misunderstanding that arises from an overly concrete interpretation of what these ideals demand, especially concerning the institutional conditions required for realising the idea of the rule of law. Of course, if the rule of law is contrasted with the 'rule of men' then no reconciliation with democratic rule will be possible. However, recent analyses of the rule of law suggest that

this ideal incorporates a variety of political values and that it cannot be adequately described by reference to only one of these values (such as legal formality).[6] Thus, in a comprehensive review, Richard Fallon suggests that there are at least four 'types' of rule of law (historicist, formalist, process, and substantive) and that no one of these types alone captures its role in contemporary legal practice (Fallon, 1997). Rather, elements of each type are important and if, as he suggests, one looks to the various 'interests' served by the rule of law (clarity, predictability, accountability, public justification, etc.), then a case can be made, not only that the rule of law is compatible with democracy, but that democracy (itself conceived as set of institutions for public debate and decision-making) itself both requires the rule of law and anticipates some institutional structures well-suited for its realisation.

Similarly, Jean Hampton, in the context of a friendly amendment to Hart's conception of law as a system of primary and secondary rules, has also argued democracy itself offers a set of rules for how legal rules are to be changed (Hampton, 1994). Of course, at some level, these rules must themselves be included in what Hart called the 'rule of recognition'; but it is a distinctive feature of a democracy that the rules for changing the rules of the game themselves be legally specified, at least in a broad sense (e.g., through inclusion in a democratic constitution). At the same time, one function of the rule of law (and the role of law, generally) is to provide a relatively stable, predictable, and publicly justifiable set of norms in accordance with which citizens can regulate their interactions with one another.

Of course, an institutional account of the relation between deliberative democracy and the rule of law as has been suggested here certainly needs to be explored empirically and allows for a variety of institutional forms. But, such a conception, I believe, allows one to see how the rule of law can play an important constitutive role in realising a deliberative democracy, and, more specifically, how processes of legal adjudication as the task of a (more or less) autonomous legal community can be 'rational,' without thereby invoking an overly rule-based conception of law (Waldron, 2004; Baynes, 2007). The idea is that both institutions of legal reasoning and legal argument *and* institutions of political deliberation and will-formation necessarily complement one another in seeking to express a more general conception of *public deliberation*. More importantly, it also suggests how the idea of the rule of law expresses a commitment to forms and procedures of practical reasoning – a 'theatre of debate,' to borrow Waldron's phrase – that both complements yet *requires* other institutions of public reason and deliberation best

expressed in the idea of a deliberative democracy. Neil MacCormick has also recently emphasised the 'public reasoning' aspect of the rule of law, as an indispensable complement to the dimension of 'legal certainty (MacCormick, 1999). Further, to return now to Kingsbury's thesis, I also see no particular reason not to find this same relation between democracy and the rule of law to be relevant at the international level as well: both capture different but related aspects of a commitment to public global reasoning.

In fact, there is some empirical basis for claiming that a 'democratic entitlement' is emerging at the international level not only as a 'moral prescription' but as a 'legal obligation'. In his comprehensive study, Thomas Franck has identified three 'generations' in the development of this entitlement (Franck, 1995). The first generation, dating from at least 1918, is a right to self-determination that applies primarily to 'peoples'. The second generation centred on the human right to free expression and civil association. The third generation of normative entitlement is that of a participatory electoral process. This generation is potentially the most radical since it raises the question of international monitoring of democratic processes in ways that greatly challenge traditional conceptions of internal sovereignty. Franck's claim is not that these entitlements have been fully realised and even less that they constitute a claim for cosmopolitan democracy as outlined above. Rather, his claim is that a democratic entitlement has already received wide recognition as a basic human right at the international level and that the three generations together constitute a coherent normative entitlement that has a firm basis in established international law. I believe it further suggests that with the increasing thickening or juridification of international relations – itself still quite uneven both in terms of its content and its application – there is some basis for recognising a corresponding democratic entitlement. As such, it may present some counter-evidence to Kingsbury's thesis that there is an important alternative between what he calls Kantian cosmopolitanism and a Grotian *jus gentium* that supports pluralism rather than global democracy.

In fact, it seems to me that there are some good reasons to anticipate a growing convergence between the processes of juridification described by Kingsbury and processes of global governance that might claim some degree of democratic legitimation. In *A New World Order*, Anne-Marie Slaughter offers a comprehensive overview of developments in global governance, especially in connection with *transgovernmental* networks (Slaughter, 2004). In contrast to transnational networks, transgovernmental organisations occur primarily in the context of

a 'disaggregated' state in which sub-national governmental bodies develop global networks with like-minded bodies in other states. She describes these in the three areas of regulatory bodies, judicial bodies, and (to a lesser extent) legislative bodies. Examples include regulatory agencies in which private corporations work with IGOs, NGOs, and other organisations to develop more socially responsible policy, judicial bodies that take on a more global awareness, even to the point of incorporating international judicial viewpoints within their own judicial decisions.[7]

This process of 'disaggregation' of state sovereignty, however, does not necessarily support Hauke Brunkhorst's more pessimistic claim that, 'every weakening of the strong public sphere of national democracies is, first of all, to the advantage of the thicker and thicker interweaving of economy and law, and thereby shifts the balance of the 'separation of powers' set up between 'solidarity' and 'money' (Habermas) in favour of the medium of money' (Brunkhorst 2005, p. 150). On the contrary, Slaughter's claim is that the process of horizontal networking may allow for more democratic policy formation than is possible within the traditional model. Of course, thus far the horizontal networking (among regulatory, judicial, and legislative bodies) is much more extensive than the vertical networking; and whether such networking will in the long run secure genuine democratic accountability remains an open question. Indeed, Slaughter herself describes the need for a 'network of networks' – what I described above as a 'constitutional framework of democratic procedures' – including the creation of more vertical government networks that 'pierce the shell of state sovereignty by making individual government institutions – courts, regulatory agencies, or even legislators – responsible for the implementation of rules created by a supranational institution' (Slaughter, 2004, p. 132). Whether global governance develops in this way also depends, as I shall argue in the next section, on whether a global public sphere that is able to significantly contribute to the transparency, accountability, and responsiveness of these global networks in both their horizontal and vertical dimensions also develops.

Curiously, Kingsbury, like Brunkhorst, also expresses some caution about the prospects of the 'spontaneous' legal orders that emerge independently of states as proposed by Teubner and others (Kingsbury, 2009, p. 193; see Teubner, 1997). Thus, the reflexive law of relatively distinct, autonomous systems (evidenced primarily in *lex mercatoria*), though certainly relevant for the thickening or juridification of international relations, does not seem to capture the phenomena of

'publicness' that Kingsbury has in view. Similarly, he distances himself from more radical pluralists, including the recent proposal by Hardt and Negri for a 'democracy of the multitude' (Hardt and Negri, 2004). However, if cosmopolitanism itself is no longer identified exclusively with the idea of a world state or world republic, it is no longer obvious what Kingsbury's specific disagreements with it might be. After summarising Hauke Brunkhorst's recent suggestion that the already existent 'weak public sphere' of a global civil society might be strengthened via a 'constitutionalization of international law' (Habermas), Kingsbury concludes: 'In sum, I think the Deweyan problem-solving too soft and expert-oriented, the Arendtian joint action too limited and erratic, and the strong coupling of a global public with constitutionalist institutions too improbable, for this cluster of Habermasian approaches to be a likely basis for public law on a global basis in the near future, however helpful these ideas may be in world sociology' (Kingsbury, 2009, p. 187). But this conclusion seems unnecessarily hasty and fails to consider some important aspects of the Habermasian model. In particular, it neglects the central role played by civil society in Habermas's 'two-track' model of democracy. Once the significant role for civil society in global governance is properly noted, it would seem that Kingsbury's observations regarding an emergent global law might well describe at least one aspect of just the kind of intermeshing and exchange between weak and strong publics that Habermas and Brunkhorst envision.

Civil society and global governance

As noted above, an important feature of Habermas's deliberative model of democracy is his sharp division of labour between a 'weak public' and a 'strong public' or between the formation of public opinion in the vast array of associations that together constitute civil society and the more formally organised institutions of decision-making (including mass political parties as well as the institutions of government).[8] Indeed, a main feature of Habermas's work since the early 1990s has been his controversial claim that radical democracy must be 'self-limiting' in the sense that while a 'weak public' should attempt to influence the deliberations and decision-making of a 'strong public,' it should not, however, attempt to displace (or replace) those formally organised bodies (Habermas, 1990; 1996). Rather, drawing on a proposal by Bernard Peters, Habermas uses the metaphors of sluices, dams, and canals to describe how a vast network of institutions and associations lying on the periphery might shape opinion and influence

decision-making in the political core without replacing those formal institutions or depriving them of their own important function (Peters, 1993; Scheuerman, 2002b). Though I will not pursue the details further here, this model is obviously connected to his systems-theoretic conviction that the formally organised institutions of the market and political power serve important functions even if they must simultaneously be tamed by the 'communicative power' formed in civil society (Habermas, 1996, c.7).

Since a 'strong public' at the global level corresponding to the state apparatus at the national level will most likely be more plural and dispersed among a variety of transnational bodies (see Habermas, 2006, p. 141), there is perhaps even more reason to look to the role of civil society in making global governance public and more accountable. Thus, the increasing juridification of global governance – whose positive aspects Habermas describes as a constitutionalisation of international law – must itself be accompanied by the strengthened role of a global civil society that has a similar taming effect on the development of transnational or global law. This would in turn allow for the emergence of a form of democratic global governance even in the absence of a world government and would aptly capture Habermas's two-track model at the level of a post-national constellation.

In fact, the last few decades have witnessed increasing attention to the emergence of a global or transnational civil society that might perform just such a role (Keane, 2003; Kaldor, 2004; Smith and Brassett, 2008). Jan Aart Scholte, a long-time scholar of civil society, has recently characterised it as 'a political space where voluntary associations seek, from outside political parties, to shape the rules that govern one or another aspect of social life' (Scholte, 2011, p. 214) and has expressed guarded optimism about its increased role in global governance. He has also studied for over two decades the ways in which various associations comprising a global civil society have worked to make other international organisations (such as the UN, the World Bank, the IMF, and WTO, among many others) more transparent and accountable to their stakeholders. Many organisations have established at least consultative status to NGOs and draw on their expertise in other ways in their policy deliberations. The WTO, particularly since their Third Ministerial Meeting in Seattle in 1999, has aggressively cultivated its relationship with NGOs, created an informal NGO Advisory Board, and has, as a result, made its deliberations more transparent and accountable (Williams, 2011; Erman and Higgott, 2010). At the same time, through their efforts to increase public awareness about activities and policies

of various international organisations, NGOs have at least helped to make some of those meetings more responsive and have arguably have had some positive effect on the formation of public policy itself (Scholte, 2004; Dryzek, 2006). Although at this point the conclusions are still mixed and their influence is uneven, NGOs and other civil society associations have certainly had some success in making the deliberations of these organisations more accessible to a wider public, in providing forums for discussion of their policies, and in making them more responsive to their stakeholders.

Working in close connection with Habermas's own two-track model, Nanz and Steffek have also stressed the importance of a global civil society for democratic and accountable governance and they have identified specific ways in which civil society might enhance transparency, increase the quality of deliberations, and make deliberations more inclusive (Nanz and Steffek, 2004; 2007). It would also be useful, in connection with Habermas's multi-level model of global governance, to explore the different roles and contributions of civil society with respect to each level.[9] For example, at the supranational level, a global public sphere can help maintain peace and secure human rights by appeal to a moral conscience focused on basic human rights as has arguably been the case in the various uprisings and protests of the Arab Spring and beyond. With respect to the 'global domestic politics' of 'transnational negotiating systems,' by contrast, the role of NGOs and other organisations within civil society becomes much more complex and would have to take into consideration extremely difficult questions concerning the relevant domains of expertise, the appropriate identification of 'stakeholders,' and the fair opportunity for inclusion and voice (Scholte, 2011). There is also even greater danger for a hegemonic imposition of dominant interests (Habermas, 2006, p. 142).

Nonetheless, despite these increased complexities and challenges, a robust and vigilant global civil society, together with a transnational public media, does not seem less suited to play such a role and can arguably make some claim to provide a more appropriate source of legitimacy than some of its competitors (such as global private corporations and markets, or various international organisations, or some subset of international legal and juridical bodies alone) (Steffek, 2010). Of course, if this proposal for a public and democratic global governance is to offer an attractive model, more needs to be said and much more will need to happen: active associations of civil society are still predominantly those located in the northern hemisphere and those with strong ties to economically developed states, they still have often

very limited access to international organisations, inadequate resources, and in some cases questionable democratic accountability within their own structure (Scholte, 2004). Still, coupled with the pressures for an increased rule of law discussed in the previous section, a more robust and active civil society offers a not unrealistic account for how global governance might be made more public and, hence, more democratic. If that is indeed an emerging trend in global governance, it would still require a more vigilant and active role of associations of civil society in holding governments and international organisations accountable and a more involved mass media that informs its public about the actions of civil society in both their successes and their failures. A discernible trend does not constitute a realised ideal!

Of course, many difficult questions about the prospects – indeed, even the very idea – for a global democracy remain. In particular, the question of how to detach democratic accountability from its historical links with the territorial nation state is especially relevant for the idea of 'disaggregated sovereignty' within a vast system of vertical and horizontal networks or (if it amounts to the same thing) what Habermas calls 'the organizational forms of an international negotiation system' (Habermas, 2001, p. 109). Habermas's suggestion that democratic legitimacy might be linked more to an 'expectation of rationally acceptable results' of diverse and overlapping deliberative *fora* than the decisions of a territorially delimited political body is certainly worthy of further consideration (despite the fears of a 'technocratic' or 'expert-oriented' elitism) (see Schmalz-Bruns, 2007; Niesen, 2008).[10] Similarly, questions about the appropriate role of the principle of symmetry – the claim that those affected by a political decision should have an equal voice in that decision – within a conception of democracy become even more troublesome at the global level (Held, 2004, p. 99). However, difficult as these questions are, they do not alone offer support for the view that we can have global law without global democracy and they do not seem to threaten the two-fold thesis I have sought to defend here: first, the claim that if the mutual supposition of the rule of law and democracy is valid at the level of the nation state, there would seem to be at least *prima facie* grounds for expecting the same relation of mutual supposition at the global level as well; and, second, the claim that global governance can be made more public and more democratic through a strengthening of institutions and associations of a global civil society that indirectly influences the quality of the deliberations and decisions of the various international organisations. Of course, there is no guarantee that globalisation will develop along these lines and some indications that

indeed it may not (see Cronin, 2011; Niesen, 2008). Still, it seems to me, the Habermasian project presents one outline for how a realistic utopia in the best sense of that term might unfold, namely, by 'taking men as they are and laws as they might be' (Rousseau).

Notes

1. Scheuerman, 2002a; for Held's somewhat limited remarks on 'cosmopolitan democratic law', see Held, 1999, especially pp. 105–8.
2. For another example of a moral- or justice-based approach, see Buchanan, 2004.
3. For other representative political (or institutional) cosmopolitans, see Held and McGrew, 2002.
4. See Habermas, 1998; 1996, Ch. 4; this is, of course, a corollary to the 'co-originality' of public and private autonomy, introduced in Habermas, 1996, Ch. 3.
5. For strong criticism of this widespread view, see Burbank, 1999.
6. See, for example, Tamanaha, 2004, who speaks of different 'themes' in the rule of law; Fallon, 1997, who speaks of different 'types' of the rule of law, and their 'fusion'.
7. Justice Kennedy, for example, cited the European Court of Human Rights in the Texas sodomy case, *Lawrence v. Texas*, 539 U.S. 558, at 570 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)), and even legislative bodies that seek to become more globally informed. (Newt Gingrich, to take an even more surprising example, is a member of the Twenty-First Century International Legislators Network!).
8. This feature of Habermas's model has not generally been noted by those who engage Habermas's cosmopolitan views; two notable exceptions, however, are Bohman, 2007 and Dryzek, 2006.
9. In related work, they have also proposed criteria for empirically measuring the effects of global civil society within global governance (Nanz and Steffek, 2005).
10. 'The democratic procedure no longer draws its legitimizing force only, indeed not even predominantly, from political participation and the expression of political will, but rather from the general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results' (Habermas, 2001, p. 110; see also Habermas, 2009, p. 147).

Bibliography

Archibugi, D. (2008) *The Global Commonwealth of Citizens* (Princeton, NJ: Princeton University Press).

Baynes, K. (2007) 'Disagreement and the Legitimacy of Legal Adjudication', in O. Shabani (ed.) *Multiculturalism and the Law: Critical Debates* (Cardiff: University of Wales Press).

Bohman, J. (2007) *Democracy across Borders* (Cambridge, MA: MIT Press).

Brock, G. (2009) *Global Justice: A Cosmopolitan Account* (New York: Oxford University Press).

Brunkhorst, H. (2002) 'Globalizing Democracy without a State: Weak Public, Strong Public, Global Constitutionalism', *Millennium* 31: 675–90.
Brunkhorst, H. (2005) *Solidarity: From Civic Friendship to a Global Legal Community* (trans. J. Flynn) (Cambridge, MA: MIT Press).
Buchanan, A. (2004) *Justice, Legitimacy and Self-Determination* (NY: Oxford University Press).
Bull, H. (1990). 'The Importance of Grotius', in H. Bull, B. Kingsbury, and A. Roberts (eds) *Hugo Grotius and International Relations* (NY: Oxford University Press).
Burbank, S. (1999) 'The Architecture of Judicial Independence', *Southern California Law Review* 72: 314–50.
Cohen, J. and C. Sabel (2005) 'Global Democracy', *NYU Journal of International Law and Politics* 37: 763–81.
Cronin, K. (2011). 'Cosmopolitan Democracy' in B. Fultner (ed.) *Jürgen Habermas: Key Concepts* (Durham, UK: Acumen Press).
Dryzek, J. (2006) *Deliberative Global Politics* (NY: Cambridge University Press).
Erman, E. and R. Higgott (2010) 'Deliberative Global Governance and the Question of Legitimacy: What can we Learn from the WTO?' *Review of International Studies* 36: 449–70.
Fallon, R. (1997) '"The Rule of Law" as a Concept in Constitutional Discourse', *Columbia Law Review* 97: 1–56.
Franck, T. (1995) *Fairness in International Law and Institutions* (NY: Cambridge University Press).
Gauthier, D. (1995) 'Hobbesian Public Reason', in E. Paul (ed.) *Contemporary Political and Social Philosophy* (NY: Cambridge University Press).
Habermas, J. (1990) 'What Does Socialism Mean Today?' *New Left Review* 183: 3–21.
Habermas, J. (1996) *Between Facts and Norms* (trans. W. Rehg) (Cambridge, MA: MIT Press).
Habermas, J. (1997) 'Kant's Idea of Perpetual Peace with Two Hundred Years' Hindsight', in J. Bohman and M. Lutz-Bachmann (eds) *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge, MA: MIT Press).
Habermas, J. (1998) *The Inclusion of the Other: Studies in Political Theory* (trans. C. Cronin) (Cambridge, MA: MIT Press).
Habermas, J. (2001) *The Postnational Constellation* (trans. M. Pensky) (Cambridge, MA: MIT Press).
Habermas, J. (2006) *The Divided West* (trans.) (Cambridge, MA: MIT Press).
Habermas, J. (2008) *Between Naturalism and Religion* (trans. C. Cronin) (Cambridge, MA: MIT Press).
Habermas, J. (2009) *Europe: The Faltering Project* (trans. C. Cronin) (Cambridge, MA: MIT Press).
Hampton, J. (1994) 'Democracy and the Rule of Law', in I. Shapiro (ed.) *The Rule of Law* (NY: New York University Press).
Hardt, M. and A. Negri (2004) *Multitude: War and Democracy in the Age of Empire* (NY: Penguin).
Held, D. (1991) 'Democracy and the Global System', in D. Held (ed.) *Political Theory Today*. (Stanford, CA: Stanford University Press).
Held, D. (1995) *Democracy and the Global Order* (Stanford, CA: Stanford University Press).

Held, D. (1999) 'The Transformation of the Political Community', in I. Shapiro and C. Hacker-Cordon (eds) *Democracy's Edges* (NY: Cambridge University Press).
Held, D. (2004) *Global Covenant* (London: Polity Press).
Held, D. and A. McGrew (eds) (2002) *Globalization/Anti-globalization* (NY: Cambridge University Press).
Kaldor, M. (2004) *Global Civil Society: An Answer to War* (Cambridge: Polity Press).
Kant, I. (1995) *Kant's Political Writings* H. Reiss (ed.) (NY: Cambridge University Press).
Keane, J. (2003) *Global Civil Society?* (NY: Cambridge University Press).
Kingsbury, B. (2003a) 'The International Legal Order', in P. Cane and M. Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press).
Kingsbury, B. (2003b) 'People and Boundaries: An Internationalized Public Law Approach', in A. Buchanan and M. Moore (eds) *States, Nations and Borders* (NY: Cambridge University Press).
Kingsbury, B. (2009) 'International Law as Inter-Public Law', in H. Richardson and M. Williams (eds) *Moral Universalism and Pluralism* (NY: New York University Press).
Loughlin, M. (2003) *The Idea of Public Law* (NY: Oxford University Press).
MacCormick, N. (1999) 'Rhetoric and the Rule of Law' in D. Dyzenhaus (ed.) *Recrafting the Rule of Law* (Oxford: Hart Publishing).
McCarthy, T. (2002) 'On Reconciling Cosmopolitan Unity and National Diversity', in P. de Greiff and C. Cronin (eds) *Global Justice and Transnational Politics* (Cambridge, MA: MIT Press).
Nanz, P. and J. Steffek (2004) 'Global Governance, Participation and the Public Sphere', *Government and Opposition* 39: 314–35.
Nanz, P. and J. Steffek (2005) Assessing the Democratic Quality of Deliberation in International Governance', *Acta Politica* 40: 368–83.
Nanz, P. and J. Steffek (2007) 'Zivilgsellschaftliche Participation und die Demokratisierung internationalen Regierens', in P. Niesen and B. Herborth (eds) *Anarchie der kommunikativen Freiheit* (Frankfurt am Main: Suhrkamp).
Niesen, P. (2008) 'Deliberation ohne Demokratie? Zur Konstruktion von Legitimitaet jenseits des Nationalstaats', in R. Kreide and A. Niederberger (eds) *Transnationale Verrectlichung* (Frankfurt am Main: Campus Verlag).
Niesen, P. and B. Herborth (eds) (2007) *Anarchie der kommunikativen Freiheit* (Frankfurt am Main: Suhrkamp).
Peters, B. (1993) *Die Integration moderne Gesellschaften* (Frankfurt am Main: Suhrkamp).
Pogge, T. (1994) 'An Egalitarian Law of Peoples', *Philosophy and Public Affairs* 23: 195–224.
Pogge, T. (2002) *World Poverty and Human Rights* (Malden, MA: Polity Press).
O'Neill, O. (1989) *Constructions of Reason* (NY: Cambridge University Press).
Rawls, J. (1999) *The Law of Peoples* (Cambridge, MA: Harvard University Press).
Raz, J. (1979) 'The Rule of Law and its Virtue', in *The Authority of Law* (Oxford: Clarendon Press).
Ruggie, J. (2004) 'Reconstituting the Global Public Domain: Issue, Actors, and Practices' in *European Journal of International Relations* 10: 499–531.
Ruggie, J. (2005) 'American Exceptionalism, Exemptionalism, and Global Governance', in M. Ignatieff (ed) *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press).

Saward, M. (2000). 'A Critique of Held', in *Global Democracy: Key Debates*, B. Holden (ed.). (NY: Routledge).
Scheuerman, W. (2001) 'Reflexive Law and the Challenges of Globalization', *Journal of Political Philosophy* 9.
Scheuerman, W. (2002a) 'Cosmopolitan Democracy and the Rule of Law', *Ratio Juris* 15.
Scheuerman, W. (2002b) 'Between Radicalism and Resignation: Democratic Theory' in R. von Schomberg and K. Baynes (eds) *Discourse and Democracy* (Albany, NY: SUNY Press).
Scheuerman, W. (2008) 'Global Governance without Global Government?' *Political Theory* 36: 133–51.
Schmalz-Bruns, R. (2007) 'An der Grenzen der Entstaatlichung. Bemerkungen zu Jürgen Habermas' Modell einer 'Weltinnenpolitik ohne Weltregierung', in P. Niesen and B. Herborth (eds) *Anarchie der kommunikativen Freiheit* (Frankfurt am Main: Suhrkamp).
Scholte, J. (2004) 'Civil Society and Democratically Accountable Global Governance', *Government and Opposition* 39: 211–33.
Scholte, J. (ed.) (2011) *Building Global Democracy? Civil Society and Accountable Global Goverance* (NY: Cambridge University Press).
Slaughter, A. (2004) *A New World Order* (Princeton, NJ: Princeton University Press).
Smith, W. and J. Brassett (2008) 'Deliberation and Global Governance: Liberalism, Cosmopolitanism, and Critical Perspectives', *Ethics and International Affairs* 72: 67–90.
Steffek, J. (2010) 'Public Accountability and the Public Sphere of International Governance', *Ethics and International Affairs* 24: 45–67.
Tamanaha, B. (2004) *On the Rule of Law: History, Politics, Theory* (NY: Cambridge University Press).
Teubner, G. (ed.) (1997). *Global Law without a State* (Aldershot: Dartmouth).
Tinnevelt, R. and Mertens, T. (2009) 'The World State: A Forbidding Nightmare of Tyranny?' *German Law Journal* 10: 63–80.
Waldron, J. (2004) 'The Rule of Law as a "Theatre of Debate"' in J. Burley (ed.) *Dworkin and His Critics* (Malden, MA: Blackwell).
Wendt, A. (2003) 'Why a World State is Inevitable', *European Journal of International Relations* 10: 491–542.
Williams, M. (2011) 'Civil Society and the WTO: Contesting Accountability', in J. Scholte (ed.) *Building Global Democracy?* (NY: Cambridge University Press).
Zolo, D. (2000) 'The Lords of Peace' in B. Holden (ed.) *Global Democracy: Key Debates* (NY: Routledge).

8

Initial Citizenship and Rectificatory Secession

Jouni Reinikainen

Secessions that are justified by rectificatory justice – that is, by the fact that they rectify a previous unjust incorporation into another state – very often seem to confront us with a moral dilemma when it comes to the delimitation of the initial citizenry. In non-rectificatory secessions, all legal residents of a seceding unit have legitimate expectations to retain the equal citizenship status that they possessed in the old state. This means that the unconditional inclusion of all inhabitants becomes a requirement of justice. However, what justice requires in the delimitation of the initial citizenry seems more uncertain if the seceding unit has first been unjustly incorporated into another state and then also subjected to settlement of new residents from the incorporating state during the period of incorporation. This is the situation that the Baltic States faced in 1991 and – to some extent – that East Timor experienced in 2002. Moreover, it is a situation that Palestine, Tibet, and Western Sahara would also face if those political units would become independent states in the future. The question called forth in these cases is if justice really requires the unconditional inclusion of all legal residents in the initial citizenry or if the rectification of the injustice does not, in fact, require the exclusion of the settlers.

This chapter investigates what justice requires in the delimitation of the initial citizenry in rectificatory secessions.[1] I will concentrate on the right to unconditional, initial citizenship of people whose presence on the territory of the state is a result of settlement during a period of unjust incorporation. These are people like the Chinese settlers and their descendants in the forcibly annexed Tibet; the Israeli settlers and their descendants on the occupied West Bank; and the Moroccan settlers and their descendants in the occupied and annexed Western Sahara. Does justice require that these persons are treated

as lawful inhabitants who are entitled to unconditional citizenship in the state that emerges or re-emerges on the territory after the incorporation? This was basically the approach chosen in post-Soviet Lithuania. Or does the recitification of injustice require that they are treated as illegal colonists whom the members of the members of the wronged group may deny admission? That was basically the approach chosen in post-Soviet Estonia and Latvia – where the relative share of Soviet-era settlers and descendants to settlers was higher than in Lithuania, it should perhaps be added.

I will argue that we should draw a line between inclusion and exclusion in these cases on the basis of a distinction between choice and circumstance. The distinction between choice and circumstance speaks in favour of granting descendants to settlers a right to unconditional inclusion in all these cases. As for the settlers, the distinction speaks in favour of a second distinction between occupations and annexations. On this second distinction, we should grant persons who have settled on annexed territory a right to be unconditionally included while persons who have settled on occupied territory may, in general, justifiably be excluded.

Right against right

The delimitation dilemma addressed here may be described as a situation of right against right, where a right to rectification of the wronged group stands against a right to inclusion of the settlers and their descendants (Reinikainen, 1999). The way we prioritise between these rights ultimately seems to hinge upon how we prioritise between two different conceptions of justice: We either give priority to a rectificatory conception of justice or to a conception of formal justice (as Rawls calls it).

If we prioritise the right of the wronged group we are likely to be morally motivated by a rectificatory conception of justice similar to that defended by theorists like Rodney Roberts in the contemporary debate. Roberts endorses a conception of rectification that includes 'compensation, restoration, apology, and punishment' (Roberts, 2002, p. 7). However, the principal aim and benchmark of this conception of rectification seems to be the restoration of status quo ante, which means the restoration of the situation that existed before the injustice took place. This presupposes returning exactly the same rights, tenures, or possessions that have been unjustly taken whenever possible (Roberts, 2002, p. 15). Rectification, thus understood, is essentially backward-looking

and it should not be confused with compensation for past injustices. Compensation is both backward-looking and forward-looking in the sense that compensation for past injustices is justifiable from a compensatory perspective when the injustices of the past affect the wronged group negatively today in terms of distributive justice. By contrast, the restoration of status quo ante means that we should return what was unjustly taken even if the wronged group is not disadvantaged by the historical injustice today in distributive terms. The reason is that restoration aims 'to set unjust situations right' – and in order to undo '*the rights violation itself*' we must restore the very same thing that has been unjustly taken (Roberts, 2002, p. 15).

It is easy to see that this understanding of rectification justifies restoration of the territorial sovereignty of a seized unit in cases of unjust seizure of territory. But what are the implications of restoration of status quo ante if we move beyond restoration of sovereignty to the delimitation of the initial citizenry? One understanding of these implications – which I take to be consistent with the idea of restoration of status quo ante – is expressed in various declarations by restorationist organisations in Estonia from the early 1990s. A declaration from 1990 by the so-called Congress of Estonia (a restorationist shadow parliament that existed in Estonia at the time) states that the Soviet Union 'on June 17, 1940 … commenced a still current act of aggression against the Republic of Estonia' and that 'the Republic of Estonia is to this day still occupied by the USSR and an illegally annexed country'.[2] The declaration continues by demanding that 'the free and independent Republic of Estonia must be restored' and that the 'restoration of the Republic of Estonia must be based on the continuity of the Republic of Estonia's citizenship'. The message here is that the Soviet Union has seized Estonia unjustly, and that this injustice can only be rectified through the restoration of the pre-annexation state together with its legal citizenry (Reinikainen, 1999, p. 76–95).

As for the Soviet-era migrants and their descendants, the Congress of Estonia describes all considerations 'to give the comers from the Soviet Union the right to obtain Estonian citizenship in a simplified manner … [as] an attempt to legalize (even partially) the wrong done to Estonia by the Soviet Union during World War II as well as the consequences'.[3] According to another declaration in 1995 by the purist restorationist so-called Initiative Centre for the Decolonisation of Estonia, 'the only lawful and ethical way to relieve the tensions in Estonia is the peaceful decolonisation of Estonia'.[4] For the most principled advocates of restoration it was not enough to give the Estonians and Latvians their states

and their citizenships back. For them, the restoration of status quo ante also included the restoration of the demographic situation that existed before the injustices took place.

That goal was part and parcel of the restoration of the legal situation that existed before the injustices took place, however. Proceeding from an elusive conception of 'legal restoration', the Baltic restorationists argued that the laws of the pre-annexation republics were valid in an ideal sense during the whole Soviet era, creating an ideal legal continuity from the pre-annexation republics and onwards. At the same time, the laws that were introduced by the Soviet Union were claimed to be invalid and basically unlawful in the same ideal sense. Legality could therefore only be re-established by restoring the pre-annexation states and their basic laws, such as the constitutions and the citizenship laws. In addition, legal restoration also required the official annulment of all Soviet laws, including the law on residence (the *Propiska*) and the law on suffrage in local elections. These were the laws that granted Soviet-era migrants and their descendants equal citizenship status in Estonia and Latvia (Reinikainen, 1999, p. 16–19). If legal restoration had gone this far, the Estonians and Latvians would, in fact, have been able to deny the Soviet-era migrants and their descendants the right to continue their residence in Estonia and Latvia.[5]

However, the perception of justice as the restoration of status quo ante is not the only way to look upon justice in these cases. As already mentioned, we may also prioritise justice for the group that is threatened by exclusion, which is how Michael Walzer perceives justice in cases like the ones discussed here. Walzer calls attention to the fact that 'many newly independent states find themselves in control of territory into which alien groups have been admitted under the auspices of the old imperial regime' and that in some cases 'these people are forced to leave' (Walzer, 1983, p. 42). According to him, there is 'a kind of territorial or locational right' in which the 'state owes something to its inhabitants simply, without reference to their collective or national identity', and in his eyes 'the first place to which the inhabitants are entitled is surely the place where they and their families have lived and made a life' (Walzer, 1983, p. 42). Walzer presumes that the 'attachments and expectations they have formed argue against a forced transfer to another country' (Walzer, 1983, p. 42). His conclusion is that '[i]nitially, at least, the sphere of membership is given: the men and women who determine what membership means, and who shape the admission policies of the political community, are simply the men and women who are already there' (Walzer, 1983, p. 43). According to Walzer, '[n]ew

states and governments must make their peace with the old inhabitants of the land they rule … including [with] aliens of some sort or another – whose expulsion would be unjust' (Walzer, 1983, p. 43).

Note the bottom line of Walzer's argument. According to him, the principal argument for including the 'the men and women who are already there' is the 'attachments and expectations they have formed'. The underlying assumption, I take it, is that these expectations are legitimate. This is why their inclusion in the initial citizenry is warranted. If this is the correct reading, the conception of justice implicitly invoked by Walzer is what Rawls calls formal justice or justice as regularity. I will soon return to that.

How should we draw the line?

How, then, should we draw the line between the right to rectification of the wronged group and the right to inclusion of the settlers and their descendants? I will defend a solution here that brands settlement on forcibly seized territory as unjust when done in bad faith, that is, in full awareness of the fact that the territory is forcibly incorporated. I will assume that the conscious participation in that injustice undermines the claim to both residence and unconditional citizenship in the seceding unit. However, I will also assume that there are acquitting circumstances that absolve the individual from responsibility for the role that they have played in the injustice. These circumstances include settlement in good faith and the haphazardness of being born on the territory to settler parents, grandparents, or more remote ancestors. When these circumstances are at hand, a person has a valid claim to unconditional inclusion even if the presence of the person on the territory of the seceding unit is, in fact, a result of settlement during a period of forcible incorporation. If such persons are not granted a right to unconditional membership, a new injustice is done – against the ones excluded this time.

The solution that I defend draws a line between inclusion and exclusion on the basis of a distinction between choice and circumstance. According to this distinction, a person is responsible for her conscious choices but not for circumstances beyond her control. The fact that I propose to apply the distinction to the question of initial citizenship does not mean that I wish the distinction to be used in a luck egalitarian way on other policy areas as well.[6] A luck egalitarian application of the distinction, rather, seems relevant in this particular question. The distinction between choice and circumstance is inherent in the principles

that 'a criminal offense requires both a voluntary act (*actus reus*) and a culpable state of mind (*mens rea*)', which have been described as 'the most basic principles of modern criminal law' (Levenson, 1993, p. 401). The distinction may, thus, be described as a taken for granted point of departure that we already implicitly proceed from in our evaluations of responsibility for injustice. What I propose is basically that we should proceed from the same principles in the cases discussed here and see people's responsibility for their participation in injustices against an unjustly incorporated group as decisive to whether they may be justifiably excluded or included when the territorial sovereignty of the seized unit is restored. Another reason for invoking the distinction between choice and circumstance in this context is that the distinction does a justificatory job in terms of warranting a claim to compensation for those who are disadvantaged by circumstances beyond their control, as is the case if people who have no responsibility for the role they have played in the injustice against a wronged group are divested of their citizenship. In that situation, a right to unconditional inclusion for these persons may be looked upon as the equivalent compensation that they are entitled to.

On the basis of the distinction between choice and circumstance, we should regard persons who have settled on forcibly seized territory in bad faith as personally responsible for their participation in the injustice. The relevant analogy in this situation is a person who wilfully takes the liberty to move into another person's house in spite of the fact that she knows that the house belongs to another person who has been unjustly deprived of it. On the same distinction, we should not see people who end up on the territory of a forcibly seized unit as a result of circumstances beyond their control as responsible for the role they have played in the injustice against the wronged group. The relevant analogy in this case could be a person who is deceived into buying an apartment in the house that the original owner has been unjustly bereft of. In the former case, the liberty that the person has taken is illegitimate. In the latter case, the right to residence that the person has acquired should not be seen as illegitimate.

It may be objected here that while being a descendant to settlers is a circumstance beyond a person's control, migrants who have settled in good faith have actually made a choice to settle on the territory of the forcibly seized unit, albeit in good faith. Should a choice – even if made in good faith – really be described as a circumstance that the individual has no personal responsibility for? As far as I can see, it should. The person who is deceived into buying an apartment in a house that

the righteous owner has been unjustly bereft of has certainly made a choice to buy the apartment. Yet, she is still a victim of circumstances beyond her control in terms of her participation in the injustice, which is not voluntary (*actus reus*) and intended (*mens rea*). If so, the contract on the apartment should not be considered null and void if the property is restored to the righteous owner, which the property should be since it is a requirement of justice. If the contract on the apartment is nonetheless annulled in the process of restoration, the person who has acted in good faith should be compensated by being offered an equivalent contract on the apartment from the righteous owner unconditionally.

By the same token, persons who settle in good faith on a territory that is unjustly taken from another group have certainly made a choice to settle on the territory, but they are still victims of circumstances beyond their control in terms of their participation in the injustice, which is not voluntary and intended in this case either. The legal rights to residence, suffrage, et cetera that they have acquired on the territory are not illegitimate and their legal rights should therefore not be considered null and void. If their legal rights are annulled notwithstanding (i.e., through the disintegration of their state and the abrogation of the citizenship of the old state), these persons ought to be compensated by being offered the option of unconditional registration as citizens in the state that emerges or re-emerges on that territory.

From the point of view of these persons, it would not be sufficient to be offered unconditional citizenship in the annexing state or in its successor state, which the non-citizens in Estonia and Latvia were, indeed, offered by Russia. In a situation where those excluded previously possessed the same citizenship rights as the other inhabitants of the political entity where they reside, that option may not be considered equivalent compensation. The reason is that this option will not grant a person the same rights as the other inhabitants enjoy in their common state of residence. The underlying idea here is that an individual has a claim to equivalent compensation if she is disadvantaged by circumstances beyond her control (Dworkin, 1981), and, in order to be equivalent, compensation must take the form of an option of unconditional citizenship in the restored state in this case. When seen from this perspective, it would, in fact, be just as unfair to annul legal rights that settlers have acquired in good faith without equivalent compensation as it would be to annul the contract on an apartment that a person has acquired in good faith without equivalent compensation. In both cases, good faith similarly tips their actions over from choice to circumstance,

which absolves them from responsibility for their participation in the injustice and accords them a claim to equivalent compensation.

The distinction between choice and circumstance may be claimed to offer a criterion for establishing when the right to inclusion should be given normative precedence over the right to rectify injustice. It does so by pinpointing when the expectations of the settlers and their descendants are legitimate and when they are not. The view that the distinction between choice and circumstance implicitly suggests is that settlers and descendants to settlers should be granted a right to be unconditionally included when they have legitimate expectations to continue their residence on the basis of the rights and the status that they have acquired on the seized territory. The distinction conversely also suggests that settlers may justifiably be excluded when they have illegitimate expectations to continue their residence on the basis of the rights and the status that they have acquired on the seized territory. There are two normative logics in operation here: Settlement in good faith and nascency on seized territory are on the circumstance side in terms of participation in the injustice, which gives rise to legitimate expectations to retain legal rights and an equal citizenship status, as well as to a claim for equivalent compensation if those expectations are not met. Settlement in bad faith is on the conscious choice side in terms of participation in the injustice, which gives rise to illegitimate expectations as well as to a right for the wronged group to exclude the settlers.

The philosophical basis for this view on legitimate expectations may be found in Rawls's conception of justice as regularity – or formal justice as he also calls it (Rawls, 1971, pp. 58–60 and 235). According to Rawls, justice as regularity is the justice in a regulatory system, such as a legal system. Justice as regularity safeguards the fair application and administration of the rules that regulate the lives of those subject to the rules. In the legal sphere, formal justice is synonymous with the rule of law: The 'regular and impartial administration of public rules becomes the rule of law when applied to the legal system', Rawls explains (Rawls, 1971, p. 235). According to him, the rule of law is intimately connected with the security that people may feel in the possession of their rights and liberties, and hence it is also intimately connected with freedom. The connection, however, runs through the legitimate expectations that people form under the rule of law. Rawls writes that the 'rule of law is obviously closely related to liberty' since laws that are just in the regulatory sense 'establish a basis for legitimate expectations' (Rawls, 1971, p. 235). They 'constitute grounds upon which persons can rely upon one another and rightly object when their expectations are not fulfilled'

he argues, and continues: 'If the bases of their claims are unsure, so are the boundaries of men's liberties' (Rawls, 1971, p. 235).

One complication with using Rawls's rule of law based notion of legitimate expectations as a basis for a judgement of the legitimacy of expectations in this context is the fact that there are generally two sets of laws in the type of cases that we discuss here and, into the bargain, these two sets of laws declare diametrically opposite things as regards the legality of settling on the incorporated territory. In the Baltic case, there were, accordingly, the Soviet laws on residence and participation in local elections, which declared that the residence and voting rights of the Soviet-era migrants in Estonia and Latvia were legal and valid. At the same time, there was an article (49) in the fourth Geneva Convention that declares that population transfers on occupied territory are illegal and that brands settlement on forcibly seized territory as a breach of international law. On top of that, there was a Western policy of non-recognition that the restorationists in Estonia and Latvia claim undermined the validity of all Soviet laws in Estonia and Latvia, including the laws that granted the Soviet-era migrants and their descendants residence and voting rights.

Why should we, then, base our judgement of the legitimacy of the expectations of the settlers and their descendants on the laws of the incorporating state, here the Soviet Union? Why should we not proceed from the norms in international law that brand settlement on forcibly seized territory as illegal? The answer is that we should proceed from the laws that the settlers knew of and perceived as valid, and in the Baltic case those laws were the Soviet laws. One of the features of the rule of law mentioned by Rawls that is particularly relevant in this context is the 'precept that there is no offense without a law (*Nulla crimen sine lege*)' (Rawls, 1971, p. 238). Rawls writes that this 'precept demands that laws be known and expressly promulgated, [and] that their meaning be clearly defined' for a transgression to be able to take place. If it is not clear what the laws 'enjoin and forbid, the citizen does not know how he is to behave' (Rawls, 1971, p. 238). If this is clarified later on by new laws, the new law 'should not be retroactive to the disadvantage of those to whom they apply'. According to Rawls, it would be tyrannical to 'change laws without notice, and punish … [the] subjects accordingly … these rules would not be a legal system, since they would not serve to organize social behaviour by providing a basis for legitimate expectations' (Rawls, 1971, p. 238).

It should be pointed out that Rawls had penal law in mind when he wrote these lines. Nevertheless, I believe his guidelines to be relevant

also to when we may hold people liable for transgressions of other norms, such as the prohibition against settlement on occupied territory in the fourth Geneva Convention. On the basis of Rawls' precept, we may conclude that the legitimacy of the expectations of the Soviet-era migrants in Estonia and Latvia should not be judged on the basis of the fourth Geneva Convention if they were unaware of the fact that the Baltic republics were de facto occupied and forcibly annexed. If we would judge them on the basis of the Geneva Convention although the information that was available to them at the time of their migration announced that settlement in these republics was entirely lawful, we would apply laws retroactively 'to the disadvantage of those to whom they apply'. To use laws in that way does 'not serve to organize social behaviour by providing a basis for legitimate expectations'.

It should also be pointed out here that the Rawlsian view on legitimate expectations seems highly relevant in these cases also in the sense that it is congruent with the view on legitimate expectations implicitly invoked by many advocates of an inclusionary approach to initial membership in Estonia and Latvia. In a report on the Estonian citizenship policy from 1993, *Helsinki Watch* argues that the residency of the Soviet-era migrants in Estonia 'was legally established under the applicable law at the time they entered the territory of Estonia' and that the migrants therefore should be seen as '(former) legal residents' who are now 'entitled to … Estonian citizenship … on the same basis as any other residents of Estonia' (*Helsinki Watch*, 1993, p. 14). A declaration by the Russian Democratic Movement (RDM) – a moderate non-citizen oriented party that existed in Estonia in the 1990s – develops the same view. According to the RDM, 'the majority of the people who have found themselves stateless … have settled here before the republic regained its independence and in accordance with the laws which were in force in the Soviet Union at the time', and that '39 per cent of them were born in Estonia' (Semionov, 1993, p. 2). The RDM argues that neither 'they nor their parents could have forecasted the circumstances which have radically changed their legal and political status' (Semionov, 1993, p. 2).

Boris Tsilevich, a Latvian-Russian social scientist, similarly refers to what the migrants and their descendants could have forecasted when he tries to explain the difference between applying conditions for naturalisation on newly arrived immigrants and applying the same conditions on a group that has already taken up residence and acquired an equal citizenship status on the basis of existing laws. According to Tsilevich, the 'usual trap is comparing rights and freedoms of Latvian

"non-citizens" with rights of immigrants of other European countries' (Tsilevich, 1993, p. 1). According to him, 'these matters are quite different'. Immigrants are 'completely aware of all the rules of the game in advance' while Latvia's disenfranchised 'non-citizens came to Latvia in … accordance with laws which were in force at the time of arrival … [and] kept the same citizenship' (Tsilevich, 1993, p. 1). The basic point here is that settlement in the incorporated unit appeared to be lawful to the migrants when they took up residence in Latvia. Hence their expectations to retain the status and the rights that they have acquired on the territory should be considered legitimate.

The legitimacy of a settlement policy on forcibly seized territory is one thing and the legitimacy of the expectations of the settlers is another. The expectations of the settlers to continue their residence on the basis of the rights and status that they have acquired on a territory may, in fact, be legitimate even if the population transfers that the Soviet authorities put through on the same territories were illegal and unjust. In a situation where the individual settlers have acted in good faith, the fact that settlement on forcibly seized territory is a breach of the Geneva Convention only taints the actions of the occupying state. Eide correctly points out that the fourth Geneva Convention primarily 'addresses the legality of the acts of the occupier, but does not solve the question of the fate of the human beings that have settled in good faith during long-standing incorporations which, according to the information available to them, appeared to be lawful' (Eide, 1993, p. 13).

Legitimate expectations as a constraint on rectification

On the view defended here, legitimate expectations should be seen as a constraint on the right to rectification of the wronged group. This means that restoration of status quo ante may justifiably be invoked to restore the sovereignty of an unjustly seized unit as well as the citizenship of the pre-annexation population and their descendants. But it cannot be stretched so far as to exclude people who have acquired equal citizenship rights on the territory in good faith and who therefore have formed legitimate expectations to maintain their legal rights and their equal citizenship status. We should, thus, not 'deny the right of any sovereign state to dismantle the institutions of a former occupying power and to erase the cruel legacy of colonialism', as Jeri Laber of Human Rights Watch correctly points out (Laber, 1992, p. 15). 'However', Laber continues, 'the rights of individuals should not be compromised in the process' (Laber, 1992, p. 15). The upshot is that 'those who have

become, in good faith, permanent residents on a territory … should have the option, without discrimination [with] regard to the other inhabitants of that territory, to become citizens of that … state' (Eide, 1993, p. 13).

But why must wronged groups respect legitimate expectations when they restore their sovereignty and citizenry? Can it not be objected here that they have a right to thwart legitimate expectations if this is necessary for the rectification of the more fundamental injustice that they are the victims of? Rawls actually suggests something similar – even if he, as we have seen, pleads for respect for legitimate expectations in other regards. His argument in this part may seem to belie the idea that legitimate expectations should be seen as a constraint in the process of rectifying injustice. Let us therefore take a closer look at what Rawls says about this and then return to the Baltic case to see if his argument offers a reason for reconsidering my judgement.

According to Rawls, justice as regularity may sometimes coexist with a more fundamental injustice. The reason is that justice as regularity is 'simply an aspect of the rule of law which supports and secures legitimate expectations', and that it in itself does not prevent an unjust basic structure (Rawls, 1971, p. 59). In situations where justice as regularity coexists with an unjust basic structure, justice as regularity may be described as a painkiller that does nothing to cure the underlying disease but which still makes life more decent and foreseeable: 'In this way', writes Rawls, 'those subject to them [i.e., the laws] at least know what is demanded and they can try to protect themselves accordingly; whereas there is even greater injustice if those already [unjustly] disadvantaged are also arbitrarily treated in particular cases when the rules might give them some security' (Rawls, 1971, p. 59). But then he adds that 'it might be still better in particular cases to alleviate the plight of those unfairly treated by departures from the existing norms'. Rawls is uncertain of '[h]ow far we are justified in doing this, especially at the expense of expectations founded in good faith on current institutions' (Rawls, 1971, p. 59). However, let us presume that this would be justified whenever it is necessary to put an end to a more fundamental injustice.

If we translate this argument to the Baltic case, it might be argued that the Soviet laws on residence and suffrage in local elections were, to some extent at least, formally just in the sense that they applied to the whole Soviet Union and that virtually all residents in the union could take up residence and acquire local voting rights in another Soviet republic on the basis of them (Reinikainen, 1999, p. 110). At the same time, the relative formal justice of these laws was combined with injustice at a

more fundamental level as the Baltic republics were forcibly annexed and subjected to population transfers. The situation was one of relative formal justice in the application and administration of these laws on top of an unjust basic structure if you wish. Can it not be argued that it was better to alleviate the plight of the Estonians and Latvians in this situation by departing from the norms that the Soviet-era migrants and their descendants had based their expectations on? Is it not justifiable to thwart legitimate expectations in this case for the sake of rectifying the injustice against the Estonians and Latvians?

As far as I can see, it is not. Note that in Rawls's argument the ones who have formed expectations that would be forsaken by a departure from existing norms are the same persons as those who are unfairly treated on a more fundamental level and whose plight would be alleviated by the departure. The situation referred to by Rawls is, thus, a situation where we sacrifice the formal justice of a person for the sake of realising justice for the same person on a more fundamental level. I take this to be justifiable, at least in some situations. An analogy could be a doctor who secretly swaps her patient's painkillers against another drug that intensifies the pain considerably but which ultimately cures the patient. This would be offending but it may still be justifiable if it is necessary for the recovery of a patient who will otherwise die or have a very poor quality of life. However, this is not the situation that we are faced with in the Baltic case. In this case, the formal justice of one group of persons – the Soviet-era migrants and their descendants – was sacrificed for the sake of rectifying injustice for another group of persons – the Estonians and Latvians. This is to replace one injustice with another. The relevant analogy to this situation would be if our doctor, to treat a part of the population that suffered from a disease, secretly added a cure with long-lasting and harmful side-effects to the drinking water of a whole population. This is to sacrifice one group of innocent persons for the benefit of another.

It might be objected here that this sacrifice may still be justifiable since formal justice is less weighty than a just basic structure and that there is a net profit in terms of justice nonetheless. Certainly the reasonable view is that 'an injustice is tolerable only when it is necessary to avoid an even greater injustice' (Rawls, 1971, p. 4). Can not the restorationists in Estonia and Latvia justifiably argue that the forcible annexation of the Baltic States and the subsequent Soviet population transfers is the greater injustice in this case and that the exclusion of the Soviet-era migrants and their descendants was necessary to avoid that greater injustice? I cannot see that, either. The exclusion of the

Soviet-era migrants and their descendants was hardly necessary to avoid the forcible annexation of the Baltic States and the subsequent population transfers. Those things had already happened and the exclusion of the Soviet-era migrants and their descendants could not undo them. What the exclusion of the Soviet-era migrants and their descendants at most could accomplish was to undo the demographic consequences of those injustices, that is, through the extruding effects of the exclusion.

Yet, those who are prone to give priority to the aspiration to undo the demographic consequences of these injustices proceed from a misconceived understanding of what should count as an injustice in this situation. As far as I can see, it is an injustice to exclude people who have legitimate expectations to retain their rights and equal citizenship status but it is not an injustice to deny a misappropriated group the right to exclude and extrude the same persons. An injustice is, indeed, only tolerable when it is necessary to avoid an even greater injustice. But in this case, the perceived demographic harm that the Estonian and Latvian restorationists would have had to live with if they had been denied the right to exclude the settlers and their descendants should not be seen as an injustice. The analogy that I referred to previously with a person who gets her house back after having been unjustly bereft of it may, again, illustrate the point. Would it be an injustice against this person if she was denied the right to evict a tenant who had acquired a contract in good faith during the period of unjust deprivation? If there is no other relevant ground for eviction (failure to pay the rent, disturbance, etc), that does not seem to be the case.

It should also be added that the exclusion of the Soviet-era migrants and their descendants was not necessary for the rectification of the injustice against the wronged groups in other respects. A right to unconditional option of citizenship for the Soviet-era migrants and their descendants in Estonia and Latvia would not have prevented the restoration of these states, nor would it have averted the restoration of the pre-annexation citizenries. The restoration of the pre-annexation states and citizenries in Estonia and Latvia would, instead, have been just as realisable in a situation where the Soviet-era migrants and their descendants had been offered the possibility to register as citizens unconditionally. This is precisely how Lithuania chose to restore the pre-annexation Lithuanian state and its legal citizenry. This was far from restoration status quo ante in the demographic sense that the purist restorationists dreamed of. Nevertheless, it was the justifiable amount of restoration and therefore the adequate rectification also in the Estonian and Latvian cases.

Occupations and annexations

Restorationists in Estonia and Latvia often point out that Estonia and Latvia are restored states and that they therefore are exempt from the inclusionary obligations that apply to new states. They, thus, try to establish a distinction between new and restored states according to which new states are seen as obligated to include all inhabitants on their territories in the initial citizenry. Restored states are, by contrast, only presumed to be obligated to include the pre-annexation citizenries and their descendants unconditionally. At the same time, they are presumed to have a right to exclude persons whose presence on their territories is a result of settlement during the period of forcible incorporation. However, the argument that I have developed here disallows that distinction and, instead, speaks in favour of an alternative distinction between occupations and annexations that is defended by Eide. According to Eide, 'occupations are different from … annexations which are illegal under international law and which may have been brought about through illegal occupation' (Eide, 1993, p. 13). Under annexations 'legal rights can be acquired in good faith by individuals … [and] human beings who have entered may have had no reason to believe that this was a temporary and illegal occupation, and it would be unacceptable in regard to most of them to deprive them of the option of citizenship' (Eide, 1993, p. 13). According to Eide, settlement in good faith is, thus, only possible under annexations; it is not possible during an occupation.

According to this alternative distinction, states that emerge or re-emerge after occupations are therefore the only units that have a right to exclude persons who have settled on the territory of the seized unit prior to independence. States that are restored after long-standing annexations, such as the Baltic States, ought to have the same obligation as entirely new states to include all legal residents on the territory of the seceding unit unconditionally. The reason is the acquisition of legal rights in good faith and the legitimate expectations that follow from good faith. The crucial feature in these cases is that the same legal system has applied to the annexed territory as to the rest of the territory of the incorporating state. As a consequence, people who have settled on the territory cannot be expected to have thought of the territory as an irregular part of the country. It seems unreasonable to demand that settlers should be aware of the fact that settlement on the territory is an injustice if the territory is a regular part of the country and settlement on the territory is legal according to the laws of the state.

States that emerge or re-emerge after occupations are distinct from all other seceding units on this point. Under occupations, it is, in fact, reasonable to presume that persons who enter the territory of the seized unit should be aware of the fact that the territory is occupied. The crucial feature in these cases is the fact that the territory is under military administration and that another legal system therefore applies to that territory than to the rest of the territory of the incorporating state. This means that there are rules and regulations that apply specifically to the territory and that the jurisdiction is run by military courts, as on the parts of the West Bank that lie outside the zone where Israel has complete security authority (i.e., zones A and B). Persons from the incorporating state who establish settlements on such territory may therefore be presumed to be aware of the fact that the rights and status that they acquire on the territory are connected with the occupation and that their continued possession of these rights is dependent on the continuation of the occupation. They may also be expected to be able to foresee that their possession of their status and rights will be interrupted by an altered statehood of the territory if and when the territory is freed from occupation. In that sense, they are implicitly aware of the conditioned character of the rights that they acquire, which implicitly disallows the validity of these rights. If they expect to retain the rights and the status that they acquire, they do so because they trust the power of their country's army. Such expectations are based on might rather than right, and it would be wrong to see them as legitimate.[7]

But is not the distinction between occupations and annexations that I propose here too blunt? Is there not, rather, a sliding scale between these endpoints reflecting the duration of an occupation, where an occupation more and more takes the form of a de facto annexation the longer it lasts? To some extent, there is, indeed, a sliding scale between endpoints. However, it is not the duration of the occupation as such that creates a grey zone. The sliding scale, rather, reflects the extent to which an occupying power phases out occupation legislation or marshal laws and instead introduces its regular legal system on the seized territory. That process may create a blurred legal situation where legal rights may be acquired on the seized territory on the same terms as in other parts of the country in spite of the fact that the territory is not formally annexed.

Nevertheless, the act of formal annexation is still a moral divide here. When a territory is formally annexed, the incorporating state not only legalises settlement and acquisition of rights on the territory on the same terms as in other parts of its territory. It also signals that

the territory is a regular part of the country. Both factors are crucial to the acquisition of legal rights in good faith. A state that introduces its regular legal system on an occupied territory without formally annexing the territory sends mixed signals to its citizens. The message is that it is possible to acquire legal rights on the territory but that this is still not a regular part of the country. This is basically the situation in the zone of the West Bank where Israel has full security authority (zone C). Although the legal situation must seem blurred for the Israeli settlers in this zone, I do not think that their acquisition of legal rights amounts to acquisition in good faith. The situation is different if a state has annexed a territory, which is thereupon recognised by other states as a legal part of the state – as was the case after the extensive annexations of unjustly seized territories by the USA in the nineteenth century. Under these circumstances, a claim for acquisition of legal rights in good faith becomes far more credible.

But is there not something profoundly disturbing about the idea of acquiring legal rights in good faith? Can states really be so good at disguising the injustice of their seizures so that all citizens buy a doctored version of the history as the true version of the incorporation? Surely the settlers must know that there is something fishy about their settlement on the territory even when the territory is annexed. The discouraging truth, however, seems to be that some states are, in fact, totalitarian or authoritarian to a point where they are able to establish a doctored version of the incorporation as the true version of history.[8] However, the mythology surrounding the European conquest of Native American territory in the Americas reveals that it is possible to establish a beautified and romanticised picture of unjust seizure of territory without the powerful propaganda apparatus of a modern state. Yet again, the crucial factor seems to be that the state has annexed a piece of territory. The act of annexation legally sanctions the state's version of the incorporation, which means that the official version of the incorporation becomes the legal version. This may explain how North American settlers in the nineteenth century could regard their acquisition of land as lawful – in spite of the fact that they also knew that the land was originally inhabited by the Native Americans.

The best way to see the difference between acquisition of rights under occupations and annexations is probably to look upon the existing cases, however. If we take a brief look at the cases mentioned initially we may only find credible cases for settlement in good faith in cases of settlement under long-standing annexations. Of the cases mentioned initially, these cases include Tibet, where Han-Chinese migrants have

settled since the unit was forcibly annexed by China in 1950–1; Western Sahara, where Moroccan migrants have settled since the Moroccan occupation and annexation in 1975–6; and in the Baltic republics, where the Soviet-era migrants settled subsequent to the forcible annexation of these units in 1940–4. All these cases subsume protracted periods of incorporation when legal rights have been acquired by new residents on identical conditions as in other parts of the country. Yet, even in these cases the credibility of a claim for settlement in good faith appears stronger for later generations of migrants than for the first generation, who took up residence in a situation that actually had elements of a regular occupation (Reinikainen, 1999, p. 107).

Indeed, the first wave of settlements in all these cases may very well have resembled the present Israeli settlement in zone C on the West Bank, which Israel seems to be in the process of annexing. But the West Bank is still essentially different from these other cases in the sense that Israel has not formally annexed any parts of that territory yet, which is the reason why good faith may not be invoked in this particular case. The clearest cases of settlement in bad faith (i.e., in full awareness of the forcible character of the incorporation of the territory) are likely to be the first Israeli settlements on the West Bank as well as the numerous outposts that have stretched over the territory during the last decades. These settlements have been set up wilfully by radical settlers' groups, although they have regularly been backed up by the state of Israel later on. Yet, even persons who choose to join one of the established settlements in zone C on the West Bank today should be aware of the fact that the territory is occupied and that settlement on the territory is a breach of international law. The fact that Israel may be in the process of annexing that particular part of the territory certainly confuses the legal situation but not to a point where the settlers may invoke good faith.

The flip side of the legitimate expectations argument is that there are situations where we may, in fact, justifiably use the international norms on population transfers and non-recognition as the basis for our judgement of the legitimacy of the expectations of settlers. These are situations where it is reasonable to demand that the settlers should be aware of the fact that the territory is unjustly incorporated and that settlement on the territory is a breach of international law. This actually seems to be the case with the Israeli settlers on the West Bank. In situations such as on the West Bank, the expectations of the settlers to continue their residence on the basis of the status and the rights that they have acquired on the territory must be described as illegitimate. The Israeli settlers on the West Bank may therefore justifiably be

excluded from initial citizenship if they end up on the territory of an independent Palestinian state subsequent to a return of the territory to the Palestinians. At the same time, however, the Palestinians may not be granted a right to enforce their return to the territory of the incorporating state, that is, to the territory that Israel would receive in a new partition of the territories seized by Israel since 1948. The descendants to settlers who would end up on Palestinian territory are not responsible for the role they have played in the injustices against the Palestinians. These persons have legitimate expectations to continue their residence on the territory where they were born and when they come of age they should have a right to be unconditionally included in a Palestinian citizenry. They should not be expelled together with their parents, which is the likely outcome of a right to enforce the return of the settlers for the Palestinians.

Implications for international law

The legal situation concerning initial citizenship in international law may be described as unclear and contradictive (Reinikainen, 1999, pp. 51–75). There are no norms that address the issue of initial citizenship head-on and the norms that are relevant to the issue point in both an exclusionary and an inclusionary direction. On the one hand, there is the customary rule on non-recognition of forcibly seized territory, which became institutionalised subsequent to the refusal of the major Western states to recognise the Soviet Union's forcible annexation of the Baltic Republics in 1940 (Hough, 1985). This norm may be interpreted in an exclusionary way, that is, as a rejection of the validity of the rights to residence or suffrage that settlers acquire on seized territory (Reinikainen, 1999, pp. 76–95). Another possible foothold for an exclusionary approach is article 49 of the fourth Geneva Convention from 1949, which stipulates that 'Individual or mass forcible transfers … [on] occupied territory … are prohibited, regardless of their motive' and that an 'Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'.[9] On the basis of this article, it may, perhaps, be argued that the very presence of settlers and descendants to settlers on forcibly seized territory is a breach of international law, and that they therefore should return to the territory of the incorporating state rather than be included in the initial citizenry of the state that emerges or re-emerges on the seized territory.

On the other hand, there are various human rights norms and conventions that point in the direction of inclusion, albeit none of them may be claimed to be entirely clear and unequivocal either. One of the academic

advocates of an inclusionary approach, Eide, admits that neither 'international law in general, nor international human rights are entirely clear on [initial] citizenship requirements of the kind that have emerged in the dissolution of the federations of USSR and Yugoslavia' (Eide, 1993, p. 7; see also Eide, 2000; 2007). His opinion, however, is that it 'would undoubtedly be most in conformity with modern human rights … if persons, who under the law … preceding restored independence had become lawful residents of the territory were given the option to become automatic (initial) citizens of the … restored state' (Eide, 1993, p. 13). According to Eide, the Estonian and Latvian approach does not violate any specific rule of international law but it still 'runs so strongly counter to a number of basic principles of modern human rights that the cumulative effect must be to consider them as violations'.[10]

International law generally recognises that states have the right to set their own citizenship standards (de Groot, 2006) and the contradictory legal situation concerning initial citizenship in international law has left new and restored states with basically the same prerogatives in their delimitation of the initial citizenry. However, against the background of the exclusion of the Soviet-era migrants and their descendants from initial citizenship in Estonia and Latvia, there seems to be a need for a new convention on initial citizenship that would prevent new and restored states from unjust exclusion (Reinikainen, 1999, pp. 163–4). The convention should, first and foremost, grant a right to unconditional citizenship to all descendants to settlers who end up on the territory of a new or restored state. These persons are not responsible in any way for the role they have played in an injustice against a wronged group and, as I have argued, they therefore have a claim for unconditional inclusion. In other respects, the convention ought to follow the distinction between settlement during annexations and settlement under occupations that I have defended here. Hence another article should specifically address settlers on annexed territory who have taken up residence in accordance with existing laws. These persons should also be granted a right to unconditional inclusion, preferably by way of a right to register unconditionally as citizens in the new or restored state.

Furthermore, the convention should also include an article that denies a right to unconditional, initial citizenship for persons who voluntarily take up residence on occupied territory. That article would be vital to the rectification of the injustice against a wronged group and it is also significant as a signal to regimes that contemplate upon or currently carry through colonisation projects. The article would, moreover, be in agreement with article 49 of the fourth Geneva Convention,

which, as we have seen, prohibits population transfers specifically on occupied territories.[11] Another article in this convention ought to grant persons who have settled on occupied territory an unconditional right to *residence* in the state that emerges or re-emerges on the territory after the occupation. This is necessary as a protection against their expulsion. A right for the wronged group to enforce their return to the territory of the incorporating state would, indeed, be justifiable if it only affected the settlers. Yet, such a right would indirectly also jeopardize the right to residence of the children to the settlers. On territories such as the West Bank, the divide between legitimate and illegitimate expectations may often run right through families, with, on the one hand, parents who have settled in bad faith and, on the other hand, children who have been born on the territory. The most just solution in that situation would be to grant the descendants/children a right to unconditional citizenship and the settlers/parents a right to unconditional residence but not to unconditional citizenship.

Some may fear that granting these rights to settlers on unjustly seized territory would give rise to worrisome incentives. The principal fear may, perhaps, be that incorporating states would be encouraged to annex territories that they have occupied since that will make sure that settlers from the incorporating state will be entitled to citizenship if the independence of the seized unit is restored. While these fears may be well-founded, they should still not be allowed to stand in the way for a convention on initial citizenship. The perverse incentives that a convention on initial citizenship may possibly give rise to should, instead, be neutralised by a sharpening of the prohibition against annexation in international law. It should cost more for states to annex unjustly seized territory than they may gain in terms of possible future influence and control of neighbouring states by means of the settlers that they have left on their territories during a period of unjust incorporation.

Notes

1. I will use the term rectificatory secession instead of restoration of statehood here. The reason is that I wish to also cover cases of unjust divestiture of territorial sovereignty where a group has had sovereign control over a territory without having been recognised as an independent state in the legal sense. Tibet prior to the Chinese seizure in the 1950s is one example.
2. 'Declaration of the Congress of Estonia concerning the legal restoration of state authority on the territory of the Republic of Estonia', 11 March 1990.
3. 'The plan of activities of the Estonian Committee concerning the issue of citizenship', *Minutes of the Second Estonian Congress*, 25 May 1990.

4. Initiative Centre for the Decolonisation of Estonia (1995) 'Decolonization: The Only Solution for Estonia', *Nationalities Papers*, Volume 23, Issue 1, p. 229.
5. Indeed, in 1993 the Estonian parliament adopted a new Law on Aliens that actually went this far, although the Estonian president withdraw the law after widespread civic disobedience from the non-citizens and intervention from international organisations and Western countries.
6. The distinction between choice and circumstance was originally introduced by John Rawls as a key justificatory element in his theory of justice. See J. Rawls (1971). Later on, it was developed by Ronald Dworkin and luck egalitarian theorists as a basis for distinguishing the outcomes of choices – which the individual is seen as being personally responsible for – from the results of circumstances – which the individual is not considered personally responsible for and which generates a valid claim for compensation. See R. Dworkin (1981). The distinction has also been invoked by Will Kymlicka as a basis for distinguishing the claims to cultural protection of national minorities from the claims of immigrants. See W. Kymlicka (1995). My general view is that the Rawlsian use of the distinction is adequate. However, this does not mean that we should be forbidden to use the distinction in a more policy-decisive, luck egalitarian way in particular questions where this is relevant, as in the case of the delimitation of initial citizenship.
7. But although the act of annexation is a moral divide in this sense, there may nonetheless be cases of settlement on occupied territory where the settlers should not be seen responsible for their participation in the injustice against the wronged group and where they therefore have a justifiable claim for inclusion. This would, for instance, be the case if army personnel or civilians have been commanded to settle on unjustly seized territory by the occupying state. The distinction between annexations and occupations should be seen as a way of implementing the distinction between choice and circumstance in international law. It approximates the distinction between choice and circumstance but it may still deviate from it in particular cases. In cases of deviation, we should start back with the underlying distinction between choice and circumstance and allow for exceptions on the basis of that more fundamental moral distinction.
8. In Estonia, for instance, the impact of the official propaganda version of the history was profound even among the Estonians. Rein Taageperä claims that even the Estonians who were brought up during the Soviet era were deceived by it. When the Estonian history began to be debated in the late 1980s – subsequent to the publication of the Estonian historian's Evald Laasi's revisionist *To Fill in Some Gaps* in 1987 – they were shocked: 'Many among the one-and-a-half generations of Estonians who had learned falsified history during their entire schooling may have asked their parents and grandparents, upon reading Laasi: "Was it really like that?".' See R. Taageperä (1993), p. 155.
9. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Commentary on Part III: Status and treatment of protected persons, Section III: Occupied Territories, Article 49.
10. The norm that Eide primarily tries to lean on is Article 15 of the Universal Declaration of Human Rights from 1948, which declares that everyone

has a right to a nationality and that no one shall be arbitrarily deprived of his nationality. But he also refers to the anti-discriminatory precepts of the International Convention on the Elimination of all Forms of Racial Discrimination from 1965. According to Eide, the exclusion of the Soviet-era migrants and their descendants – who basically made up the Russophone minority in Estonia and Latvia – was an invidious distinction that was incompatible with the Convention.

11. It should be noted that Article 49 of the fourth Geneva Convention prohibits settlement on 'occupied territory', and not on annexed territory. The reason for this formulation may very well be the predicament that a number of signatories of the Convention would have faced if annexed territories also had been covered by the prohibition – as they have had annexed territories themselves historically. As we have seen, however, there is generally a relevant moral difference between settlement on occupied and annexed territory that justifies the prohibiting the former but not the latter.

Bibliography

'Declaration of the Congress of Estonia concerning the legal restoration of state authority on the territory of the Republic of Estonia', 11 March 1990.

Dworkin, R. (1981) 'What is Equality? Part 2: Equality of Resources', *Philosophy and Public Affairs* 10 (4): 283–345.

Initiative Centre for the Decolonisation of Estonia. (1995) 'Decolonization: The Only Solution for Estonia', *Nationalities Papers* 23: 227–229.

Eide, A. (1993) 'Citizenship and International Law: The Challenge of Ethno-Nationalism', *Citizenship and Language Laws in the Newly Independent States of Europe*, The Danish Center for Human Rights.

Eide, A. (2000) 'Citizenship and Human Rights Law', Butenschøn N., Davis U. and Hassassian M. (eds), *Citizenship and the State in the Middle East* (Syracuse, NY: Syracuse University Press).

Eide, A. (2007) 'Minority Rights of Non-citizens', R. F. Jørgensen and K. Slavensky (eds), *Implementing Human Rights: Essays in Honour of Morten Kjærum*. The Danish Center for Human Rights.

De Groot, G. R. (2006) 'Nationality Law', in Smiths J. M. (ed.) *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar Publishing Limited).

Helsinki Watch. (1993) 'Integrating Estonia's Non-citizen Minority', *Helsinki Monitor*, 5.

Hough, J. H. W. (1985) 'The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory', *New York Law School Journal of International and Comparative Law* 6: 391–446.

Kymlicka, W. (1995) *Multicultural Citizenship* (Oxford: Oxford University Press).

Laber, J. (1992) 'Letter to Andrejs Pantelejevs, Chariman of the Human Rights and Nationalities Issues Committee, Supreme Council of Latvia', February 10, 1992', *Helsinki Monitor*, 4.

Levenson, L. (1993) 'Good Faith Defenses: Reshaping Strict Liability Crimes', *Cornell Law Review* 78: 402–55.

'The plan of activities of the Estonian Committee concerning the issue of citizenship', *Minutes of the Second Estonian Congress*, 25 May 1990.

Rawls, J. (1971) *A Theory of Justice* (Oxford: Oxford University Press).
Reinikainen, J. (1999) *Right against Right: Membership and Justice in Post-Soviet-Estonia*, Stockholm Studies in Politics 65.
Roberts, R. (2002) 'Justice and Rectification: A Taxonomy of Justice', in R. Roberts (ed.) *Injustice and Rectification* (New York: Peter Lang).
Semionov, A./The Russian Democratic Movement (1993) 'The Problem of Citizenship and some Proposals for the Reduction of Statelessness in the Republic of Estonia', *Citizenship and Language Laws in the Newly Independent States of Europe*, The Danish Center for Human Rights.
Taageperä, R. (1993) *Estonia: Return to Independence* (Boulder, CO: Westview Press).
Tsilevich, B. (1993) 'Citizenship Problems and Language Legislation in Today's Latvia', *Citizenship and Language Laws in the Newly Independent States of Europe*, The Danish Center for Human Rights.
Walzer, M. (1983) *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford: Blackwell).

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