

*Democrats without borders*



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*Democrats without borders*  
*A critique of transnational democracy*

University of Gothenburg 2008

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# Acknowledgements

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Johan Karlsson  
Gothenburg in October 2008



# 1. Taking democracy global

Is globalisation a reason to radically rethink democratic theory and reorganise its practice? Many people inside and outside of academia think it is. We live in interesting times, they tell us. Globalisation has made us realise we are now one world, Peter Singer writes, and the fundamental changes it brings about also “needs to be reflected in all levels of our thought”.<sup>1</sup> Robert Dahl asks whether democracy is currently going through its third transformation, where it must once again be rethought to fit the changes in scale of political communities, just as the second transformation revamped democracy, until then considered only suitable for the small city-states of Antiquity, to make it fit for modern mass-societies and nation-states.<sup>2</sup> Similarly, in his manifest for global democratic reform, George Monbiot thinks we are on the brink of a “metaphysical mutation”. This mutation will forever change the way we look upon ourselves and the world in which we live, a historical paradigm shift equalling, if not outclassing, the Enlightenment and the industrial revolution: “For the first time in history, we will regard ourselves as one species.”<sup>3</sup>

Over the past decade and half, this narrative of dramatic change and daunting challenges has inspired activists in the so-called global justice movement, but it has also spawned a vast literature in democratic theory. These theorists claim that globalisation fundamentally alters the conditions of politics in the contemporary world. Most importantly, it undermines the autonomy of the nation-state, the unit of social organisation for which democracy has been theorised and practised for the past couple of centuries; it accelerates inequalities of wealth and power on a global scale; and it empowers increasingly autonomous international institutions beyond democratic accountability. Thus, these

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<sup>1</sup> Singer 2004

<sup>2</sup> Dahl 1989. However, unlike most of the writers we will confront here, Dahl has later argued that democratising international organisations is neither feasible, nor really desirable (Dahl 1999a).

<sup>3</sup> Monbiot 2005, my translation

visionaries suggest, it is high time we start rethinking the concept of democracy to fit this new, globalised world of ours, and start building democratic institutions beyond, above or across nation-states, wherever political power today rests. If we wish to preserve and develop democracy in a globalising world, we have to take it to the next – that is, to the international, transnational, or even global – level. We should not underestimate that conclusion. On the most enthusiastic accounts of transnational democratic theory, transforming democracy in this way is not just a possible and possibly desirable development of democracy: it is a necessary requirement for democracy at all.

A central advocate of transnational democracy, David Held suggests that unless we make democracy supranational, democracy as such will be threatened in the future: “Democracy must become not only a national but a supranational thing, if it is to be realised both in a confined geographic area, and in the wider international community.”<sup>4</sup> Held’s intellectual companion Daniele Archibugi strikes an equally dramatic tone when claiming that “Cosmopolitical democracy is based on the assumption that important objectives – control of the use of force, respect for human rights, self-determination – will be obtained *only* through the extension and development of democracy.”<sup>5</sup> Richard Falk similarly suggests that democracy within existing sovereign states “will not itself be viable unless reinforced by the extension of democracy to all arenas of authority [...], including the family of organizations that constitute the United Nations”, and that this “comprehensive democratization” is necessary both for the functional stability and normative legitimacy of the current world order.<sup>6</sup> Likewise, Andrew Strauss argues that “the increasingly powerful international system should no longer stand apart from the movement to democratize planetary social life” and thus, we must “take democracy global”.<sup>7</sup> Otfried Höffe well captures the historical importance that he and others attach to global democratic reform when he claims that the project of a democratic world order (immodestly modelled on the Federal Republic of Germany) serves to “salvage the ethical-political achievement of modernity, democratic government committed to justice and equality, into the age of globalisation.”<sup>8</sup>

Equally concerned with the future of democracy in the era of globalisation,

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<sup>4</sup> Held 1995b

<sup>5</sup> Archibugi 2003a, emphasis added

<sup>6</sup> Falk 1998

<sup>7</sup> Strauss 2005

<sup>8</sup> Quoted in Fischer-Lescano 2003, my translation from the German: “um die sittlich-politische Errungenschaft der Moderne, die auf Recht und Gerechtigkeit verpflichtete Demokratie, ins Zeitalter der Globalisierung zu retten.“

Jürgen Habermas notes that only the facades of the democratic Western states are still standing. Habermas's goal is a political order that will transform world politics into domestic politics, but without a world government. What is at stake in this project, he claims, is "whether we must completely give up the ideas of a politically constituted democratic community or if these ideas waning on the nation state level can be rescued to the post-national constellation."<sup>9</sup>

Critical of the stiff formalism of Habermas's political theory, John Dryzek argues that only his own radical, "discursive" account of deliberative democracy is equipped to respond to the challenges of globalisation, and thus, "for the sake of both democratic theory and democratic development it is vital" that this critical voice be retrieved.<sup>10</sup> Proffering a republican-deliberative perspective, James Bohman similarly argues that we currently live in "the golden age of democracy", where liberal democracy has become recognised as an almost universal norm, while at the same time, paradoxically, "democracy has never been weaker", because facing the various challenges of a globalising world, democracies "cede many areas of social life to delegated and increasingly nondemocratic forms of authority."<sup>11</sup> Bohman concludes that "transnational democracy – democracy as realized in a variety of institutions and communities – is not only more democratic, but is the only feasible way in which to realize the democratic minimum and the rights of members of the human political community."<sup>12</sup>

In short, if we take these diverse scholars' word for it, transnational democracy of some sort is not just an interesting possibility to be pondered upon, an optional add-on, or an undeniably important value that still has to be weighed against other human purposes. Instead, they present transnational democracy as a necessary condition for democracy in a globalised world. Thus, there is a lot at stake here – the very future of democracy, they say.

So what is the alternative future of democracy that these theorists have to offer? The suggested remedies range, roughly, from building the institutions of a democratic world government to more modest suggestions for increased participation and deliberation within existing global governance. Both the drastic diagnoses of a current crisis of democracy and their resultant remedies are built upon particular conceptions of democracy. There are distinct theories of transnational democracy, based on distinct principles, concepts and premises. The purpose of this thesis is to critically examine these theories. While holding

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<sup>9</sup> Habermas 2007: 163, my translation; 1998a; 2004

<sup>10</sup> Dryzek 2000: 30

<sup>11</sup> Bohman 2007: 1

<sup>12</sup> Bohman 2007: 6

a sceptical view of the problem to which transnational democracy is presented as a solution, I shall argue that the democratic principles underlying these theories are ill-founded and that the ensuing institutional solutions also fail to remedy the very problems for which they are suggested. The upshot of my argument is that these theorists fall short of establishing that transnational democracy is a *sine qua non* of democracy in the future.

The view from which I criticise the idea of transnational democracy is both liberal and internationalist. My view is internationalist in the sense that it takes a sceptical view of the boldest claims that globalisation fundamentally transforms the global political order. The world order is international and among its most important political institutions are sovereign states.<sup>13</sup> Thus, this view disputes both realist claims that sovereignty is “organised hypocrisy”, implying that regardless of norms like sovereignty, strong actors do what they can while the weak suffer what they must, and post-sovereignist claims that a world order premised on sovereign states has been superseded by globalisation.<sup>14</sup> My view is broadly liberal in regard of the state, individual rights and democracy.<sup>15</sup> It holds that legitimate claims to inclusion arise not from being merely affected by decisions taken by others, but from being subject to the law and to the state with its power and authority to coerce individuals. Moreover, it holds that some basic individual rights cannot simply be derived from the principles of democracy. It regards, finally, representation as fundamental for democracy and, consequently, I argue that the dominant approaches to transnational democracy fail to provide convincing accounts of representative institutions, which is especially problematic given the multi-level character of the institutional order they propose.

### 1.1.1 *Pinning down the problem*

As a latecomer browsing the numerous books, essays, articles and pamphlets about transnational democracy that theorists, thinkers and activists have poured out over the past decade, you might be led to believe that everyone agrees that globalisation fundamentally challenges democracy as we know it, and that we need to take urgent action. Most advocates of transnational democracy present globalisation as a looming threat, but also an opportunity of

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<sup>13</sup> This is an empirical or ontological claim, separate from the issue of whether an international order is also normatively justified.

<sup>14</sup> Krasner 1995; 1999; Karp 2008; Dahbour 2006; Cohen 2004; Navari 2007; Tan 2008. Notably, my basic internationalist claim is compatible with various non-realist theories of international relations.

<sup>15</sup> This is not to say that the views I am criticising are non-liberal.

tremendous importance, to which the only reasonable answer spells transnational democracy of some sort.

However, we would make a mistake if we were to uncritically jump on this bandwagon of democrats anxious of globalisation. Consider another issue which has spurred public and academic debate over the past decades: The challenges that cultural diversity allegedly poses to liberal, Western societies. Opening his sharp critique of multiculturalism – broadly, the idea that cultural groups should be granted exemption from liberal equality – Brian Barry notes that those who write on that subject for the most part do so from some sort of multiculturalist position, and thus you could be lead to believe that everyone agrees what the problem is and that liberal multiculturalism provides the proper solution. But this consensus is illusory, Barry claims, because:

“those who do not take this position tend not to write about it at all but work instead on other questions that they regard as more worthwhile. Indeed, I have found that there is something approaching a consensus among those who do not write about it that the literature on multiculturalism is not worth wasting powder and shot on.”<sup>16</sup>

Belonging to the latter camp, Barry argues for liberal egalitarianism against various strands of multiculturalism, because he disagrees with multiculturalists’ framing of the problem.

Similarly, the literature on transnational democracy is largely produced by people who agree to the framing of the problem.<sup>17</sup> Those who believe that globalisation poses fundamental and serious challenges to democracy (in theory as in practice) try to come up with a response to what they perceive as an imminent and pressing problem. That might give the impression that although theorists may quarrel about the proper solutions, they all agree that the problem is important and deserves our attention. But the consensus we register in the debate may simply conceal the fact that most people who dissent have moved on to write about things they find more interesting, important and challenging.

This illusory consensus, then, justifies that we explore the possibilities of arguing against transnational democracy.<sup>18</sup> Political theory thrives on argument, disagreement, antagonism and disputation, whereas consensus is a can-

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<sup>16</sup> Barry 2001: 6

<sup>17</sup> This is not to suggest that advocates of transnational democracy have not faced criticism. For examples of exchanges between transnational democrats and their critics, see Shapiro & Hacker-Cordón 1999; Holden 2000; Archibugi 2003b.

<sup>18</sup> Cf. Sanders 1997

cer. Thus, the role I step into when engaging with the literature on transnational democracy is to play the part of the antagonist, of the contrarian.

## 1.2 TWO MODELS OF TRANSNATIONAL DEMOCRACY

As we saw at the outset, many contemporary thinkers and theorists believe that globalisation forces us to radically rethink democratic theory and to adjust real existing democracy accordingly. Two broader traditions of thought are central in the literature on transnational democracy: cosmopolitan democracy and a variety of deliberative democracy concerned with the transnational setting.<sup>19</sup> Theorists working in or across these traditions usually start from a shared concern that globalisation poses serious threats or challenges to democracy and suggest ways in which democratic theory and practice could be adjusted to avert such threats and take on such challenges.

### 1.2.1 *Cosmopolitan democracy*

Tracing its ancestry to the Enlightenment if not to Antiquity, cosmopolitanism is an old philosophical tradition, orbiting around the general idea “that all human beings, regardless of their political affiliation, do (or at least can) belong to a single community, and that this community should be cultivated”.<sup>20</sup> Cosmopolitan democracy, however, claims to turn cosmopolitanism into a political project by coupling it with a particular conception of democracy.<sup>21</sup> With David

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<sup>19</sup> Given the variety of proposals for democratic responses to the challenges of globalisation and internationalisation, why focus exclusively on cosmopolitan democracy and deliberative democracy? Since what we are interested in is transnational democratic theory, we may leave out on the one hand various theorists who are worried about the legitimacy of global governance but who do not explicitly propose democratic solutions to that problem. For example, Robert Keohane, who has taken on the lack of accountability, legitimacy and transparency in global governance, rejects democracy as a solution to those problems (Keohane 2003; Keohane & Nye 2003; Grant & Keohane 2005). Similarly, Jan Aart Scholte is a key advocate of globalisation theory and expounds how it challenges state sovereignty and institutionalised democracy, but Scholte sees civil society as at most a potential functional equivalent of democracy at the international level and does not develop a distinct model of transnational democracy (Scholte 2004; 2005). On the other hand, we may also leave out various proposals more narrowly focusing on institutional design, drafting for example a world parliament or increased NGO representation in the Bretton Woods institutions, without grounding those designs in a comprehensive normative conception of transnational democracy (for example, Patomäki & Teivainen 2004; Monbiot 2005; Strauss 2005).

<sup>20</sup> Kleingeld & Brown 2002; cf. Archibugi 2002; Pogge 1992

<sup>21</sup> Calhoun 2003; Franceschet 2000; Urbinati 2003; Archibugi 2003a

Held and Daniele Archibugi as its main protagonists, cosmopolitan democracy proposes a political response to globalisation amounting to a radical restructuring of global political institutions around a notion of cosmopolitan citizenship entrenched in a “democratic public law”.<sup>22</sup> Daniele Archibugi describes cosmopolitan democracy as an attempt to steer between “the Scylla of independent autonomous states and the Charybdis of a planetary Leviathan – that is, between the existing, conflict-ridden multilateral structure of the United Nations system and the daunting prospects of a potentially despotic, all-powerful world government.”<sup>23</sup> Although on some accounts, cosmopolitan democracy would require that states should be abolished and replaced by regimes relegating functional issue-areas, most cosmopolitan democrats rather seem to think of their project as adding layers of authority above existing states and democratising various international institutions, embedding the world in “multiple and overlapping networks of power”.<sup>24</sup>

Implementing this ideal of cosmopolitan democracy follows a scheme for international reform including reforming the bodies of the United Nations, in order to work as an autonomous decision-making centre that can establish the rule of law in international relations; instituting new global and regional parliamentary assemblies, whose decisions should be recognised as legitimate independent sources of law; empowering international courts to maintain the democratic public law and adjudicate conflicts of jurisdiction; transnational referenda on diverse matters in functional constituencies formed around issues; expanding the role of global civil society, and so on. Given that cosmopolitan democrats seem so concerned with the institutions familiar from nation-state democracy (parliamentary assemblies, constitutionally entrenched individual rights, courts settling conflicts, referenda, vertical and horizontal distribution of powers), some interpret cosmopolitan democracy as a conventional conception of democracy writ globally large.

### 1.2.2 *Deliberative democracy*

Deliberative democracy is a tradition in political thought both older, deeper, and broader than cosmopolitan democracy. Combining elements of both liberal-representative and republican-participatory models of democracy, deliberative democratic theory stresses public rational argument as the main point

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<sup>22</sup> Held 1995a; Archibugi 1995; Archibugi, Held & Köhler 1998; Held 2000a; Archibugi 2003a; 2004 etc.

<sup>23</sup> Archibugi 1995

<sup>24</sup> Pogge 1992; cf. Burnheim 1995; Kuper 2000; Held 1995a

with democracy.<sup>25</sup> The “deliberative turn” in democratic theory is usually described as a reaction against the aggregative, economic, or realist models of democracy, which regard democracy as the arena where elites compete for power via popular vote and fixed, pre-political preferences are aggregated. Deliberative democracy, by contrast, stresses the communicative process of will-formation that precede voting, and accountability, that is, to give public account of policies and decisions taken, replaces consent as the conceptual core of legitimacy. Deliberation should proceed under conditions of mutual respect: “citizens who deliberate must address each other as equals and acknowledge this status by offering reasonable, morally justifiable arguments to each other.”<sup>26</sup> Public deliberation is desirable because it makes decisions better, more robust, and well-informed, as all their pros and cons will have been thoroughly examined. Further, public deliberation educates individuals to become autonomous, rational and moral citizens, promotes mutual respect between people through inclusion and civility, and may transform people’s preferences rather than just confirming them, as it encourages people to understand each other or at least agree on what they disagree on. Finally, public deliberation improves legitimacy, as deliberated-upon policies are supposed to be more generally accepted by those who are affected by them, and implementation thus runs smoother.<sup>27</sup>

Some theorists of deliberative democracy – most notably, perhaps, Jürgen Habermas, John Dryzek, Seyla Benhabib and James Bohman – have addressed issues similar to those raised by cosmopolitan democrats.<sup>28</sup> These theorists of deliberative democracy, and others inspired by their work, see deliberative democracy as “the political taming of globalisation”, but they often claim that they present a more feasible way of achieving transnational democracy in a globalised world than the model of cosmopolitan democracy.<sup>29</sup> As we have seen, the cosmopolitan roadmap for transnational democracy requires that we redistribute authority and set up an array of new global and regional institutions, mostly modelled on liberal and social democracy. By contrast, deliberative democracy, some of its proponents argue, may offer a more feasible solution, since it would start with existing institutions and centres of power in world politics – states, multilateral organisations, transnational corporations,

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<sup>25</sup> Chambers 2003; Bohman & Rehg 1997; Bohman 1998; Freeman 2000; Warren 2002

<sup>26</sup> Sanders 1997

<sup>27</sup> Chambers 2003; Verweij & Josling 2003; Fung 2003

<sup>28</sup> Habermas 1996b; 2001b; 2007; 1996a; Dryzek 2000; 1999; Bohman 1997; 2007; 2005; Benhabib 2004.

<sup>29</sup> Grant 2000; cf. Warren 2002; McGrew 2002c



non-governmental organisations, etc – and open them to deliberative politics, without necessarily challenging existing actors’ self-preservation. The deliberative approach thus also lessens problems of constituting the transnational democratic community, since deliberation is supposed to occur between actors bound together by transnational (or other) issues that affect them. Hypothetically, then, deliberative democracy could start here and now – we just need to get the relevant actors to deliberate publicly with each other about why they do whatever they do.<sup>30</sup>

### 1.2.3 *Varieties of cosmopolitanism*

Over the past decade or two, political theory has witnessed a renewed interest in cosmopolitanism and the debate about transnational democracy is certainly part of this general cosmopolitan turn.<sup>31</sup> But while theorists of transnational democracy take as their starting point the political problem of globalisation as a challenge to state-based democracy, theorists of cosmopolitan justice usually start from the problem of universal justice.

In an oft-cited passage, Thomas Pogge suggests that all cosmopolitans hold at least three common beliefs:

1. *Individualism*: Human beings are the ultimate units of moral concern, and consequently, other entities such as families, tribes, nations and states are only derivative units of moral concern.
2. *Universalism*: All human beings equally hold this status as an ultimate unit of moral concern.
3. *Generality*: Human beings are ultimate units of moral concern for everyone, not only for their compatriots, tribesmen or fellow believers, etc.<sup>32</sup>

As Simon Caney notes, these basic cosmopolitan beliefs are consistent with a variety of particular cosmopolitan theories.<sup>33</sup> For example, cosmopolitans differ

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<sup>30</sup> Positioning themselves against cosmopolitan democracy, many deliberative democrats have argued along these lines that deliberative procedures, out of the box, are better suited to a globalising world. For a few examples of this argument in different contexts, see Kapoor 2004; Nanz & Steffek 2004; Verweij & Josling 2003; Dryzek 1999; King 2003; Fung 2003; Hoskyns & Newman 2000; Bodansky 1999.

<sup>31</sup> Some even talk of a general cosmopolitan turn in the social sciences. This claim usually comes in tandem with a transformationalist account of globalisation and a charge against “methodological nationalism”, suggesting that because of globalisation, the social sciences should no longer take the nation-state as their baseline unit of analysis, or else they will be increasingly irrelevant (Beck 2000; Beck & Sznaider 2006; Grande 2006).

<sup>32</sup> Pogge 1992

<sup>33</sup> Caney 2005

considerably in their moral theories. Some embrace cosmopolitanism from the perspective of utilitarianism, others defend rights-based theories of cosmopolitanism, while yet others approach cosmopolitanism from a capabilities approach to justice.<sup>34</sup> Moreover, while there is a certain affinity between cosmopolitanism and the liberal doctrine concerned with persons' equal liberty, cosmopolitanism is not necessarily liberal and liberalism is not necessary cosmopolitan. For example, while his liberal theory continues to inspire the current trend in cosmopolitan political theory, John Rawls's international theory is not cosmopolitan, since he argues that different liberal principles apply within societies than in the international order.<sup>35</sup> Vice versa, some cosmopolitans reject liberalism:

“For example, although most cosmopolitan utilitarians seek to defend liberal rights it is possible for them to argue that maximizing total utility at the global level requires restrictions on freedom. Alternatively, some religious thinkers have argued for the equal moral standing of all persons but have argued for illiberal interpretations of these principles. Some indeed have embraced authoritarian or theocratic conceptions.”<sup>36</sup>

One debate among cosmopolitans, important for our purposes, concern what practical, political and institutional conclusions to draw from these conceptions: Is cosmopolitanism an ethical stance that can be practiced within an international political order (or any institutional order) or should cosmopolitanism also be committed to a concrete political ideal, a cosmopolitan global institutional order?<sup>37</sup> For instance, Immanuel Kant, a key philosopher of the cosmopolitan tradition, espouses a cosmopolitan moral theory, while in his international political theory, he ultimately rejects global political institutions, save for a voluntary pacific league of free republics.<sup>38</sup>

Most theorists of transnational democracy may be considered cosmopolitans in a general sense.<sup>39</sup> Perhaps this grounds for some confusion, since cos-

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<sup>34</sup> Singer 2004; Nussbaum 2006

<sup>35</sup> Rawls 1993; 1999b

<sup>36</sup> Caney 2005: 5

<sup>37</sup> Beitz 1979; Pogge 1992; Dallmayr 2003

<sup>38</sup> Kant 1984 [1795]; 1990 [1797]. For some recent commentaries on Kant's cosmopolitan theory: McCarthy 1999; Benhabib 2004: Ch. 1; Habermas 1998b: Ch. 7; Mertens 1996; Waldron 2000; Kleingeld 2006; Bohman & Lutz-Bachmann 1997; Franceschet 2000; Fine 2003.

<sup>39</sup> Many of them also place themselves within the broader liberal tradition, but some notably take issues with liberalism. For example, James Bohman proffers a republican account of cosmopolitanism and criticises its more liberal varieties (Bohman 2007).

mopolitan democracy incorporates cosmopolitanism into its name, but the deliberative model of transnational democracy is often no less cosmopolitan.<sup>40</sup> However, a theory of transnational democracy need not rest on the three pillars of cosmopolitanism. One could espouse some form of transnational democracy for other normative reasons than reasons consistent with or derived from cosmopolitanism. For instance, you could advocate transnational democracy in the European Union on communitarian grounds, perhaps stressing a common heritage of uniquely European cultural values, while rejecting the idea that we owe moral duties to all human beings everywhere.<sup>41</sup> Thus, the relation between cosmopolitanism and transnational democracy is contingent.

### 1.3 POLITICAL THEORY AND CRITIQUE

My aim is to provide a critical argument against two normative theoretical approaches to transnational democracy. Generally speaking, the bundles of arguments of which normative political theories consists can helpfully be broken down along three lines. They make factual claims about the world, which may be anything from concrete statements of fact to abstract ontological assumptions; they make normative claims, proposing principles of right and wrong or asserting values, virtues and vices; and they give practical guidance about what we ought to do.

In the following, I shall confront the two approaches to transnational democracy from each of these three angles in order to provide a full, multifaceted critique. While all three aspects are in view at all stages, I first focus on the factual premises of the problem: whether globalisation compels us to radically rethink democracy, as proponents of transnational democracy suggest. I shall argue that no conclusions about democracy follow that straightforwardly from the claims about globalisation; on the other hand, transnational democracy need not rely on those claims either. Second, I approach the normative principles underlying claims for transnational democracy and dispute the tenability of normative principles and concepts offered in its support. Here, I criticise the so-called all-affected principle, suggested to determine the boundaries of democratic communities, which I shall argue offers no support for relocating political authority to the transnational level. I also address the normative cor-

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<sup>40</sup> Daniele Archibugi has suggested the term “cosmopolitical democracy” to distinguish his and Held’s theory of transnational democracy from cosmopolitanism in general, but the term has not stuck (Archibugi 2003a).

<sup>41</sup> Cf. Bellamy & Castiglione 1998

relation between human rights and democracy, which some theorists argue justifies transnational democracy. The third step in my argument moves on to consider whether we could bring these models to bear on our current circumstances. Here, factual considerations resurface, as I argue that the model of cosmopolitan democracy does not present a stable, feasible political order, and that deliberative democracy, on its own terms, is a lot more difficult to apply to transnational governance than its proponents seem to recognise.

However, before we start this critical enterprise, we need to specify further its parameters and contours. We now turn to the style of political argument, how to perform a convincing critique and why we should bother to criticise ideas even if we disagree with the problem to which they are presented as solutions.

### 1.3.1 *Thinkers, traditions and arguments*

In political theory, there are three ways of writing on any set of related issues: We can focus either on thinkers and assess their work, or on traditions or schools of thought and assess their weaknesses and strengths, or on arguments for and against certain courses of action.<sup>42</sup> My main focus is on the arguments for and against transnational democracy, but since arguments are presented by theorists and located within broader systems of thought, all three aspects are important to keep in play.

However, as Simon Caney argues, the role that traditions of thought take on in an argument should not be overstated. One danger in focusing too much on traditions is what Quentin Skinner has dubbed the mythology of doctrines: the expectation that each tradition of thought or each writer will be found to enunciate some doctrine on each of the topics that we believe constitute the subject. That is often not the case, and we will do both traditions or thinkers and the subject injustice if we extort the tradition or thinker of a doctrine or a position that simply is not to be found in their actual argument.<sup>43</sup> This, how-

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<sup>42</sup> Caney 2005: 16; Glover 1977; Tännsjö 2000

<sup>43</sup> Caney 2005; Skinner 1969. Moreover, exegetic approaches to thinkers often assume that political theorists hold or ought to hold a coherent view, the correct interpretation of which we can argue about. Popper, for instance, claims that a critical interpretation “must try to reconstruct the philosopher’s thought as a consistent edifice”, and that in cases of doubt we should prefer the interpretations that render a “great philosopher” more rather than less consistent and coherent (Popper 2002a: 105f; Vedung 1982). Thus, this interpretive approach works under the assumption that each great thinker holds one overarching philosophical position, one that is preferably internally consistent and coherent, but that might not always be the case. For a defence of the coherence assumption and a critique of Skinner’s position, see Bevir 1997.

ever, is not to say that we should confine ourselves to those arguments that have actually been presented by a certain thinker or within a certain tradition: Sometimes the task of critical inquiry is also to counterfactually consider arguments that could have but have not been presented. Karl Popper famously suggests that if we aim to build up a position really worth attacking, then we must not hesitate to construct arguments in its support which have never been brought forward by the proponents of that position themselves.<sup>44</sup>

Secondly, being too concerned with traditions of thought, Caney claims, “leads to a fruitless obsession as to whether philosopher X is, say, really really a cosmopolitan or not.”<sup>45</sup> Likewise, if we focus too much on thinkers we risk putting too much emphasis on exegesis: how to correctly interpret and represent the way in which a certain philosopher has presented an argument on an issue.<sup>46</sup> Moreover, traditions of thought do not really have clearly demarcated borders, and thus concentrating on appraising traditions of thought “assumes a chimerical precision so that one can say that Bull, for example, definitely is not a realist.”<sup>47</sup> Finally, the tradition-driven approach may lead people to think that traditions “are monolithic entities that possess distinct and separate identities” that are logically exhaustive and exclusive of each other, while in reality they may often “overlap or even converge on some issues.”<sup>48</sup> Too much stress on traditions thus tends to reify their differences and obscure what they have in common.

I shall rather use cosmopolitan democracy and deliberative democracy as heuristic devices, constructs that help us order a field of political thought. In that sense, analytical traditions, models or schools of thought are also inher-

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<sup>44</sup> Popper 2002b: 3

<sup>45</sup> Caney 2005: 17

<sup>46</sup> A risk in focusing too much on thinkers is that we end up debating whether our reconstructive interpretations of their arguments are correct, rather than whether those arguments, or our counterarguments, are convincing in their own right. Notably, though, Held and Habermas recur throughout my argument as key players within both traditions of thought (Habermas actually contributes substantively to both). This is not to give thinkers pride of place over arguments or even traditions, but merely due to the fact that both theorists present comprehensive and sophisticated versions of the arguments under scrutiny. For instance, Habermas’s claim to resolve the alleged paradox between human rights and democracy merits careful attention in Chapter 4, while Held’s sketch of a cosmopolitan political order has set a standard in cosmopolitan democracy and therefore takes a central position in Chapter 5.

<sup>47</sup> Caney 2005: 18

<sup>48</sup> Caney 2005: 18.

ently invented phenomena.<sup>49</sup> Instead of thinking of these ordering constructs as exhaustive and exclusive categories, it may be more fruitful to regard them as ideal-types or orientation points aligning and connecting ideas and arguments.<sup>50</sup> Real-existing arguments may float closer to or farther away from the ideal-typical abstractions, being more or less aligned with them without necessarily perfectly matching the one or the other.<sup>51</sup> Of course, both commonalities and disagreements are in part something we construct by juxtaposing particular traditions to each other rather than to some other possibly competing traditions or intermediate positions. In that sense, the distinction itself serves to uphold the characteristics of each tradition and in effect determines their respective boundaries.<sup>52</sup> While inescapable, that problem is alleviated somewhat by focusing on arguments rather than traditions and by regarding traditions as ideal-typical nodes rather than as taxonomical categories.

The two perspectives on transnational democracy around which I structure my argument do have a lot in common. For one thing, moral and institutional cosmopolitanism may serve as a baseline for all these theories, as well as the concern with globalisation and its effects. As Nadia Urbinati notes, transnational democratic theory is largely a European phenomenon. Both traditions derive their moral justifications from a common Kantian premise, and:

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<sup>49</sup> Jeffery 2005. Jeffery analyses the way international relations theorists writing the intellectual history of their discipline have employed traditions as a historiographical device. The term “tradition of thought” seemingly implies that ideas are inherited: a canon passed on from the old Greats to our contemporary theorists. While cosmopolitan and deliberative democracy sometimes appropriate classical thinkers as intellectual forebears, they more often claim novelty by breaking off from older, allegedly Westphalian political thought, so the historical problem in the concept of tradition seems less troubling.

<sup>50</sup> In that sense, thinkers may be just as invented as traditions, when the analyst interprets, reconstructs and represents the usually complex and multi-faceted work of a particular thinker.

<sup>51</sup> Weber 1977

<sup>52</sup> For example, Anthony McGrew suggests a typology of “three distinct normative accounts” within the literature on global or transnational democracy: democratic intergovernmentalism, transnational republicanism and cosmopolitanism; at other times, he distinguishes four: liberal internationalism, radical pluralist democracy, cosmopolitan democracy and deliberative democracy (McGrew 2002a; 2002b; 2002c). James Bohman identifies four distinct current theories of democracy beyond the nation-state with Rawls, Habermas, Held and Dryzek, respectively, and seeks to improve upon all of them with his own theory as a fifth alternative (Bohman 2007). Other typologies are conceivable, too. In which drawer a particular theorist or a particular argument belongs partially depends, of course, on how we construct the cabinet.

“Both conceive a postnational democratic order as the most advanced answer to the challenge posed by the erosion of state sovereignty and the domestic and international order set up by the Westphalian treaty.”<sup>53</sup>

Sometimes debate runs deep between the camps, sometimes within them, sometimes against common enemies, making the very idea that they are distinct and opposing camps confusing and obfuscating (which in reality, of course, they are not anyway).<sup>54</sup>

But as theories of transnational democracy, cosmopolitan democracy and deliberative democracy do give partially competing claims about democracy beyond the nation state, and as the debates between their proponents demonstrate, they part company on some important issues, for example in how they correlate human rights and democracy (Chapter 4) or how they envisage the transnational political order (Chapters 5 and 6). Thus, I think I am in good company when I treat cosmopolitan democracy and deliberative democracy as two kindred but distinct, sometimes rivalrous, sometimes unanimous models of transnational democratic theory.<sup>55</sup> The point in juxtaposing them is not to set up a contest between two rivals in order to judge who gives the most viable or desirable account of transnational democracy. Rather, by employing these traditions of thought as an organising device for our inquiry, we gain a more thorough understanding of the subject of transnational democracy.

### 1.3.2 *Norms of critique*

Now, if the purpose with approaching the subject of transnational democracy is to engage in a critique, what characterises a good critique or a good critic? Let me consider a few guidelines for an argument of this kind.

A pitfall with any attempt to criticise is the sheer negativity of the business. Critics risk confining themselves to act as faultfinding, nitpicking intellectual sanitation workers, or as all-knowing umpires judging the efforts of others, or as the big bad wolf that knocks down in a single blast of air what others have carefully and cautiously constructed and nurtured.<sup>56</sup>

An antidote to such exaggerated pessimism, scepticism or cynicism is to put

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<sup>53</sup> Urbinati 2003: 70

<sup>54</sup> Sometimes the distinction between them is further blurred by the different ways different writers use and appropriate the terms “cosmopolitan democracy” and “deliberative democracy.”

<sup>55</sup> Urbinati 2003; Verweij & Josling 2003; Cochran 2002; McGrew 2002c; 2002a

<sup>56</sup> Latour 2004; Beckman 2006b

the same demands on our own argument as on the views we criticise; to hold ourselves to the same standards as we hold others, though of course, we will always be biased judges in our own case. Furthermore, what distinguishes the critic from the mere grouser, Brian Barry suggests, is believing to know of a better way.<sup>57</sup> While this is usually a sound ambition for a critic, it has limits. Sometimes it is suggested that we cannot refute a theory by falsifying it, but only by devising a better alternative.<sup>58</sup> While this might be true for explanatory scientific theories, these standards need not always apply to normative theories. First, if we convincingly can demonstrate, for instance, that a particular normative theory implies unpalatable consequences, we might well decide to reject it even if we have no better alternatives. On the other hand, we rarely come to the kind of conclusions were we can say, once and for all, that a certain normative theory should be discarded because of the arguments we have offered against it. People stick to their reasoned views in spite of well-argued (and not so well-argued) counterpunches, for good reasons. Second, and perhaps more importantly, once we start requiring better alternatives, we cede to the views we are criticising the privilege of formulating the problem, of setting the agenda, but often the problem or the agenda is the very thing we disagree on.

In that case, critique of already presented arguments and existing traditions of thought may help us understand from which tacit presumptions they are working. Robert Dahl argues that democratic theories are always followed in their tracks by a vaguely distinguishable phantom theory of democracy, consisting of concealed premises, suppressed antecedents, and unexplored preconditions: that there is a people to rule, that there is a demos, that democracy applies to communities of a certain size, and so on.<sup>59</sup> Critique can call that phantom theory out into daylight and force it to materialise in a more tangible shape. Doing so does not necessarily depend upon presenting and defending an alternative, preferable conception.

Another norm often suggested to steer the practice of arguing is generosity: We should aim to give an accurate, reasonable and attractive reconstruction of the view we wish to criticise. This norm is often referred to as the principle of charity. It is a guideline for interpretation, suggesting that we should give the benefit of a doubt to the scholars whose work we are evaluating and criticising. We seek a sympathetic understanding and assume, if only provisionally, that

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<sup>57</sup> Barry 1990: 364

<sup>58</sup> Lakatos 1978; Steinvorth 1980

<sup>59</sup> Dahl 1989



our conversation partners are reasonable people presenting valid and interesting arguments. Sometimes the principle of charity is understood as “an ethical rule requiring criticisms to be generous, fair, or just.”<sup>60</sup> For the critic, though, the reason for charity need not be altruism: It is also sound practical advice which helps make our own argument less vulnerable to counterattack, since a more benevolent reading of the position we are criticising might nullify our objections.<sup>61</sup> In Popper’s words, we aim to build up a position really worth attacking.<sup>62</sup>

A measure of humility, finally, is mandatory. We should recognise the possibility that we may be mistaken. Robert Nozick notes that we often write as though we, unlike the people before us who have wrestled with the same problems, claim to have found the final, absolute truth on the matter “and built an impregnable fortress around it”.<sup>63</sup> But most of us are actually more modest than that, he adds, aware as we are of the weak points and flaws in our own arguments. Even when we stand by our convictions unflinchingly, we realise that complex truths and better theories only arise from the collective interplay of arguments.<sup>64</sup> And that practice, to paraphrase John Stuart Mill, “has to be made by the rough process of a struggle between combatants under hostile banners.”<sup>65</sup> Therefore, a critical argument is also constructive, even when it is not presented as a deliberate amelioration of the position criticized.

For that reason, too, the criterion of success is not to present definite reasons for our opponents to abandon their views. To continue arguing “with those from whom we differ is a form of respect.”<sup>66</sup> Thus, if my involuntary conversation partners find that they recognise themselves in the way that I represent their positions, that the critique I deliver is worth considering and perhaps, also, that at least some of my arguments are constructive contributions, helping them to restate and develop their own position, then I would be more than pleased – and they, too, I hope.

### 1.3.3 *Why ideas matters*

The thinkers and theorists cited in the opening section seem confident that democracy faces daunting challenges in the era of globalisation. I countered

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<sup>60</sup> Vedung 1982: 106

<sup>61</sup> Vedung 1982: 106

<sup>62</sup> Popper 2002b

<sup>63</sup> Nozick 1974: xii

<sup>64</sup> Waldron 1993

<sup>65</sup> Mill 1991 [1859]

<sup>66</sup> Anderson 2006

with agnostic doubts concerning their framing of the problem. I shall neither axiomatically assume that globalisation challenges democracy, nor submit this assumption to rigorous empirical testing.

However, one may ask, why does it matter? If we are not driven by an anxiety for what will happen to democracy when it faces globalisation, why bother? With Brian Barry one might answer that it matters “to the extent that ideas matter, and in the long run they do”.<sup>67</sup> At face value, a lot depends on whether we think transnational democrats have a good point when they tell us that globalisation puts the future of democracy at stake. If we believe they do, huge tasks await us. If we believe they do not, we can spend our time and resources on other, more important political projects. And as most of us value democracy, then we should certainly be concerned enough to dissect the arguments behind these claims about looming threats and inspiring possibilities for our preferred way of organising our societies.

That is one reason. But others argue that these attempts to rethink democracy are important not because they may hold a future solution to a possibly important problem, but because they already do have an impact. This line of critique suggests that those who wave off the idea of transnational democracy as utopian, unrealistic, and utterly unfeasible miss the point: It is already reality – and indeed, a precarious one. Danilo Zolo, for example, argues that cosmopolitanism legitimates hegemonic domination and imperialism, which will always be authoritarian and violent (Zolo finds ample evidence for his claim from the Gulf War to the Balkans).<sup>68</sup> Similarly, David Chandler, another critic of international interventions “from Kosovo to Kabul”, argues that the idea of cosmopolitan rights undermine popular sovereignty as we know it, without supplying any new mechanisms for people to exercise their new rights, which therefore remain tenuous.<sup>69</sup> Chantal Mouffe claims that notions of transnational democracy longing for a world beyond sovereignty “all partake of a common anti-political vision which refuses to acknowledge the antagonistic dimension constitutive of ‘the political’.”<sup>70</sup> This is not only a conceptual mistake, she argues, but also fraught with political dangers. By claiming that we have entered a new era where antagonism has been put to rest, Mouffe suggests, these post-political perspectives jeopardise rather than safeguard the future of democratic politics.

Indeed, some theorists, who are more favourably inclined to globalisation

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<sup>67</sup> Barry 2001: 4

<sup>68</sup> Zolo 1997

<sup>69</sup> Chandler 2002; 2003

<sup>70</sup> Mouffe 2005: 2

and transnational democracy, see a new world order already in the making, too. Against the critique that transnational democracy is a utopian and unfeasible ideal, they argue that we already have an embryonic constitution of the world, that global civil society already holds global power wielders to account, that there are global institutions making decisions binding on all citizens of the world, that various agents of multilevel governance already do engage in deliberative procedures, etc.<sup>71</sup> Yet others argue that in the long run, the international system will inevitably transform itself into a world state.<sup>72</sup>

The realist and radical critiques aside, we may still agree that the ideas of transnational democracy have got a foothold – among academics, of course, but also among political activists and NGOs, among lobby groups and think tanks, among policymakers and world leaders. For example, from the 1995 report from the Commission on Global Governance up to the last of former Secretary General Kofi Annan's several plans for UN reform, *In Larger Freedom* (2005), a number of international policy proposals have echoed the ideas that good global governance must be supported on the principles of democracy. Transnational democracy may not yet be a reality, but it has already built up a strong and influential fan-base. So either way, these ideas do matter, and we ought to take them seriously enough to criticise them.

#### 1.4 AN OUTLINE OF THE ARGUMENT

I started out by reviewing the strong claims made by some prominent political theorists that globalisation challenges democracy as we know it; I continue in Chapter 2 by addressing the challenges that globalisation allegedly poses to democracy. However, I shall argue that if what we are really interested in is normative models of democracy, we should not put too much effort into evaluating globalisation. While they usually are premised on empirical claims and assumptions about globalisation as a thorough, qualitative transformation of world order, normative models of transnational democracy neither stand nor fall with those premises. The chapter concludes by arguing that specific claims about globalisation should be assessed in the contexts where they are made, rather than simply evaluating globalisation *tout court*.

My consecutive argument is organised in two parts. The first part concerns the normative foundations of transnational democracy, its constitution, so to speak, while the second part concerns its practical application, its feasibility.

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<sup>71</sup> See for example Brunckhorst 2002; Tånnsjö 2004; cf. Held 2002

<sup>72</sup> Wendt 2003

The first part focuses on two fundamental arguments proposed by most cosmopolitan democrats and deliberative democrats: That all who are affected by political institutions have a right to participate in them, and that human rights and democracy are equally important in some non-trivial sense.

In Chapter 3, I criticise the so-called all-affected principle, to which many transnational democrats appeal in order to justify their claims for global democratic reform. The all-affected principle states that everyone who is affected by a decision has a right to participate in making it. Although often identified as a core principle of democratic theory, the all-affected principle is difficult both to interpret and to apply. In the first part of this chapter, I examine the critique against the all-affected principle, arguing that specifying what it means to be affected is itself a highly political issue, since it must rest on some disputable theory of interests; and that the principle does not solve the problem of how to legitimately constitute the democratic community, since such acts, too, are decisions which affect people. Furthermore, I argue that applying the principle comes at too high a cost: either political boundaries must be redrawn for each issue at stake or we must ensure that democratic politics only has consequences within an enclosed community and that it affects its members equally. In the second part of the chapter, I consider how this critique bears upon cosmopolitan democracy and deliberative democracy, both of which rely crucially on the all-affected principle. In the final part of the chapter, I consider three possible replacements for the all-affected principle: (a) applying it to rules, not to decisions; (b) a principle by which to draw boundaries so as to maximise everyone's autonomy (or some other democratic value); and (c) a principle according to which everyone who is subject to the law should be granted the right to democratic participation. These replacements solve some of the problems that followed from the all-affected principle, but perhaps not the fundamental problem of determining democratically the boundaries of political communities. I conclude by reflecting on what it means to treat the boundary problem as impossible in principle to solve.

In Chapter 4, I approach another theoretical central claim in transnational democratic theory: that there is no tension or conflict between democracy and human rights. While democratic theorists have debated whether democratic procedures have priority over individual rights or vice versa, both cosmopolitan democrats and deliberative democrats claim that we really do not need to choose between the two. I shall argue that these claims are unsuccessful, albeit for different reasons. Cosmopolitan democrats propose an extensive list of fundamental rights and a global rule of law to uphold them, while leaving very little room for democratic procedures: democracy here comes to be defined as

the implementation of certain human rights. A central claim in deliberative democracy is that rights and democracy are not conflicting principles but interdependent and co-original. By insisting on the internal relation and the co-originality of rights and democracy, deliberative democrats end up in a peculiar regress and they also have problems explaining how there can be international human rights in the absence of democratic procedures at the global level.

Whereas the first part focused on the general normative underpinnings of transnational democracy, the second part considers the feasibility of transnational democracy as a political ideal. The general problem concerns how to realise a democracy that is transnational in the sense of superseding states in a world where states or other institutionalised collectivities continue to enjoy some autonomy and authority. Although they share a commitment to a political order composed of multiple levels and actors, the political orders envisioned by the two traditions of transnational democratic theory are fairly different. Thus, I shall address each model in a separate chapter.

In Chapter 5, I evaluate the political order of cosmopolitan democracy. Cosmopolitan democrats present a comprehensive scheme of reforms that are necessary, both in the short run and the long run, to institutionalise cosmopolitan democracy. Cosmopolitan democrats usually describe the resulting global political order as a multi-level, multi-sited, multi-layered or multi-actor system of governance. Unlike a potentially despotic world government, the multi-dimensional character of the cosmopolitan scheme serves as a check on authority. Judging the political order of cosmopolitan democracy by its stability and feasibility, I shall argue that it would not likely be stable because it underestimates the problem of maintaining a political order based on dispersed sovereignty without final authority. It shall also question the feasibility of cosmopolitan democracy. It presents two conflicting logics of international change, one suggesting that international order has been superseded by emerging cosmopolitan frameworks, the other emphasising that sovereign states continue to block global reform. I shall argue that while the first perspective mistakes elements of international order, such as the human rights regime, for a cosmopolitan order in the making, the second perspective leads to little else than an appeal to state leaders to act justly in order to bring cosmopolitan democracy about.

In Chapter 6, I turn to a frequent claim from scholars inspired by deliberative democracy. In contrast to the grand schemes for global institutional reforms suggested by cosmopolitan democrats, some argue that deliberative procedures may convey legitimacy to global or transnational governance even

short of such overarching, global institutions. We need only get the relevant actors of global governance – states, non-governmental organisations, inter-governmental organisations and multinational corporations, for instance – to deliberate publicly with one another and follow the rules of rational discourse. The problem is: How can existing actors of global governance produce legitimate outcomes simply by following procedures of public deliberation? I shall examine three possible interpretations of this claim. The first version holds that deliberation may produce legitimate result irrespective of the internal democratic legitimacy of the agents. It fails, however, to explain why illegitimate representatives can produce legitimate results through deliberation. The second version holds that social integrators like states, NGOs or MNCs, are collective persons capable of deliberating rationally. While somewhat more in line with the general deliberative argument, this version sharply raises the bar for legitimate deliberation, and also seems to contradict the basic belief that only human beings are units of ultimate moral concern. The third version is seemingly the easiest and most obvious: democratic representation. However, I shall argue that deliberative democrats fail to accommodate a theory of representation for two reasons: by insisting on actual deliberation among all and by ruling out sanctions from the concept of democratic accountability.

## 2. Globalisation and democracy

One way or the other, most scholars who write about transnational democracy premise their normative argument on an empirical premise about globalisation.<sup>1</sup> As we saw in the introduction, many thinkers and theorists argue that globalisation poses a dramatic challenge or even a threat to democracy as we know it, and that we must do something drastic if democracy is to survive in the globalised era.

It might seem natural, then, to start assessing theories of transnational democracy by examining the empirical premise of globalisation and ask: Does globalisation really challenge democracy in the way these theorists suggest? If we then find that it does, we could continue to address their normative claims: Would some model of transnational democracy properly address the challenge that globalisation poses to democracy? On the other hand, if we find that the empirical premise about globalisation is incorrect, the normative claims might seem to fall by implication, since there would be no need to fix democracy if it is not broken.

However, in this chapter I shall argue that evaluating globalisation is not necessarily the best starting point for assessing transnational democracy. The point is not that globalisation is irrelevant or insignificant in such an assessment. Rather, I shall argue that if we put too much effort into evaluating the empirical premise of globalisation, we might never get to the part where we can address the normative models of transnational democracy. Moreover, those models do not necessarily stand nor fall with the empirical premise about globalisation.

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<sup>1</sup> As we will see, there are exceptions to this rule, but it holds sufficiently not only for those theorists who advocate some form of transnational democracy but also for their critics, who often put considerable effort into disproving the empirical premise of globalisation.

## 2.1 GLOBALISATION THEORY

To the extent that theorists of transnational democracy premise their argument on globalisation, they often employ a conception of globalisation as a fundamental transformation of social geography. This conception of globalisation has been variously formulated by theorists such as Anthony Giddens, Manuel Castells, Ulrich Beck, Jan Aart Scholte and, notably, David Held. We can call this a transformationalist account of globalisation. The transformationalist approach distinguishes itself from other theories of globalisation in suggesting that globalisation implies not just more of the same, but a qualitative change in the social organisation of human societies.<sup>2</sup>

A rival account of globalisation uses the term to signify a growth of international exchange and interdependence or the economic integration and interpenetration of markets. Economic interdependence and integration result from liberalisation, removing state-imposed sanctions on exchange between countries, such as trade barriers, foreign exchange restrictions, capital control and visa regulations. Some writers argue that while the flows of trade, capital, investment and people across the borders of nation-states have increased, the underlying order is still distinctly international. Indeed, Paul Hirst & Grahame Thompson famously challenge the idea that we are currently witnessing an all-time high in international exchange: We are only now beginning to approach the levels of international exchange during the period from 1870 to 1914.<sup>3</sup> Consequently, they argue, the trends are reversible and governments have considerable elbow-room in deciding on economic and social policies.<sup>4</sup>

For another group of writers, globalisation rather signifies a process of universalisation, by which both cultural phenomena and a certain societal model has come to gain almost global spread and universal acceptance.<sup>5</sup> Some highlight the way in previously local phenomena today have become spread over virtually all populated areas of the planet – from Chinese restaurants and blue jeans to cattle farming and wage labour. Others stress globalisation as modernisation or westernisation, “a dynamic whereby the social structures of modernity [...] are spread the world over, normally destroying pre-existent cultures and local self-determination in the process.”<sup>6</sup> By this conception, globalisation

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<sup>2</sup> Justin Rosenberg labels this approach capitalised Globalisation Theory, distinguished from less ambitious lower-case “theories of globalisation” (Rosenberg 2005).

<sup>3</sup> Hirst & Thompson 1999; 2000; 2002

<sup>4</sup> Cf. Bardhan, Bowles & Wallerstein 2006; Schmitter 1999

<sup>5</sup> Featherstone 1990

<sup>6</sup> Scholte 2005: 16



largely equals cultural imperialism. The flip side of this process of modernisation is fragmentation and localisation, trends toward “ethnic revivalism, re-invigorated nationalism, religious fundamentalism, and other local patterns of identification and organization.”<sup>7</sup>

While both economic and cultural integration features in the transformationalist conception of globalisation, it differs from these conceptions of globalisation in insisting that globalisation not only or even predominantly implies the increased exchange of goods or cultural phenomena or socio-cultural institutions across borders, but rather that borders as such and the territories they delimit become ever less important. As global interconnectedness accelerates and intensifies, it shrinks the planet. Jan Aart Scholte describes this as a “re-configuration of social geography with increased transplanetary connections between people”, and David Held similarly suggest that globalisation must be understood as “a set of processes which shift the spatial form of human organizations and activity to transcontinental or interregional patterns of activity, interaction and the exercise of power.”<sup>8</sup> This spatial shift is largely driven by a technological revolution in communications. As the means of communication become faster, cheaper and easier to access, social, cultural, economic and political boundaries become fluid and permeate each other, but social relations also become increasingly detached from territorial places, distances and boundaries. This process of deterritorialisation inevitably renders the sovereign nation-states not only less powerful, but also less adequate and relevant a form of political organisation.

Thus, by this conception globalisation implies that the Westphalian world order has become increasingly obsolete and possibly already transcended, according to the transformationalist account. The peace treaties of Osnabrück and Münster in 1648 marked the consolidation of the modern international system and the sovereign state. Based on the principles of fixed territorial state boundaries, of the sovereignty and legal autonomy of the state and of the consensual basis of international law, the Westphalian order indicated a break from the medieval world order that went before it. With the advent of nationalism and industrial capitalism, the state was consolidated not only as a political unit, but also as a coherent economic, social and cultural entity. However, the transformationalist account holds, globalisation has disrupted the Westphalian order. Its once so neat economic, cultural and political order becomes dislocated and disintegrated.

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<sup>7</sup> Goodhart 2005: 11f

<sup>8</sup> Scholte 2005: 16; Held 1998: 13

In political terms, globalisation implies that power is being displaced or re-distributed away from the centralised, unitary Westphalian state. To use a directional metaphor, power moves outwards, downwards, and upwards – and dangers for democracy may lurk in every direction.<sup>9</sup> Outwards, globalisation moves powers and capabilities traditionally controlled by the state to other institutions and organisations, such as corporations, non-governmental organisations, and other private actors, or to the elusive market.<sup>10</sup> Downwards, globalisation moves power from the state to regional and local government within states or even across state borders.<sup>11</sup> Upwards, finally, globalisation displaces power in favour of international regulatory organisations, increasingly autonomous from the states that once created them (perhaps in order to solve common problems in turn caused by globalisation). Decision-making in such organisations is technical, elitist, and policy is formed not by democratically accountable politicians, but by experts and bureaucrats. In addition, many suggest that globalisation also brings with it a redistribution of power between states, increasing the asymmetries of power and influence in world politics.

Now, globalisation, deterritorialisation and the demise of state sovereignty would not necessarily be a threat or challenge to democracy, if the institutions of democracy had not remained bound to the territorial nation-states – the very units which are now being debilitated by globalisation. Therefore, globalisation threatens democracy as we know it, and that's the problem to which transnational democracy is the solution.

Before we address this argument about how globalisation challenges democracy, we should note that the transformationalist conception of globalisation seems to provide a more far-reaching foundation for a project of transnational democracy than the other conceptions do. If we regard globalisation as an increase in economic interdependence resulting from deregulation and liberalisation, it might affect democracy by restructuring the political choices to political leaders. But it still pits nation-states as the most important political institutions, and provides no decisive reason why we should also need transnational forms of democracy. Rather, it reinforces the empirical, conceptual and normative ties between democracy and the nation-state. Likewise, construing globalisation as universalisation or modernisation fails to give momentum to transnational democracy, but for different reasons. While the worldwide spread of local cultural phenomena could have political consequences, it does not obvi-

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<sup>9</sup> Hooghe & Marks 2003; Pierre & Peters 2000; Kahler & Lake 2003; Coleman & Porter 2000

<sup>10</sup> Cf. Cerny 1999

<sup>11</sup> cf. Archibugi 2003a: 4

ously undermine democracy directly. Moreover, if we understand globalisation as a more thorough global penetration of traditional societies by modern, Western social structures, a project of transnational democracy will rather be part of the problem than of the solution. Rolling back cultural imperialism, if that is what we want, calls for quite different measures. To conclude, because of its claims about the demise of the Westphalian world order, the transformationalist account of globalisation may seem to provide a more far-reaching conceptual premise for transnational democracy.

## 2.2 GLOBALISATION, THE STATE AND DEMOCRACY

To recap, transnational democracy is usually associated with a transformationalist account of globalisation, by which globalisation implies more than a mere quantitative growth in international economic transactions or global cultural homogenisation. Globalisation implies deterritorialisation and the undermining of the sovereign nation-state of the Westphalian world order. And since modern democracy has been so intimately tied to the nation-state, globalisation challenges democracy. Globalisation's impact on democracy follows from its complicity with the modern state.

But this argument relies on a questionable conceptual leap from the state to democracy. As Michael Goodhart observes, there is something odd about the entire debate about how globalisation affects democracy:

“Of all the alleged effects of globalization on democracy, none clearly has anything directly to do with democracy. They are really claims about how globalization affects the state”.<sup>12</sup>

And this conceptual leap comes with a number of problems. First, our analytical focus slips from democracy to globalisation, so that before we get to the issue of democracy we must first take stock of globalisation, which often turns out to be an overwhelming task:

“Since reliable conclusions about the fate of states and, indirectly, democracy are contingent upon reliable evaluations of globalization, the tremendous complexity and uncertainty surrounding globalization itself becomes an issue; suggestions for reforming or strengthening demo-

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<sup>12</sup> Goodhart 2005: 14

cracy will stand or fall with the credibility of the accounts of globalisation informing them.”<sup>13</sup>

Secondly, conflating democracy and the state is also conceptually problematic, because both states and democracy come in many shapes and sizes, and are not uniformly affected by globalisation. For one thing, what is good for states might be bad for democracy, and vice versa.<sup>14</sup> For example, while the rapid spread of information and communication technology across the world may imply a significant loss of capacity for a government to control the information available to its citizens, the same process may radically improve and more equally distribute the capacity to form and exchange well-grounded opinions among the citizens, which is both practically conducive to democratisation and a normative requirement for democratic processes.<sup>15</sup> Moreover, it is misleading to regard states as a homogenous group and assume that they will be equally and similarly affected by the processes of globalisation. Whatever globalisation implies – increased transnational flows, increasingly autonomous international regulatory regimes, cultural imperialism or what not – states face it from quite different positions. Some states are strong, others weak. Some are democratic, others not. On a range of other relevant parameters too – rule of law, respect for fundamental human rights, military prowess, economy, welfare regimes, population, et cetera – states are significantly different. Therefore, too, what is good for democracy in some states might hurt it in others. Quite often, globalisation theory seems to assume that the states whose authority and sovereignty is challenged are Western-Northern, industrialised, liberal and social democratic welfare states, and thus:

“while purporting to describe global or worldwide processes, [much of the literature on globalisation] really reflects Western experiences with globalization. Many perceived threats to democracy and the state are relevant only to developed countries.”<sup>16</sup>

Some critics have argued that the transformationalist account of globalisation actually relies on a fictive account of the Westphalian world order. Somewhat

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<sup>13</sup> Goodhart 2005: 15

<sup>14</sup> Indeed, it is a bit surprising that precisely theorists of transnational democracy, who challenge the very notion that democracy must be organised at the nation-state level, still often seem to rely on that notion in explaining why it is now necessary to rethink democracy in transnational terms.

<sup>15</sup> Cf. Dahl 1989

<sup>16</sup> Goodhart 2005

paradoxically, this reliance on Westphalia makes them intellectually dependent on the very tradition of political theory founded on territoriality and sovereignty that they aim to supersede. In order to depict our current world as qualitatively different, as deterritorialised and post-sovereigntist, transformationalist globalisation theory must conjure up a ghost-image of the world order that went before it, a model which portrays a world of sovereign state units with absolute jurisdiction over bordered territories.<sup>17</sup> But, as Justin Rosenberg argues, the “prior existence of a ‘Westphalian System’, which serves as the crucial historical foil for contemporary claims about globalisation, is actually quite mythical.”<sup>18</sup> Arguing that the Westphalian System was stable from the mid-seventeenth century to the mid-twentieth century, transformationalist globalisation theory fails to grasp fundamental and large-scale changes in socio-political orders during this era: capitalism, colonialism, imperialism, decolonisation, democratisation, and so on. By contrast, the way in which transformationalist globalisation theorists employ the Westphalian System is blind to these modern processes, because it implies “a continuity of territorially defined geopolitics across the period as a whole.”<sup>19</sup> Moreover, it also underestimates how the rules originally laid down in Westphalia in 1648 consolidated and developed over time.<sup>20</sup>

Furthermore, when we evaluate how globalisation affects the state and democracy, our evaluation ultimately relies on our normative conceptions of democracy. What is good for one kind of democracy may be bad for another kind of democracy. Or rather, our standards for evaluating the impact of globalisa-

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<sup>17</sup> While the argument here is that transformationalist globalisation theorists are intellectually dependent on political realism, international relations realists have criticized the myth of the Westphalian System too (Krasner 1995; Thompson 2006). Stephen Krasner argue that the Westphalian model based on sovereign autonomy and territory does not accurately describe states and the way they have interacted in the past, and that consequently, the claim that sovereignty is being altered because the principles of Westphalia have been transgressed, are historically myopic. “Breachers of the Westphalian model have been an enduring characteristic of the international environment because there has been nothing to prevent them” (Krasner 1995). Besides, already the peace treaties of 1648 accorded great powers – Sweden and France – the right to intervene in Germany as they saw fit (Thompson 2006). However, this realist critique of Westphalia seems to reinforce the argument that the historical starting point of transformationalist globalisation theorists – the now vanishing Westphalian world order – is flawed, while the critique does not undermine the claim that those theorists’ notion of that order makes them dependent on a political realist notion of the state.

<sup>18</sup> Rosenberg 2000: 10; cf. Rosenberg 2005; Coward 2006

<sup>19</sup> Rosenberg 2000: 15

<sup>20</sup> Mitzen 2005; cf. Bull 1995

tion on states and democracy depend on normative models of democracy. A concrete empirical phenomenon – such as the liberalisation of markets, the increase in cross-border transactions or the growing autonomy of international regulatory regimes – might be more challenging to some conceptions of democracy than to others. Accordingly, some argue that the liberal constitutionalist view of democracy, by which government should be limited and balanced, adapts quite well to globalisation, whereas the social democratic project of an active and sizeable government does not.<sup>21</sup> The same empirical facts of globalisation (if they are facts) may challenge different conceptions of democracy differently, which only reinforces the argument that we should place the normative conceptions of democracy *per se* in the foreground.

Indeed, some theorists of transnational democracy agree that we cannot start the project of disentangling democratic theory from the sovereign state, which they consider crucial, by assuming that globalisation has uniform and predominantly negative consequences for democracy. Just as globalisation wrests decisions out of democratic control, they argue, it also lessens the grip of many institutions and forces that have been opposed to democracy. The social facts opposed to and in favour of democracy form a complex balance sheet where the bottom line does not by default turn up to be negative.<sup>22</sup>

### 2.2.1 *Factual premises and normative conclusions*

Thus far, I have suggested that globalisation theory might be a false start if we are interested in models of transnational democracy. Actually, we can simplify this argument further by looking at the role factual claims about globalisation serve in these normative models. Globalisation serves as an empirical premise in arguments for transnational democracy. A crude and over-simplified version of a general argument for transnational democracy might look like this:

1. Globalisation undermines nation-state democracy.
2. Democracy is important.
3. Therefore, transnational democracy is desirable.

Obviously, for the conclusion to hold even minimally, this argument would have to be complemented and elaborated in detail, for instance by explicating how globalisation undermines nation-state democracy (perhaps because states transfer authority to intergovernmental organizations) and why democracy is important (perhaps because binding decisions to which we are subject should

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<sup>21</sup> Verweij & Josling 2003; Singer 2004

<sup>22</sup> Bohman 1998; Dryzek 1996.

be taken democratically, etc.), as well as by explicating what transnational democracy and its desirability mean and in what sense it solves the problems that globalisation causes for democracy.

For our current purposes, however, this simplistic syllogism serves to demonstrate that the empirical premise (1) is only one possible formulation of an empirical premise that would allow us to draw the conclusion (3) in conjunction with the normative premise (2). We could just as well substitute another premise not predicated on globalisation for the empirical premise that globalisation undermines democracy (1):

1. A system of rivalling sovereign states is inhospitable to democracy.<sup>23</sup>
2. Democracy is important.
3. Therefore, transnational democracy is desirable.

What interests me here is rather the normative premise (2) and the conclusion (3). While the conclusion relies on both the empirical premise (1) and the normative premise (2), we can evaluate the normative premise (2) independently of our assessment of the empirical premises. This does not imply that the empirical premise is irrelevant – it is necessary for the conclusion to follow.

But we could also invert this argument. Even if we accept the empirical premise of globalisation, very different normative conclusions could still follow. As Hume's Law states, value statements cannot be logically deduced from statements of fact. Put differently, a normative ideal or Ought-statement cannot simply be deduced from an empirical fact, an Is-statement. In fact, the empirical premise drawing on globalisation theory allows for a range of normative conclusions, and in that case, evaluating the empirical premise of globalisation is at most indirectly helpful in assessing the normative arguments and conclusions drawn by different theorists. As James Bohman argues, "the empirical fact of the increasing scope and intensity of global interaction and interdependence are [sic] not sufficient to decide the issue between" different models of transnational democracy.<sup>24</sup>

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<sup>23</sup> In fact, sometimes proponents of transnational democracy seem to adhere to both versions of the factual premise at the same time. For example, Daniele Archibugi presents as fundamental tenets of cosmopolitan democracy both the claim that (a) a feuding system of states hampers democracy within states and (b) that globalisation erodes states' political autonomy and thereby curtails the efficacy of state-based democracy (Archibugi 2004). But these tenets seem to be difficult to reconcile, since (a) is based on the persistence of an international system, which the transformationalist conception of globalisation in (b) denies, or at least questions. In Chapter 5, I shall address these claims about state sovereignty in cosmopolitan democracy.

<sup>24</sup> Bohman 2007: 3.

### 2.2.2 *Empirical earthquakes*

Additionally, there are two strategic reasons why transnational democrats should not place too high stakes on globalisation as an empirical premise of their argument.

First, if a normative theory puts too much emphasis on its empirical premises, it becomes very sensitive to developments in the real world, which often changes faster than our attempts to make sense of it. Just think of how the revolutions of 1989 caught the entire academic field of international relations off guard.<sup>25</sup> Whether concerned with deterrence or disarmament, international relations scholars had devoted their attention almost exclusively to studying the Cold War conflict, and yet they failed to recognise even the possibility that the Soviet Union would abdicate from its sphere of influence and eventually dissolve.

Likewise, while transnational democrats may side with those globalisation theorists who claim that today's high levels of global interconnectedness are historically unprecedented, it would be unwise to be too certain that those levels could not sink in the near future. Avery Kolers suggests that theories of global democracy and justice that rely too heavily on the empirical fact of globalisation expose themselves to certain risks, as such facts about the world may change rapidly and unpredictably.<sup>26</sup> Kolers argues that by depending on a deterministic view of the global human future – a strong theory of globalisation – cosmopolitan theories put an unnecessary high bet on an uncertain card:

“Because of its link to globalization, cosmopolitanism depends upon empirical conjectures about ecological and resource conditions and other variables into the indefinite future. In each case, cosmopolitans seem to evince a degree of confidence about how the future will look. But the sheer weight of uncertainty counsels against this. Cosmopolitans must avoid getting bogged down in a micromanaged theory of institutional design, and instead figure out how to set in motion evolutionary tendencies that are relatively immune to exogenous shocks, such as the disruption of the Gulf Stream or the end of oil, that may radically alter human possibilities.”<sup>27</sup>

While not all cosmopolitans rely that strongly on globalisation (as we shall see) and while we may doubt Kolers' particular examples of exogenous shocks, pro-

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<sup>25</sup> Lebow & Risse-Kappen 1995; Booth 1995

<sup>26</sup> Kolers 2006

<sup>27</sup> Kolers 2006



ponents of transnational democracy may still approve of his suggestion that “a global order open to evolution rather than precise design in advance might be required in order to buffer a cosmopolitan model against empirical earthquakes.”<sup>28</sup> A cosmopolitan theory should be developed without relying too much on historical contingencies, because if history teaches us anything, it is not to be too certain about the future.

### 2.2.3 *World order reform before globalisation*

While many contemporary theorists regard globalisation as a compelling reason for transnational democracy, not all reformers of world order have placed such high bets on the globalisation card, which is a second reason not to take globalisation as our starting point when we evaluate transnational democracy. Ideas and schemes for global reform, sometimes strikingly similar to those presented by proponents of transnational democracy, have occurred long before either the theory or reality of globalisation could give them momentum.<sup>29</sup>

Prominent twentieth century proposals for reforming the world order were not predicated on globalisation. For example, David Mitrany’s theory of functional international integration sees international bureaucracies and eroded sovereignty not as the reason for but as the desirable outcome of a process of international integration across state borders. Eventually, institutionalised functional cooperation in various welfare-related issue-areas would lead to the obsolescence of the state and the high politics of sovereignty – “a working peace system.”<sup>30</sup>

The 1940s also saw the emergence of the world federalist movement, a forerunner of sorts of contemporary activism for democratising transnational governance, which gathered tens of thousands of members in Europe and the

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<sup>28</sup> Kolars 2006. David Mitrany has testified how such a shock – the First World War – abruptly shattered the hopes of his own generation, while also effectively putting an end to an era of unprecedented economic, cultural and legal internationalism:

“The generations of the Second World War can hardly realise what a shock that earlier event [the First World War] was – they had been prepared for violence and conflict by years of Hitler and Mussolini, by Bolshevik Revolution and the Spanish Civil War. For us 1914 followed a long period of stability and of liberal optimism, of expanding international trade and cultural intercourse, of pacifist movements and efforts – like the Hague Conferences at the turn of the century.”  
(Quoted in Suganami 1989: 79)

<sup>29</sup> For an overview of historical proposals for world order reform, see Suganami 1989; Kainz 1987.

<sup>30</sup> Mitrany 1943

United States.<sup>31</sup> Inspired by the newly established United Nations, world federalists wanted to go one step further and create a federal world government. While their hopes were only too soon crushed by the Cold War, world federalists in this era did argue that the World Wars had demonstrated the disasters to which a system of competing, militarised states could lead, and that the unprecedented destructive potential of nuclear weapons only added to the dangers of such a world order. Hence, their proposals for a world federation were based not on the erosion of state sovereignty, but on its sustained, disastrous and lethal vitality.

Likewise, the contemporary upsurge in cosmopolitan theories of justice may share many goals and objectives with transnational democrats, but theorists in this dynamic field of political theory have been less inclined to take globalisation as their starting point. Some certainly do – Peter Singer, for instance, who takes the fact of globalisation as his starting point, which perhaps makes more sense for a utilitarian account of cosmopolitanism, with its focus on the potentially global consequences of actions.<sup>32</sup> Likewise, Charles Beitz invokes the facts of a globalising world – where increasingly people become unequal, states vulnerable and international governance capacious – as the *Leitmotif* for his cosmopolitan liberalism, but his arguments are mainly phrased independently of these factual premises.<sup>33</sup> Others, however, seem to find that starting from the contingent and contested empirical fact of globalisation would undermine the universalist moral theories of cosmopolitanism, which are supposedly universal not only in space but also in time.<sup>34</sup> A cosmopolitan morality may seem stronger if it is not too premised on contingent social facts.<sup>35</sup>

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<sup>31</sup> Thies 2002; Suganami 1989; Wooley 1999; Cabrera 2004.

<sup>32</sup> Singer 2004

<sup>33</sup> Beitz 1999b.

<sup>34</sup> Pogge 1992; Caney 2005; Kuper 2006

<sup>35</sup> Andrea Sangiovanni demonstrates this point by distinguishing between relational and non-relational conceptions of justice. Relational conceptions of justice hold that we cannot formulate or justify principles of justice independently of the practices they are intended to regulate, while non-relational conceptions deny that such practice-mediated relations in which individuals stand should play any role when we formulate and justify principles of justice. Following this distinction, we can arrive at the conclusion that principles of justice have global scope along two different avenues: A relational account would argue that because we all participate in a global order which profoundly and pervasively affects the life-prospects of all human beings, those principles of justice that apply domestically should apply globally as well. This account is relational, because it builds upon the empirical premise about an interconnected global order. By contrast, a non-relational account would hold that the current extent

## 2.3 CONCLUSION

While performing post mortems on globalisation theory may be just as premature as the obituaries globalisation theorists wrote to Westphalian sovereignty, I have argued in this chapter that globalisation as such should not detain us from taking stock of theories of transnational democracy.<sup>36</sup> Indeed, focusing on globalisation may crowd out our concern with democracy, leading us to think that transnational democracy stands and falls with globalisation, which it in fact does not.

An objection to this conclusion might accept the argument that theories of transnational democracy need not, and perhaps should not, depend so crucially on the globalisation thesis, for all the reasons I have suggested. Be that as it may, the objection would go, most theorists of transnational democracy have actually presented their arguments as premised on globalisation, and thus we ought to weigh in their claims about globalisation in a total assessment of their respective merits. While they could have framed their argument differently, they actually have not, and given that these theorists do emphasise globalisation, we will do injustice to their arguments by not evaluating those factual claims.

However, those claims about globalisation actually made in support of transnational democracy will figure in the ensuing argument. For example, in Chapter 3, I argue against the view that negative consequences of political decisions, extending outside the border of the community that produced them, entitle those who are affected to be included in political decision-making. In Chapter 4, the international institutionalisation of human rights norms play a key role. Chapter 5 takes a closer look at the prospects for cosmopolitan democracy and assesses claims about emerging cosmopolitan frameworks for global governance and claims about sovereignty and international order. Chapter 6, finally, asks whether deliberative democracy is especially suited for new forms of multi-level governance. Thus, I shall address arguments about globalisation as they occur. Consequently, the claims we address are necessarily more restricted in scope, and thus more manageable and assessable. The globalisation thesis is simply too massive to take stock of, let alone to prove or to disprove in a single cut. We should therefore feel comfortable in letting that grand theory

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or depth of international interdependence is irrelevant for the content, scope or justification of principles of justice, and therefore, such principles must have global scope (Sangiovanni 2007).

<sup>36</sup> Rosenberg 2005

serve at most as a scenic backdrop for the following arguments, and instead focus on the real subject of this thesis: transnational democracy.

### 3. The boundaries of transnational democracy

The so-called all-affected principle is supposed to give a democratic solution to the boundary problem in democratic theory: How can we decide the proper bounds of a democratic community? According to the principle, “Everyone who is affected by a decision of a government has a right to participate in that government”.<sup>1</sup> Political theorists favouring some form of transnational democracy often invoke this principle to explain why the current, nation-state-based boundaries of democratic governance are not normatively satisfying and why we need to democratise transnational institutions or, if you like, transnationalise democracy.

David Held criticises mainstream political theorists for merely assuming that there is symmetry or congruence between citizens and the decision makers they may hold to account, on the one hand, and between decision makers and the people affected by their decisions on the other.<sup>2</sup> Globalisation has displaced this congruence, Held argues, and the project of cosmopolitan democracy takes on the task of restoring congruence to political power. Held regards congruence and symmetry between input and output, that is, between the causes and the effects of politics, as fundamental to democracy.

Equally concerned with the migration of problems and solutions outside the control of the (democratic) nation-state, some deliberative democrats, too, rely on the all-affected principle as the main reason for why democracy must be made transnational. Indeed, some deliberative democrats suggest that they take the all-affected principle more seriously, because unlike cosmopolitan democrats, deliberative democrats do not envisage government-like, super-statist institutions or a global liberal democracy as the necessary end-products. Rather, since the stakeholders change with each issue area, political institutions must have equally changeable boundaries. Deliberative democracy would engage current transnational governance in discursive procedures, its pro-

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<sup>1</sup> Dahl 1970

<sup>2</sup> Held 2000a: 18

ponents argue, and thus deliberative democracy would be more feasible than cosmopolitan democracy.<sup>3</sup>

In fact, it may seem hard to imagine calls for transnational democracy which are not animated by some version of the all-affected principle, at least in part, because it forges the necessary normative link between, on the one hand, the worries over what globalisation does to democratic sovereignty and how increasingly autonomous and democratically unaccountable international institutions impact people's life chances around the globe and, on the other hand, the conclusion that we must build democratic institutions of some sort on the transnational level.<sup>4</sup> Political causes and effects no longer operate within the safe confines of nation-states, this argument runs, and transnational democracy seeks to suture the widening gap between those who make decisions and those who are affected by them.

However, while the all-affected principle may appear common-sensibly sound and simple, it raises serious problems as soon as we try to use it to set political boundaries. In the following, I discuss some of these problems. In the first part of this chapter, I argue, among other things, that the all-affected principle does not actually give any guidance for delineating a political community but that it does give some absurd recommendations if we were to try to approximate it in political decision making. In the second part, I discuss how this critique affects models of transnational democracy and suggest that affect-*edness* is a poor criterion for boundary decisions in both cosmopolitan and deliberative democracy. In the third part, I consider three replacements for the all-affected principle and whether they could amend transnational democratic theory. But first, let us consider some of the more elaborate attractions of the all-affected principle.

### 3.1.1 *Democratic theory and those affected*

"Let us imagine a society and then consider what form of government would be just for it", Craig Calhoun writes to caricature how political theory traditionally has avoided addressing the problems of political belonging.<sup>5</sup> This criticism suggests that theorists simply assume nation-states to be the pre-political basis of politics.<sup>6</sup> As Frederick Whelan argues, democracy means rule by the people, and political theorists have largely quarrelled over what this "rule" thing should

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<sup>3</sup> Verweij & Josling 2003; Dryzek 1999; cf. McGrew 2002c

<sup>4</sup> However, as we shall see, there are alternatives to justify transnational democracy by means of the all-affected principle. See for example Brunkhorst 2005; Tännsjö 2006.

<sup>5</sup> Calhoun 2003

<sup>6</sup> cf. Held 1996

mean, while neglecting the other half of the definition.<sup>7</sup> But “any democratic theory must face the logically prior and in some ways more fundamental question of the appropriate constitution of the *people* or unit within which democratic governance is to be practiced.”<sup>8</sup> This is the so-called boundary problem in democratic theory: how to legitimately delimit the political community relevant for democracy.<sup>9</sup> The boundary problem is not tied to any particular theory of democracy, since all theories of democracy must provide some idea about how a democratic community may be legitimately constituted. Enter the all-affected principle, stating that anyone who is affected by a decision, has a right to participate in making that decision.<sup>10</sup>

There are several reasons why the all-affected principle seems morally appealing and plausible. In general, the all-affected principle seems to expound some classical democratic notions about autonomy and consent. Aristotle, for example, distinguished the self-governing citizenry, “ruling and being ruled in turn”, as an element of liberty characteristic of good political rule among equals. Another oft-cited precursor to the all-affected principle is the maxim of ancient Roman law: “*quod omnibus tangit, ab omnibus tractari et approbari debet*” – what concerns all, all must discuss and approve. Both the Aristotelian notion of the self-governing citizenry and the Roman dictum imply that liberty means living according to laws that you have given yourself. We find a similar concern in the early modern theories of the social contract. John Locke suggests that since men are natural equals, “no one can be [...] subjected to the political

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<sup>7</sup> However, while many democratic theorists traditionally may have considered the nation-state as the primary locus of democracy, it would do the tradition injustice to suggest that it has been uninterested in the problem of how to legitimately constitute the demos and draw the boundaries of democratic communities. See for example Näsström 2003.

<sup>8</sup> Whelan 1983, emphasis in original

<sup>9</sup> When Whelan discusses where the boundary problem arises, he mentions “territorial disputes involving sovereign states, or entities aspiring to statehood”, but not the context that seems the most obvious today, namely, the challenge that globalisation poses to democracy. At any rate, my argument in this chapter may also be relevant to other areas of political theory where the boundaries of legitimate rule, broadly speaking, feature prominently, such as in secession theory and theories of legitimate coercion.

<sup>10</sup> Sometimes this principle (or some variant of it) is referred to as the principle of congruence, the principle of symmetry, or the principle of democratic inclusion, the latter of which is somewhat of a misnomer, since the principle is just as much a criterion for excluding people from democratic rule. However, from this basic version, the all-affected principle opens for rather different interpretations. While working from a general formulation of the all-affected principle, I shall address some attempts to solve its indeterminacy by specifying its various terms.

power of another, without his own consent”, and nobody knows better than oneself what is in one’s own interest.<sup>11</sup> Likewise, Jean-Jacques Rousseau grappled with the problems of legitimacy, that is, finding a political form that would be consented to by its participants on rational grounds.<sup>12</sup> For Rousseau, government is legitimate in so far as it reflects the general will of the political organism formed through the social contract – a will that every citizen is thus justly subjected to. Admittedly, neither Aristotle’s autonomy, Locke’s consent of the governed, nor Rousseau’s general will imply or necessarily support the all-affected principle, but the principle seems to rhyme and resonate with these ideas, to spell out in clear terms an abstract ideal common to all of these philosophical traditions.

Furthermore, the all-affected principle implies a defensive view of politics, where political decisions and institutions inflict costs and burdens, if not damage, on people, as Whelan suggests. Fear of the Leviathan has been a strong argument for democracy: people have a right to participate in politics so as not to have their interests superseded by those who hold the monopoly on the use of force. The all-affected principle seems to support our hunch to be sceptical of politics; moreover, historically, it has been employed to support extending the franchise to groups previously excluded from participating in democratic politics. Transnational democrats often reason in a similar way: People affected – for instance, by global warming, trade policies, acid rain, financial deregulation and other transnational issues – form the constituency of world politics.<sup>13</sup>

Moreover, we may associate the all-affected principle with relational conceptions of justice in cosmopolitan theory. The peoples of the world have grown together in a community, Kant claims, and thus “a violation of rights in one part of the world is felt everywhere.”<sup>14</sup> Some contemporary cosmopolitans likewise argue that we owe duties of justice to distant other persons who are not our compatriots because we are bound together by relations of interdependence.<sup>15</sup> And just as relations of mutual influence may ground moral obligations, one might argue, they can also serve to justify the boundaries of democratic community: Persons who are affected by decisions of governments

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<sup>11</sup> Locke 2005 [1689]: VIII:§95

<sup>12</sup> Rousseau 1762

<sup>13</sup> Saward 2000a; cf. Zürn 2004

<sup>14</sup> Kant 1984 [1795]: 24

<sup>15</sup> Note that the distinction between relational and non-relational conceptions of justice concerns the scope of moral obligation; the content of those obligations is a separate matter and relational conceptions of (global) justice may be launched from different theories of justice. For a critique, see Sangiovanni 2007; Eckersley 2007.



and of other powerful actors have legitimate claims to be included in democratic decision-making, regardless of their nationality or citizenship.

Thus, there is a diverse pantry of democratic and moral traditions of thought that might lend support to the all-affected principle. And yet it turns out to be very difficult both to specify and to apply, as I shall argue in the next section.

### 3.2 PROBLEMS WITH THE ALL-AFFECTED PRINCIPLE

In the following section, I shall present four critical arguments against the all-affected principle. First, I shall argue that the all-affected principle is problematic as a criterion for delimiting political community, since it must rest on some theory of interests, a controversial issue in its own right. I shall also discuss Whelan's claim that the all-affected principle leads to an infinite regress of constitutive decisions, which complicates the matter further. Thereafter, I shall consider two ways of approximating the principle, either by drawing political boundaries around the affected or by keeping consequences within existing boundaries. These arguments, taken together, provide strong reasons to reject the all-affected principle, its intuitive appeal notwithstanding.

#### 3.2.1 *How do we recognise affectedness when we see it?*

If we wish to apply the all-affected principle, we must first clarify what it means to be affected in the relevant sense by a political decision. Obviously, the all-affected principle by itself does not explain what being affected means, so we have to complement the principle with some theory about affectedness. An objective approach to affectedness would require that we be able to specify, measure and assess the burdens and benefits inflicted upon individuals by political institutions, policies and decisions. Alternatively, one might hold that affectedness is a subjective quality. Let us explore both conceptions in turn.

In the most general sense, being affected by political decisions and institutions implies that some of your basic rights or interests have been infringed upon.<sup>16</sup> Although they not always specify what being relevantly affected means, the advocates of the all-affected principle usually employ environmental problems as the epitome of situations in which the principle applies. Global warming, toxic waste disposal, acid rain, radioactive fallout – these are the kind of contemporary cross-border problems that may affect other people than those who caused them. You are affected, then, when something bad happens to you

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<sup>16</sup> cf. Arrhenius 2005

through no fault of your own. David Held could probably express such bad things in terms of “nautonomy”, that is, as being deprived of your physical, social, economical, political, or cultural autonomy.<sup>17</sup> But we could alternatively adopt, say, Robert Nozick’s libertarian theory of self-ownership as the relevant theory of affectedness.<sup>18</sup>

Now, depending on which theory of affectedness we choose, we will arrive at different or even diametrically opposed judgements. Nozick would say that forced redistribution of incomes violates people’s basic rights and interests, whereas safeguarding the sort of social autonomy Held has in mind would require an extensive welfare state financed through taxation. And different people will count as affected by the same decision depending on which theory of affectedness we choose. Someone is unrightfully affected on the Nozickian account if he or she is forced to pay taxes for redistribution, but on the Heldian account if he or she is not guaranteed a basic level of subsistence. So which theory of affectedness should we pick? These are the kinds of clashes of interests and values that democratic politics is supposed to be able to sort out in a peaceful manner. People will disagree about what it means to be relevantly affected, just as they disagree on other fundamental matters of principle.<sup>19</sup> That’s what people do.

The all-affected principle is usually understood to concern burdens, but not benefits. And, at first glance, to take benefits into account does seem to be problematic. Would a decision be undemocratic if you prosper from it without having had an opportunity to participate in making it? To take an environmental example of the kind that transnational democrats like to invoke, it would seem peculiar to argue that an upstream community which has unilaterally cleaned up a polluted river has made an illegitimate decision solely because the decision making process excluded beneficiaries downstream. We could then qualify the all-affected principle by stating that only negative externalities, so to speak, may be illegitimate, not the positive ones.<sup>20</sup>

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<sup>17</sup> Held 1995a: 171f

<sup>18</sup> Nozick 1974

<sup>19</sup> Cf. Waldron 2001; Barry 2001.

<sup>20</sup> But this oversimplifies matters: Consider, for example, people who benefit from welfare services without contributing to their production. Those people might still have legitimate claims to participate in making such policies. Furthermore, one might argue that benefiting from political decisions indirectly creates a right to participate in making them. The fairness theory of political obligation suggests that people who receive public goods by the cooperative efforts of others have an obligation to do their fair share by obeying the law. Thus, by this theory in its crude form, the downstream beneficiaries would have an obligation to obey the laws of the upstream community provid-

But real-life political issues are usually complex.<sup>21</sup> Political decisions produce both burdens and benefits and distribute them unequally.<sup>22</sup> Furthermore, once we start conceiving of political consequences in economic, utilitarian terms, it seems logical to think of benefits and burdens as commensurable: A burden translates into a negative benefit and vice versa – that is, being deprived of a benefit is a burden and alleviating a burden equals a benefit. Whereas it would be difficult to keep separate balance sheets for benefits and burdens respectively, if we do take them both into account the all-affected principle, in turn, becomes difficult to apply.

Finally, how should we aggregate and weight burdens and benefits? Torbjörn Tännsjö argues that if we regard democracy as a method of aggregating interests, it would be more reasonable to interpret the all-affected principle as a claim that everyone should have an influence proportional to the stakes he or she holds.<sup>23</sup> A graded right to participate seems to fit the rationale behind the all-affected principle, since only then would an intensely affected minority be able to trump a slightly affected majority. On the other hand, grading people's right to participate in decision making according to the extent to which they are apparently affected would seem to be at odds with the basic demo-

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ing the public good of clean water. And in virtue of being obliged to obey the laws of the upstream community, the citizens of the downstream community would also have a legitimate claim in its decision making. As David Mapel has argued, situations where public benefits cross borders demonstrate why this fairness account of obligation is insufficient (Mapel 2005).

<sup>21</sup> As an example of how the all-affected principle would draw its boundaries, Arrhenius suggests that whereas the school curriculum in Waco, Texas, is not a matter of concern for Icelanders, the Texan teachers' hairspray is, in so far as the aerosol propellants deplete the atmospheric ozone layer (Arrhenius 2005). Again, real-life cases are rarely that clear-cut, and we can at least imagine that the Icelanders would care more about what is being taught in Texan schools than about what their teachers use to coif their hair. Consider, as well, the concern that the French policy to ban headscarves and kippas in public schools raised among religious groups in other countries; or the outrage in many Western countries over Saudi school curricula and textbooks teaching children to abhor religions other than Wahhabite Islam. Are those concerned in these cases relevantly affected? Have their interests been infringed upon? They certainly seem to think so.

<sup>22</sup> We could adjust the principle to state that only net negative externalities qualify those who bear them for political participation. That is, if the burdens outweigh the benefits that you receive from a political institution, then you have legitimate claims to be included in its decision making.

<sup>23</sup> Tännsjö 2007

cratic principle of one person, one vote.<sup>24</sup> In effect, it grants a veto to minorities with strong preferences. I think few proponents of the all-affected principle would depart happily from this basic democratic principle of equality.<sup>25</sup>

Thus, the all-affected principle appears to be difficult to specify, because what it means to be affected by politics is itself a highly political question. I believe the search for objective criteria for specifying the all-affected principle is a mistaken approach, because the principle must be founded on some particular notion of what it means to be affected and such notions are frequently matters of fundamental disagreement (but we shall need to return to this approach, because some have suggested human rights to provide the standard for inclusion).

So perhaps we should instead look for a subjective conception for affectedness, whereby people who consider themselves to be affected by political decisions have a rightful claim to inclusion. Michael Saward, for instance, endorses the all-affected principle and advocates a “‘subjective’ way of locating issue-based subject populations”.<sup>26</sup> He suggests cross-border initiatives, by which a significant number of citizens can raise border-transgressing issues for referenda, and argues that innovations like these would actually better match the rationale behind the all-affected principle than Held’s scheme for cosmopolitan reform would.

A subjective understanding of affectedness could, I believe, draw support from a different tradition in democratic theory. In Noortje Marres constructive reading of the debate between Walter Lippmann and John Dewey, the affected

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<sup>24</sup> And besides, we may again ask, by what standard or conception of affectedness should people’s right to participate be graded? By Held’s or by Nozick’s?

<sup>25</sup> But indeed, the all-affected principle does seem difficult to reconcile with majority rule and representative democracy (cf. Persson 2008). Ian Shapiro similarly recognises the democratic problem in including people with greatly different stakes in a decision:

”Allowing an equal say in a decision to people with greatly differing stakes in the outcome generates pathologies similar to those involving large difference in capacities for exit. This is one reason why the idea of basic interests is an important criterion for delimiting the appropriate decision-making unit in many circumstances. Those whose basic interests are at stake in a particular decision have a stronger claim to inclusion in the demos than those for whom this is not so.” (Shapiro 1999: 234)

Thus, Shapiro’s solution to the ‘equal say–differing stakes’ problem is to raise the hurdle for inclusion; those whose basic interests are affected have a stronger claim to be included, but inclusion is still conceived as a dichotomous quality: Either you are included or you are not.

<sup>26</sup> Saward 2000a

come to play a role different from the one which they have according to conventional transnational democratic theory.<sup>27</sup> Despite their differences, Lippmann and Dewey both addressed not the subjects of politics, but its objects.<sup>28</sup> Whereas democratic theory traditionally focuses on the persons whom democracy enables to master their own fate, Lippmann and Dewey were more concerned with the issues of politics. In the complex, technological societies in which we live, the intricate objects of politics seem to constitute an obstacle to democracy, for how are citizens supposed to govern themselves, when the issues that they have to deal with are so complex and strange?

It now would seem to be a simple matter to solve the problem that complex objects pose to democracy by either providing citizens with better and more up-to-date information or by simplifying difficult issues so that citizens can grasp them. Dewey, however, contended that “foreign entanglements” and complex issues, far from constituting an obstacle to democratic politics, actually play a central role in getting people involved in politics. Strange, unfamiliar and complex issues are an enabling condition for democracy, and precisely because issues are difficult to resolve, we need to bring them out in public view.

Publics get involved in politics precisely where existing institutions fail to deliver. Dewey suggests that the public does not just spring up from nowhere. It consists of people who are affected by human actions on which they have no direct influence. People who believe that they have been affected by some such issue must organise themselves into a visible community: a public. On this Deweyan account, then, affectedness is subjective, and more an enabling condition for democratic politics and participation than a rigid, objective criterion for drawing boundaries. Furthermore, as soon as a group of affected persons form a public and thus becomes involved in politics, that group also begins to affect others.<sup>29</sup>

On Roland Axtmann’s equally interesting reading of Hannah Arendt as a theorist of democracy in a globalised world, Arendt similarly embraces the idea that politics is a matter of the concerned. Her starting point for theorising on democracy is an interdependent, interrelated world – globalisation, we would

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<sup>27</sup> Marres 2005.

<sup>28</sup> Dewey 1988 [1927]; Lippmann 1993 [1927]; 2004 [1921]

<sup>29</sup> Similarly, Nadia Urbinati argues that the actors of global governance “are united as a result of the problem(s) they are affected by and that they aim at solving. Interest groups, not the ‘citizens of the world’, are their multiple agencies” (Urbinati 2003). In other words, subjective, interest-based affectedness calls upon actors to engage in politics.

say today – rather than the assumption of an isolated, already defined community. In Arendt’s ideal republic, the elite is not chosen but constitutes itself, like the publics sparked into being by issues. However, one could object, such a republic would be an aristocratic form of government, “where only those who have a demonstrated concern about the state of the world would have a right to be heard in the conduct of the business of the republic”.<sup>30</sup> On the other hand, just as we may choose to be concerned, we may choose not to be, which actually is a good thing: Such “self-exclusion, far from being arbitrary discrimination, would in fact give substance and reality to one of the most important negative liberties [...] freedom from politics”.<sup>31</sup>

There is something appealing about these subjective conceptions of affectedness, because they seem to recognise the reasons why people take political action in democratic politics, whereas the attempts to find objective standards of affectedness imply a more legal-technical view of politics. But if we opt for this subjective notion of affectedness, then we cannot use the all-affected principle to solve the boundary problem, because there is nothing inherently justified in anyone’s claim to be affected and therefore included.<sup>32</sup> Indeed, the subjective approach seems kindred to Joseph Schumpeter’s claim that we must “leave it to each *populus* to define himself”.<sup>33</sup>

### 3.2.2 *A vicious regress of constituting decisions*

However, the most serious objection to the all-affected principle is that it actually does not solve the boundary problem, because the principle creates an unsolvable hen-and-egg paradox. Since every political decision presupposes a prior decision on whom to include – a decision that affects some people – the principle leads to a logical as well as procedural impossibility, as Frederick Whelan demonstrates:

“Before a democratic decision could be made on a particular issue (by those affected) a prior decision would have to be made, in each case, as

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<sup>30</sup> Axtmann 2006: 111

<sup>31</sup> Arendt 1973: 280. As Axtmann notes, Arendt does not seem to think that those who do take care of the business of the republic must also take into account the view of those who are “self-excluded”, and she does not specify the relationship between them.

<sup>32</sup> cf. Freeman 2000: 375

<sup>33</sup> Schumpeter 1975: 245. Robert Dahl suggests that Schumpeter fails to distinguish between what are two separate issues: (a) Whether a system is democratic in relation to its own demos and (b) whether it is democratic in relation to everyone who is subject to its rule. Thus, Dahl argues that Schumpeter’s claim is absurd, because it does not allow us to differentiate democracy from despotism or oligarchy (Dahl 1999b: 191).

to *who* is affected and therefore entitled to vote on the subject – a decision, that is, on the proper bounds of the relevant constituency. And how is this decision, which will be determinative for the ensuing substantive decision, to be made? It too should presumably be made democratically – that is, by those affected.”<sup>34</sup>

Thus, when we try to delineate the political community by means of the all-affected principle, we enter a logical loop, an infinite regress of constitutive decisions from which the all-affected principle offers no escape. Delimiting the political community is a political decision which affects people, too, probably even more than any decision that might follow once the community has formed itself.

Moreover, once we apply the all-affected principle to substantive policy, we clearly see why it is indeterminate. In most cases, who is affected depends on what substantive decision the political community makes; and the problem is not just theoretical.<sup>35</sup> For example, a protectionist trade policy benefits and harms different people than does a free trade regime. So whom should we include in deciding which trade policy to adopt? Likewise, progressive taxation will affect different people differently than a flat tax, so who ought to be included in deciding taxation policy? Depending on whom we include in the decision-making process, we will reach different policies, and depending on what substantive policies we choose, we will affect different people who would have to be included in the first place.<sup>36</sup>

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<sup>34</sup> Whelan 1983: 19

<sup>35</sup> Furthermore, it might often be difficult to find consensus of what the issue is, since constructing the policy problem in a certain way rather than another is a political issue in its own right. As an example, Brian Barry disputes Iris Marion Young’s claim that women exclusively should control ‘reproductive rights policy’, noting that already this terminology takes for granted what is at stake, namely whether abortion is entirely a question about a woman’s right to control her fertility: “Whether or not some issue affects only the member of a certain group is itself normally a matter of controversy, and that controversy is itself one on which everyone can properly take a position.” (Barry 2001: 303)

<sup>36</sup> Cf. Goodin 2007: 52f. The all-affected principle is also indeterminate in another way, because it seems to assume that causation and responsibility can easily be determined too, and that such causal responsibility grounds moral obligation. But there are many issues and problems that escape nation-state borders and which thus call for transnational governance, without being clearly caused by a particular group of decision makers. For instance, David Held cites the HIV/AIDS epidemic as a paradigm case of an issue that suggests a border-transgressing political community of stakeholders. But who are the decision-makers responsible for the AIDS epidemic that those affected should hold to account? Where the responsibility for either cause or solution are dispersed and di-

Whelan's regress argument demonstrates why the all-affected principle actually gives no guidance either in matters of how to delineate the community or of what policies to pursue. Proponents of the principle seem to recognise these problems. Torbjörn Tännsjö suggests that we could get out of the logical loop by selecting a constitutional assembly of "founding mothers and fathers" to solve the boundary problem.<sup>37</sup> But this solution not only disregards the fact that the boundary problem recurs on every issue, if we take the all-affected principle seriously; the solution also effectively excludes most of the people who are affected by the constituting decision from the act of constituting it. Similarly aiming to set up an institution to handle boundary problems, David Held suggests that "issue-boundary forums or courts will have to be created to hear cases concerning where and how 'significant interest' in a public question should be explored and resolved".<sup>38</sup> That is, these new institutions would be given the authority to decide when, where and how the all-affected principle applies, including picking a theory of affectedness. As Michael Saward notes, Held's proposal would vest enormous powers "in unelected authorities requiring inhuman levels of knowledge and wisdom".<sup>39</sup>

Furthermore, both Tännsjö's and Held's solution presuppose that there is a correct and objective answer to be reached – that these institutions, with which we entrust the power to solve boundary problems, can decide in a neutral way who has been affected and thus has a legitimate claim to be included. As the examples indicated above demonstrate, who is affected cannot be settled independently of the substantive decision. By giving independent institutions the power to decide who is affected, we also grant them the power to decide on substantive matters as well. Depending on how these institutions draw the boundaries, different policies will result. The practice of gerrymandering demonstrates that this is not just a hypothetical concern. Drawing the boundaries of political communities is inescapably a political issue of power.

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luted over many different actors, the all-affected principle seems even more difficult to apply. And, as Robyn Eckersley (2007: 681) argues,

"in seeking to establish culpability via a direct or indirect causal connection between perpetrators and victims, this [cosmopolitan] approach displaces the simple appeal to our common humanity as the motivator for institutional change. If no causal connection can be shown, or if the causal connection appears weak and tenuous, then there is no residual argument to suggest that those with the capacity to assist should still take responsibility anyway."

<sup>37</sup> Tännsjö 2007

<sup>38</sup> Held 1995a: 237

<sup>39</sup> Saward 2000a



And not only will different boundaries produce different policies, but also different interests among the people sorted into communities. The all-affected principle relies on the idea that people have a right to be included when their fundamental interests are at stake. But what those interests are and how they are represented may depend on how boundaries are drawn. Your interest in migration policy, for instance, will be radically different depending on whether you end up on this side of the border or the other.<sup>40</sup> Again, the all-affected principle leads into a vicious regress.

### 3.2.3 *Fickle boundaries*

Whether we think of affectedness as objective or subjective, the all-affected principle may seem to imply that we ought to redraw political boundaries for each decision that is to be made or, at any rate, that each issue requires its own functional constituency. That is, boundaries would be considerably volatile if constantly redrawn so as to meet the requirements of the all-affected principle. Some suggest that this requirement represents a major problem with the principle, whereas others see the resulting volatility of boundaries as an advantage.

However, the advocates of the principle seem to disagree on how far the idea of issue-based constituencies actually leads us. The most radical interpretation holds that for every single political decision to be made, we first have to decide the relevant political community, that is, who is affected and thus ought to be included. Some theorists of deliberative democracy nod in this direction and embrace the fluid boundaries following from the all-affected principle. John Dryzek, for example, argues that deliberative democracy “can cope with fluid boundaries, and the production of outcomes across boundaries”, and this is in fact what makes deliberative democracy such a suitable theory of transnational democracy.<sup>41</sup> David Held, by contrast, seems to think of redrawing boundaries by means of the all-affected principle as more of a one-off process whereby we shift authority to new but permanent territorial layers of government, with regional and global democratic institutions added to those already existing at national and local levels.<sup>42</sup>

Some critics argue that because the all-affected principle leads to political

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<sup>40</sup> Cf. Kuper 2006: 15ff, see also Moore 2006; Abizadeh 2008.

<sup>41</sup> Dryzek 1996

<sup>42</sup> Although Held sometimes talks about cosmopolitan democratic reform as a project of building new political institutions around his “seven sites of power”, the concrete proposals for international reform that he puts forward seem more based in a layered territorial state logic (cf. Saward 2000a; Dryzek 1999; Coleman & Porter 2000). Also see Chapter 5 below.

boundaries that are unstable and issue-area specific, it provides an impractical criterion of legitimacy for political institutions.<sup>43</sup> Political boundaries could change from day to day and it would be hard to consolidate political institutions. Even if we shift the tasks that states perform to new regional, global or issue-specific institutions, such tasks nevertheless require a degree of continuity, especially if they are to be done in a way that is democratically accountable to anyone who is affected by them.<sup>44</sup> However, one could argue that as long as the consequences of political decisions are fairly permanent and uniform, the boundaries drawn by the all-affected principle would be accordingly stable. Moreover, there is a solid body of scholarship on international institutions, which argues that international problem-solving is already organised into specific issue areas that are all but ephemeral.<sup>45</sup> In fact, a plausible fall-back position for transnational democrats would be to argue that, albeit far from perfect, the nation-state still used to be a practical shortcut to realise the all-affected principle; while in our globalised world, international institutions could offer an imperfect but decent approximation, where improved democratic participation could allow for a better overlap between those who make decisions and those who bear their consequences.

Thus, while these practical problems in applying the all-affected principle may be overstated, we should worry more about what happens to the conditions for democratic participation once we redraw political boundaries according to the all-affected principle. Issue-specific political boundaries may be feasible, but are they also desirable? Whether we understand the resulting political institutions to be overlapping, issue-specific institutions or layered territorial entities with broader responsibilities, the communities corresponding to them are supposed to replace the once so self-evident categories that nation-

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<sup>43</sup> Whelan 1983: 19; Dahl 1970: 64

<sup>44</sup> William Scheuerman makes the related point that Held's and Archibugi's model of cosmopolitan democracy cannot provide the stability and predictability necessary for the rule of law, and that they thus ultimately misunderstand this concept so central to their own model (Scheuerman 2002). John Parkinson likewise argues that there is a "stability requirement" for democratic legitimacy, because "if rules change all the time, only those who can bear the cost of re-learning the rules will be enfranchised" (Parkinson 2003). Thus, unstable political boundaries will not likely be to the advantage of the unprivileged. Finally, as a defence for states as important units in a federal European order, Andreas Føllesdal suggests that individuals have an important interest in being able to foresee correctly their own future, and that thus, "cultural and institutional changes should not be too abrupt: Members have an interest in revising their plans as options and consequences change" (Føllesdal 1998a).

<sup>45</sup> cf. Coleman & Porter 2000; Keohane & Nye 1977.

states sorted people into. Just as the territorial nation-state would be replaced by an array of institutions claiming authority, so the sole citizenship of the individual would be replaced with a variety of affiliations with different communities of fate, choice and chance.<sup>46</sup> But what happens then to the rights, duties and belongings that territorial states, for better or for worse, have granted their citizens? Michael Saward argues that the protection of democratic rights depends upon secure and equal membership in a given unit. Applying the all-affected principle thus risks taking away the very foundation of democratic rights without replacing it with something better:

“if the constituency can and must change for each decision, then the rights of ‘members’ are not fixed, or immutable, from one decision to the next [...] Membership is only secure, because the grounds of citizenship and rightful political participation can only be clear, in a territorial entity.”<sup>47</sup>

Nor would the rights of community members be equal, if people only had a right to participate in political decision making corresponding to the stakes they hold. Thus, even if the overlapping, multilevel institutions and constituencies were to be stable and fixed rather than ephemeral, the rights of participation accorded to citizens would be tenuous.<sup>48</sup>

But must the all-affected principle really lead to fluid, issue-specific political boundaries? A different way to abide by the all-affected principle would be to ensure that a given territorial political community, national or transnational, produces outcomes that are in accordance with it. Instead of reshaping the boundaries of political institutions to fit with their consequences, we could try to reshape the political consequences to fit with existing boundaries. We would then try to assure that only those persons are affected who are already included in political decision making. Both approaches seem to meet the all-

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<sup>46</sup> Held 1999

<sup>47</sup> Saward 2000a: 38

<sup>48</sup> cf. Chandler 2003. Margaret Moore argues that territorial self-governing democratic entities cannot harmoniously coexist with issue-specific democratic bodies with different bases of inclusion, because “Non-territorial inclusion threatens the very decision-making capacity of the kind of political community that most people care about” (Moore 2006). Moore, however, seems to take the argument a bit too far. Obviously, issue-specific bodies can and do coexist quite successfully with territorial states. Arguing that states lose their decision-making capacity to issue-specific regimes also seems a rather sweeping generalisation, though it might be an argument that resonates with theorists of transnational democracy, concerned as they are with the allegedly unaccountable power of increasingly autonomous international institutions.

affected principle's requirements. Therefore, if such territorial communities still wish to abide by the all-affected principle, what policies would they have to pursue? I shall now address this latter solution to fulfilling the all-affected principle.

### 3.2.4 *Unpalatable policy recommendations*

Thus far I have argued that the all-affected principle does not offer any clear guidance on whom to include in a democratic political community, nor does it help us decide on substantive policies. But as vague as the principle may appear, there may be other recommendations that can be derived from it. I shall discuss those further implications of the principle, and I shall argue that they suggest further reasons not to make democratic theory dependent on the all-affected principle.

Hans Agné presents an interesting argument against the all-affected principle by trying to explicate the conditions for fulfilling it in a world of states.<sup>49</sup> The all-affected principle has two components: to participate in making a decision and to be affected by that decision. For the sake of simplicity, if we interpret the components as dichotomous (as do most of the all-affected principle's supporters), there are two ways in which the all-affected principle could be violated: If someone who is affected by a decision is excluded from taking part in it or, conversely, if someone who is not affected participates in making a decision. Such illegitimate exclusion and illegitimate inclusion are both ruled out by the all-affected principle.<sup>50</sup> Obviously, the all-affected principle is equally satisfied if you participate in making a decision that affects you or if you do not participate in making a decision that does not affect you.

Interpreted in the dichotomous way, the all-affected principle puts seemingly drastic requirements on democratic decision making. Even if we assume the state to be isolated from its surroundings, it seems difficult to rule out completely the possibility that someone participates in making decisions without being affected by them or vice versa. Once we add the complicating assumption of a world of states, it becomes virtually impossible to avoid illegitimate exclusion and thus to avoid violating the all-affected principle. Even if a community interacts minimally with the surrounding world, some decisions that that community makes will affect some persons outside its borders who are not allowed to participate in making those decisions.

In effect, globalisation may also lead to illegitimate inclusion. Agné's argu-

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<sup>49</sup> Agné 2006; cf. Agné 2004

<sup>50</sup> Cf. Goodin 2007

ment runs roughly like this: A community may avoid illegitimate inclusion when collective decisions concern properties that all its members share. For example, if everyone is at least a potential tax payer and a potential benefactor of public expenditures, then we may safely include everyone in deciding on tax policy.<sup>51</sup> The more characteristics people share, the more evenly will they be affected by the decisions that they make. Thus, to avoid illegitimate inclusion, a democratic community must seek to make its members more uniform – economically, socially, culturally and by any other relevant dimension – so that nobody who participates in collective decision making can shield him- or herself from the consequences. In order to make the population more homogenous and less fragmented and stratified, it may be reasonable to try to isolate the community from influx from outside. Thus, globalisation may lead to illegitimate inclusion, because globalisation brings heterogeneity into a previously well-integrated collective. It will be difficult to fulfil the all-affected principle if people are not considerably similar and equal, Agné concludes.<sup>52</sup> Because the all-affected principle suggests that democracy can only be achieved in an isolated and homogenous political community, Agné rules the principle out as an element of nationalist ideology: “[O]nly a nation-state, firmly founded on a mythology of unity and autonomy, can wield the social powers required by the [all-affected principle].”<sup>53</sup>

Thus, a community that takes the all-affected principle seriously would have to pursue a policy of isolation from its surrounding world and internal homogenisation. This conclusion may seem stretched. Would the proponents of the all-affected principle really agree that it implies a nationalist, isolationist policy? Probably not. After all, most of them use the all-affected principle to support claims for transnational democracy – not for nationalist and isolationist policies. When we assume that the political community attempting to approximate the all-affected principle is a state, we rely on the very assumption challenged by transnational democrats.

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<sup>51</sup> In fact, this might follow from a contributivist view of affectedness: You are affected if you have a stake of some kind, for example by contributing taxes (cf. Beckman 2006a)

<sup>52</sup> The argument that heterogeneity in a political community poses a threat to realising the all-affected principle resembles Carl Schmitt’s dismissal of liberal democracy. Schmitt, who defined democracy as an identity between the rulers and the ruled, argued that fascism and communism were democratic in so far as they achieved this identity of governing and governed. By contrast, liberalism (and globalisation, we could add today) leads to pluralism, Schmitt argued, which inevitably undermines the identity between rulers and ruled, and so liberalism would not be compatible with democracy (Torfing 1999: 253).

<sup>53</sup> Agné 2004: 59

Nevertheless, these implications of the all-affected principle are not significantly different from the standard narrative framing transnational democracy. Since globalisation has displaced and disturbed the once so neat match between political authority and cultural, economic and social borders, theorists of transnational democracy claim, we need to build new democratic institutions beyond or above the state as well. In so doing, we may regain lost symmetry or congruence between the rulers and the ruled – a congruence which before it was lost always required a high degree of homogenisation, unity and cohesion. If we were to fulfil the all-affected principle at the transnational political level, it might well have similar policy implications to those which emerged at the state level.<sup>54</sup> For example, identity politics in the European Union seem to reproduce nationalist ideology at the European level, albeit under a flag of post-nationalism.<sup>55</sup>

In that sense, by means of the all-affected principle, transnational democrats seem to bring on board more of the notion of the nation-state as the locus of politics than they would like to think themselves. They premise democracy on a conception of symmetry or congruence between political and social boundaries which we have now lost. As it were, the all-affected principle renders transnational democrats just as rooted as other political theorists in a tradition regarding the political entity to which democracy applies as a closed circuit, a conception so aptly described by Walter Lippmann:

“The democratic tradition is [...] always trying to see a world where people are exclusively concerned with affairs of which the causes and effects all operate within the region they inhabit. Never has democratic theory been able to conceive itself in the context of a wide and unpredictable environment. [...] And although democrats recognise that they are in contact with external affairs, they see quite surely that every contact outside the self-contained group is a threat to democracy as originally conceived.”<sup>56</sup>

### 3.3 TRANSNATIONAL DEMOCRACY AND THE AFFECTED

Thus far I have argued that the all-affected principle does not hold, for a number of reasons. Since both cosmopolitan democrats and deliberative democrats crucially rely on it, let us now consider how they would be affected by the cri-

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<sup>54</sup> Cf. Näsström 2003

<sup>55</sup> Hellström 2006

<sup>56</sup> Lippmann 2004 [1921]: ch. XVII:4

tique I have suggested here. I shall argue, first, that although the advocates of cosmopolitan democracy regard the all-affected principle as one of their core claims, they would be better off expressing their moral concern for those affected in terms of cosmopolitan rights. Indeed, some of their arguments explicitly point in this direction. Secondly, I shall argue that the all-affected principle as a criterion for delimiting the democratic community makes for some contradictions peculiar to deliberative democracy: If we seek reasoned agreement among rational, honest deliberants, who discover their true preferences only through public deliberation, affectedness is an inappropriate criterion for inclusion.

### 3.3.1 *Cosmopolitans without a cause*

The all-affected principle seems to parallel a general, cosmopolitan universalism, namely, that we are all connected to one another on this globe and that no one can remain indifferent and unmoved by the suffering of others, regardless of where or when this may occur.<sup>57</sup> Cosmopolitan democrats wish to turn this general universalism into a political cause by wedding it to democracy and the all-affected principle is one of their primary means for doing so. Daniele Archibugi suggests that there is something wrong with democratic theory if, for example, it would allow the French to decide in a perfectly democratic manner to perform nuclear tests in the Pacific, without ever having to consult the people who live there.<sup>58</sup> And Susan Marks claims that the all-affected principle is the main message distinguishing cosmopolitan democracy from other notions of transnational democracy:

“In place of the idea that the nation-state is democracy’s container, [cosmopolitan democracy] seeks to entrench the idea that democracy is relevant wherever and whenever an action is taken which affects the capacity of individuals and groups to determine the conditions of their collective lives.”<sup>59</sup>

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<sup>57</sup> Kleingeld & Brown 2002

<sup>58</sup> Archibugi 2003a

<sup>59</sup> Marks 2000: 104. Marks gives a strong formulation of the all-affected principle, since she suggests that it applies to any kind of action (and presumably non-action too) – not just to formal decisions, policies or institutions, and whether they are taken by a collective or individual person – that affects individuals’ and groups’ capacities to determine their collective lives. Marks’ statement possibly includes every non-trivial action a person may perform and places it in the domain of democratic decision making. As we shall see, however, other cosmopolitan democrats have tried to restrict the scope of the all-affected principle, precisely in order to ease the burden on democratic institutions.

If we strip the cosmopolitan democrats' argument down to a basic practical syllogism, the all-affected principle is the crucial normative premise underlying that argument. The all-affected principle allows the advocates of cosmopolitan democracy to draw the conclusion that globalisation implies that we must take democracy to a transnational level, since globalisation, in the words of Andrew Linklater, "increases the opportunities for, and the incidence of, transnational harm" and hazards.<sup>60</sup> Given, then, that cosmopolitan democracy emphasises the all-affected principle as one of its most central claims, the critique that I have suggested here must seem discouraging. Once we discard the all-affected principle, there is little to glue the practical conclusion to the factual diagnosis of the state of the world.

So how could cosmopolitan democrats respond to this critique? One way to rehabilitate the all-affected principle would be to say that in a global democracy some of the problems discussed here may disappear. Whelan's infinite regress of constitutive decisions may have an end where everyone is included.<sup>61</sup> Some actually argue that the all-affected principle and the all-inclusive principle, according to which literally everyone should be included in the demos, are actually coterminous (and thus over-inclusive) if we accept the globalisation thesis.<sup>62</sup> Furthermore, there would be no need for the isolationist policy that Agné deduced from the all-affected principle, since there would be no outside from which to fear a negative influx that could stratify the population. On the other hand, the all-affected principle may well suggest a policy for levelling differences among people so that they would all be more likely to be equally affected by collective decisions. Held's democratic public law is a far-reaching attempt to provide people all over the world with more equal living conditions – economic, social, cultural, political, and so on – and it would seem to be a proximate programme for realising this aspect of the all-affected principle on a global scale.

Furthermore, the all-affected principle could just as well (or just as poorly) support a conclusion opposite to cosmopolitan democracy. Whereas cosmo-

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<sup>60</sup> Linklater 1999: 475

<sup>61</sup> cf. Arrhenius 2005; Näsström 2003. However, even if the all-affected principle and the all-inclusive principle could, theoretically, sometimes overlap, so that literally everybody on the planet is affected by a collective decision we are about to make, it seems implausible, to say the least, to assume that that would always be the case. For a less strict, more plausible version of the all-inclusive principle, holding that boundary decisions should be justified or justifiable, in principle or in practice, to the larger moral community of humanity as a whole, see Abizadeh 2008; Kuper 2006, and Section 3.4.2 below.

<sup>62</sup> Moore 2006; cf. Goodin 2007



polititan democrats argue that because politics has become global, democracy must become global too, we could argue inversely that because democracy (as we know it) remains state-based, the impacts of politics must remain under or be returned to national control. That is, rather than globalising democracy we could roll back the authority accorded to supranational institutions beyond democratic reach.<sup>63</sup> In fact, some green theorists invoke the all-affected principle to suggest that politics must be scaled down, even from the national level, in order to achieve the symmetry between causes and effects required by the all-affected principle.<sup>64</sup> The all-affected principle has no preference for levels.<sup>65</sup>

Although Held seems to be aware that the all-affected principle leads to a vicious regress, he has not addressed the problem.<sup>66</sup> In a recent article, however, Held recognises some of the problems with the all-affected principle:

“Merely being affected cannot be sufficient to create a valid claim. If it were, virtually nothing could ever be done, since there would be so many requirements for consultation and veto points.”<sup>67</sup>

Held thus seeks to qualify his account of affectedness by introducing degrees of impact based on a hierarchy of human needs. A decision could affect a person’s life chances either strongly, moderately or weakly:

“By strong [impact] I mean that vital needs or interests are affected (from health to housing) with fundamental consequences for people’s life expectancy. By moderate I mean that needs are affected in such a way that people’s ability to participate in their community (in economic, cultural and political activities) is in question. By weak I mean an effect which impacts upon particular lifestyles or the range of available consumption choices (from clothes to music).”<sup>68</sup>

Held implies that the all-affected principle only applies to the first two degrees of impact, when people’s life expectancy and life-chances are not satisfied, whereas impacts on people’s lifestyles are not important enough to warrant democratic inclusion. Thus, stronger needs trump weaker needs. If a decision adversely affects both your life expectancy and my lifestyle, then your rights

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<sup>63</sup> Cf. Zürn 2004

<sup>64</sup> Hines 2000; cf. Barry 1999

<sup>65</sup> Cf. Näsström 2005

<sup>66</sup> Held 2002: 28. To the contrary, Held cites Whelan as support for incorporating the all-affected principle as a fundamental principle of cosmopolitanism.

<sup>67</sup> Held 2004

<sup>68</sup> Held 2004

ought to have priority over mine, and I could, presumably, be legitimately excluded from decision-making.<sup>69</sup> Carol Gould similarly argues that basic human rights provide a “reasonable criterion” for when decisions and policies so significantly impact people at a distance that we need to take their views into account.<sup>70</sup> Gould argues that “people at a distance are to be regarded as affected by a decision if their human rights are affected, where these include economic and social, as well as civil and political, rights.”<sup>71</sup> Likewise, Simon Caney suggests that the absurd implications of the all-affected principle can be averted by modifying it to read that “persons have a democratic right to be able to affect those aspects of the socio-economic-political system in which they live that impact on *their ability to exercise their rights*.”<sup>72</sup>

Focusing on fundamental interests, basic needs or human rights is intended to shield the all-affected principle from some absurd applications and to exclude from its scope a considerable share of all those myriad decisions that individuals and collectives make that adversely affect others. These modifications thus raise the bar for when someone may legitimately claim to be included. The principle thus gains somewhat in specificity: A right to be included only ensues where fundamental rights are violated, not when trivial interests are affected, such as your consumption of music.

But the attempt to raise the bar for claims to inclusion comes with two problems. First, on substantial grounds, we may reasonably dispute the hierarchy of needs and corresponding rights which underlies Held’s distinction between strong and weak impacts. Many people would dispute the claim that expressing an identity or a lifestyle, by wearing certain clothes or listening to certain music, is less important than other needs.<sup>73</sup> Moreover, distinguishing between rights in this manner might prove difficult in practice, because in many situations human rights cannot so easily be separated into distinct domains, and quite often, people claim rights precisely in dispute over such distinctions. For instance, when a government prohibits the wearing of headscarves and kippas in public schools, does it thereby violate teachers’ and pupils’ fundamental right to freedom of religion and expression (a moderate degree of im-

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<sup>69</sup> Assuming inclusion is dichotomous and not a graded quality.

<sup>70</sup> Gould 2006. Thus, Gould argues we need not allow for everyone who is affected to participate in decision-making, but merely for everyone who is *significantly impacted* to give *input* into the policy process. Though Gould claims to reject the all-affected principle, she only modifies it moderately, toning down its requirements.

<sup>71</sup> Gould 2004: 178

<sup>72</sup> Caney 2005: 158, emphasis in original

<sup>73</sup> See for example Nussbaum 2006.

pact in Held's hierarchy) or does it merely impact their choices of lifestyle and clothing? While the government will probably maintain the latter case, those affected by its headdress policy will have plenty of reasons to disagree.

Second, regardless of which particular rights the violation of which we think ought and ought not to qualify someone for legitimate inclusion, the threshold approach is also problematic in principle. Raising the bar somewhat is all that these modifications do. The problems of circularity remain, given that few things determine a person's fundamental life-expectancy and life-chances as much as the political community into which he or she is included.<sup>74</sup> Restricting the all-affected principle to cases where fundamental, strong or moderate needs and rights are at stake merely reduces the number of occasions on which we encounter the all-affected principle's fundamental indeterminacy.

Expressing affectedness in this language of basic human rights also reveals that what we really ought to care about are those rights, and not the confusing concept of affectedness. Just as affectedness seems a peculiar criterion for democratic inclusion (an issue we shall return to below), democratic inclusion is a strange remedy for having been affected in the sense relevant here, namely, to have had your fundamental interests infringed upon by political decisions. When someone's fundamental interests have been violated (that is, when someone is significantly affected), being included in democratic procedures after the fact seems to be a wholly insufficient redress for such violations.<sup>75</sup> As Margaret Moore argues, if we specify which interests are so important that they should not be adversely affected, then

“we might be in the familiar realm of not harming people's rights (at least on a familiar interest-protecting view of rights). If that is so, it is unclear why we need a *democratic* international agency rather than a justice- or rights-respecting one.”<sup>76</sup>

In the case of the islanders affected when France tests nuclear weapons on Pacific atolls, we could, on cosmopolitan grounds, condemn the injustice done to

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<sup>74</sup> Bertram 2005. Moreover, the moderate level of impact recursively suggests that the all-affected principle applies to impacts on people's ability to participate in their political community, the boundaries of which is to be decided by means of the all-affected principle. (I am grateful to Mikael Persson for suggesting this point to me.) This is not a mere technicality, as it is difficult to imagine what it means to participate in political, cultural and economic activities in the absence of a pre-existing community or a state.

<sup>75</sup> And even more so when the inclusion of those affected is reduced to merely registering their consent (Marchetti 2006) or hearing them out in the deliberative phase of decision-making by means of advocacy representation (Gould 2006; Kuper 2006).

<sup>76</sup> Moore 2006: 35

them in terms of a violation of their fundamental rights. However, excluding them from participating in making the decision to test nuclear weapons on their atoll seems to be an injustice comparatively insignificant – especially so since, short of handing the affected islanders a veto, the greater injustice could still be done, by majoritarian decision-making procedures.<sup>77</sup> And vetoes or trumps are precisely what rights are. The cosmopolitan moral concern is therefore better expressed in the language of rights than in the language of democracy.

Thus, these cosmopolitan concerns and causes are poorly addressed by means of the all-affected principle. Once we invoke the all-affected principle on these issues, in order to express our moral indignation as a matter of democracy, and argue that these actions are wrong, not primarily because of their consequences but because the people suffering those consequences have had no say in the decision-making process, then we have also effectively weakened our moral claims, because the all-affected principle cannot by itself lead to a particularly strong condemnation of anything.<sup>78</sup>

### 3.3.2 *Being affected without affect*

Many proponents of deliberative democracy suggest that their account of democracy is especially well suited for a globalised, internationalised world, precisely because they elevate the all-affected principle to a central democratic principle. Theirs is “a democracy of the affected”.<sup>79</sup> Jürgen Habermas, for instance, incorporates this regard for the affected in his ultimately legitimating “discourse principle”, which states that “Just those action norms are valid to which all possibly affected persons could agree as participants in rational dis-

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<sup>77</sup> On the other hand, one might argue that a person’s fundamental rights will best be served and protected if he or she is included in democratic decision-making consequential for his or her life. For instance, Amartya Sen famously suggests that famine has never occurred in an independent country with electoral democracy and a free press. Elected political rulers will have incentives to take their voters’ concerns into account. The right to vote and associated political rights, thus, can function as a safeguard against rights violations in general (cf. Sen 1999). But this reasoning suggests that democratic inclusion is instrumental to protect fundamental interests or rights, not that rights violations justify democratic inclusion.

<sup>78</sup> Cf. Eckersley 2007, who distinguishes between “humanitarian cosmopolitanism”, which suggests that moral obligations to assist others arise simply “from the mere fact of our common humanity and our capacity to render assistance”, and “culpability cosmopolitanism”, which traces moral obligations to “some kind of culpable causal link between perpetrator and victims”, a position which she associates with Held’s version of the all-affected principle.

<sup>79</sup> Eckersley 2000

courses.”<sup>80</sup> James Bohman similarly suggests “the inclusion of everyone affected by a decision” as a basic normative requirement and constraint on deliberation, along with substantial political equality and free and open public reasoning.<sup>81</sup>

Proponents of deliberative democracy argue that who should be a member of the relevant deliberative community depends on what particular stakeholders are affected by the exercise of public power on the issue at stake. Thus, deliberative democrats recognise that abiding by the all-affected principle leads to the practical problem of redrawing the boundaries of the political community for every issue at stake, and yet maintain that this is precisely what a deliberative democracy always ought to look like. Just like the issues, boundaries are the product of the deliberative process:

“The process of deliberation itself becomes constitutive of the relevant deliberative community. This reflexivity, argue its advocates, makes deliberative democracy admirably suitable to a world in which there are overlapping communities of fate and in which the organization and exercise of power no longer coincide with the bounded territorial political community.”<sup>82</sup>

Deliberative democrats thus have a functional conception of the demos. They claim to escape the boundary problem because they never presupposed a static demos or nation-state to begin with.<sup>83</sup>

However, if my argument so far has been correct, deliberative democrats cannot avoid the problem of deciding the demos by simply citing the all-affected principle. Actually, deliberative democratic theory and the all-affected principle make strange bedfellows. Stating that those whose interests have been violated have a legitimate claim to inclusion, the all-affected principle may be interpreted as an application of utilitarianism to democratic theory or implied with a notion of democracy whereby individuals take political action to protect and further their self-interest.<sup>84</sup> Deliberative democrats, however, usually take a strong stance against the idea that democracy is little else than a

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<sup>80</sup> Habermas 1996a: 107. However, Habermas maintains that democracy is based on self-determination by people who are bound by law, as suggested in his “democratic principle”, which is the abstract, ideal discourse principle applied to legal norms. Below, I argue that this is a more reasonable criterion for democratic inclusion and exclusion.

<sup>81</sup> Bohman 1996: 16; cf. Elster 1998: 8

<sup>82</sup> McGrew 2002c

<sup>83</sup> cf. Saward 2000b

<sup>84</sup> On the all-affected principle as an expression of utilitarianism, see Whelan 1983

procedure for aggregating the pre-political, private interests of individuals.<sup>85</sup>

In the following, I shall argue that by relying on the all-affected principle, a theory of deliberative democracy undermines both its epistemic and transformative claims.<sup>86</sup> First, if we take seriously the epistemic promise of deliberative democracy, that public deliberation will produce better outcomes, then those affected are not necessarily our best candidates for deliberation. Second, many accounts of deliberative democracy hold that people can discover their true preferences only through deliberation. But if that is the case, affectedness becomes a paradoxical criterion for inclusion.

Deliberative democracy is not just supposed to be a procedure for deliberating over issues and making collective decisions: it is also supposed to help us arrive at better decisions, that is, it ought to have epistemic value. As Habermas puts it, on a discourse-theoretical account,

“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.”<sup>87</sup>

That is, deliberative democracy is justified when it is organised so as to provide us with rationally acceptable solutions. But the all-affected principle as a criterion for inclusion seems to conflict with the epistemic conception of deliberative democracy.<sup>88</sup> If we cherish democratic deliberation because it helps us to arrive at the truth, why should affectedness be the main criterion for selecting the deliberators instead of, say, competence or expert knowledge? Just because someone is affected does not mean that he or she is more likely to arrive at truer or better answers, or to deliberate in a more honestly truth-seeking manner. Habermas, however, forcefully argues that in order to reach correct judgments, we must engage real people in actual discourses, for otherwise we would not take into account and empathise with the situations, judgements and interests of everyone concerned.

But as Samuel Freeman notes, this discords with the aim to discover what would be agreed to among fully rational, moral, and informed persons in ideal speech situations:

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<sup>85</sup> For example, see Habermas 1998b: Ch. 9

<sup>86</sup> The distinction between epistemic and transformative justifications of deliberative democracy is common, cf. King 2003; Warren 2002; Chambers 2003

<sup>87</sup> Habermas 2001b: 110

<sup>88</sup> cf. Arrhenius 2005

“Empathy with existing citizens’ current situations and interests would not seem to be necessary for these purposes. It could even be distracting.”<sup>89</sup>

Indeed, it might be more than distracting: Having your fundamental interests affected might actually undermine your capability to reach balanced, rational and impartial judgements.

Furthermore, many deliberative democrats wish to ensure that a variety of opinions, views and experiences are fed into the deliberative procedure, in part because it facilitates the epistemic goal of arriving at better conclusions. As James Bohman puts it, deliberative democracy has to be “multiperspectival”.<sup>90</sup> But such a variety of views and perspectives might actually be more difficult to achieve if we include only those affected by a common problem, since their experiences of the issue at stake are likely to be fairly similar. Ultimately, however, it is an empirical question whether we improve our chances of arriving at the best conclusions (in the epistemic sense) by deliberation among the affected, among experts or by feeding a variety of perspectives into the process.<sup>91</sup>

Turning to the problem of reconciling the all-affected principle with the transformative claim, there are a few more reasons why it seems strange or contradictory for deliberative democratic theory to rely on the all-affected principle as its criterion for inclusion. Proponents of deliberative democracy assume that people engaging in deliberation can be moved by motives such as a concern for reciprocity, a sense of justice, a willingness to cooperate with others on fair terms or a commitment to public reason-giving.<sup>92</sup> Otherwise, the ideal of a deliberative democracy would not be feasible (such motivational assumptions are also implied in the epistemic claim). Furthermore, deliberative democrats usually criticise aggregative models of democracy, claiming that these models simply treat people’s interests as a pre-political given. Deliberative democracy, by contrast, they insist, has a potential to transform and transcend the participants’ initial interests and identities.<sup>93</sup> A central claim in deliberative democratic theory is that people can only discover their true interests, identities and opinions by engaging in rational discourse with others. Just as you might be mistaken about my needs and interests, so might I myself, and

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<sup>89</sup> Freeman 2000: 386

<sup>90</sup> Bohman 2007

<sup>91</sup> Solomon 2006

<sup>92</sup> Freeman 2000: 380f

<sup>93</sup> Dryzek 2000; King 2003; cf. Kuper 2006: 67

it is only through discourse that we can correct for our misperceptions.<sup>94</sup>

Hence, on the one hand, deliberation is supposed to occur between all those who are, or who consider themselves to be, affected by a political decision. According to both the objective and the subjective approach to affectedness, being affected has something to do with having bad things happening to you. You perceive your interests to be threatened and so you take political action to secure your interests, but not necessarily aiming for solutions that promote the common good. On the other hand, public deliberation is a noble sport, where actors are not supposed to resort to such base, myopic, and possibly egoistic motivations as self-interest. Especially, they are not supposed to take, in Habermasian terms, strategic action, which preys on the free and equal exchange of beliefs and intentions. These two assumptions are contradictory. Persons who are (possibly) affected are the sole legitimate participants in deliberation, but their affectedness – that is, the fact that they wish to protect the interests they fear might be trampled upon – is, in a sense, illegitimate once participants start deliberating. Moreover, if the only interests and preferences that are valid and ought to be respected are those that flow from a deliberative and reflective process of autonomous preference formation, then we cannot use affectedness as the criterion for selecting the deliberants, because persons have no legitimate interests that can be affected before they have started deliberating and discovered their preferences. As a criterion for inclusion, the all-affected principle thus creates a vicious circle peculiar to deliberative democracy.

Noting this tension, one might argue that the all-affected principle actually gets right what the deliberative democratic theory of preferences does not. It seems stark to disqualify people's self-perceived preferences. Claus Offe suggests that we could sometimes have valid reasons to discount someone's preferences in democratic politics where those preferences would not serve his or her welfare.<sup>95</sup> A government may, for instance, have a legitimate reason to override or ignore citizens' preferences if those preferences were the result of unjust government policies or of the government failing to correct some injustice, or if preferences are contrary to someone's best long-term interest, or if pursuing those interests causes damage to others. This is not to say that a government should ignore preferences under such circumstances, it merely suggests kinds of reasons that could be acceptable.

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<sup>94</sup> Habermas 1990: 67f. In Chapter 6, I return to the problem of scale following from the demand that actual deliberation must be carried out among all affected.

<sup>95</sup> Offe 1997; cf. Saward 2000b



By contrast, deliberative democratic theory suggests that “only those preferences deserve to be respected which flow from a deliberative and reflective process of autonomous preference formation.”<sup>96</sup> This criterion for disqualifying preferences shifts focus from the unjust causes of preferences to whether they originate from idealised deliberative procedures. Offe argues that this deliberative democratic view of preferences leads to an exclusive, moralising republican elitism, privileging “those citizens who are accomplished in the practice of autonomy or republican virtue,” while “excluding all those whose preferences, as registered both in markets and in democratic politics, are (or at any rate can be suspected to be) of a more mundane nature, having to do with private life and the satisfaction of private desires and subjective welfare.”<sup>97</sup>

Some theorists of deliberative democracy put less faith in the transformative effects of deliberation. Instead, they argue that when engaging in public deliberation, people do not so much modify their preferences as the way they express them. In Jon Elster’s words, the effect of public deliberation is “to replace the language of interests by the language of reasons”.<sup>98</sup> That is, if people have to make their proposals in front of an audience, not only must they try to persuade their opponents but also to show that they take impartial concerns seriously.<sup>99</sup>

“Otherwise, their proposals will easily be rejected as contradicting the collective well-being. Clearly, this does not imply that speakers must replace self-minded base motives ‘but only forces or induces speakers to hide them.’”<sup>100</sup>

Still, even on this account, where people keep their base self-interested preferences but shroud them in more appealing arguments, Offe’s warning against exclusive republican elitism still seems warranted. Some people will be more accomplished in framing their self-interests in the language of reason. Furthermore, allowing deliberants to secretly pursue their self-minded, base motives seems to undermine many of the other values of deliberative democracy, because its epistemic and normative goals presuppose a potential to transform preferences.

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<sup>96</sup> Offe 1997

<sup>97</sup> Offe 1997: 97. Similarly, some criticise the idea that the public deliberator is expected to be “reasoned, calm, dispassionate, and articulate; and deliberation is to be competitive but orderly, logical, and non-rhetorical.” (Fritsch 2006)

<sup>98</sup> Cited in Offe 1997.

<sup>99</sup> Cf. Fritsch 2006

<sup>100</sup> Neyer 2003: 694, quoting Jon Elster

Either way, deliberative democrats end up in a paradoxical position, if using the all-affected principle as the criterion for whom to include in deliberative processes appears to be contradictory. People should get involved in politics because they are affected, but once they enter into deliberation, they must leave their affects, so to speak, out of the room. Alternatively, the preferences which lead people to take political action should transmogrify into something different, higher-minded and less self-regarding. But if such motivations for becoming involved are so suspect and so detrimental that they have to be kept out of the deliberative process, why should they then, at the same time, constitute the criterion of legitimate inclusion in the first place? If nothing else, the all-affected principle appears to saddle real people engaging in deliberation with unrealistic requirements.<sup>101</sup>

However, since the all-affected principle has provided deliberative democracy with a criterion for democratic inclusion, it might seem difficult simply to reject it. An alternative might be to stick with the tradition that regards being subjectively affected as an enabling condition of politics; on the other hand, adopting a subjective notion of affectedness renders deliberative democracy less different from the interest-aggregative models of democracy from which theorists of deliberative democracy often distance themselves.

At times, deliberative theorists acknowledge the difficulties in solving the boundary problem in democratic theory. Habermas, for instance, has claimed that if we believe that we can justify normatively the boundaries of existing po-

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<sup>101</sup> From the perspective of discourse ethics, an additional problem arises by using affectedness as the criterion for inclusion, because not everyone who commands our moral concern (those possibly affected) are autonomous persons capable to participate in discourse. This concerns for example human foetuses, severely brain-damaged persons, future generations and non-human sentient beings (for example, primates). As Gunnar Skirbekk claims: "in none of these cases can 'those affected', even when ascribed moral and legal status as persons, possibly be conceived of as participants in rational discourses." (Skirbekk 1997). The discourse principle thus cannot help us evaluate any action norms for how we ought to act towards these moral subjects, who are neither moral agents nor moral discussants but who can still be harmed in a morally relevant way. Realising this problem, discourse theorists have suggested that these actually and potentially affected persons should be included in our moral discourses by means of advocacy representation, similar to how minors are granted rights while their interests are usually represented by their custodians (Skirbekk 1997; Benhabib 2004). The farther away these moral subjects are from us, the less participatory and consensual and the more paternalistic is our discourse about what is in their interests. However, this problem is not unique to discourse ethics; it might arise in different forms as soon as we assign moral status to persons on the basis of autonomy (cf. Nussbaum 2006).

litical communities, we make a “theoretical mistake with grave practical consequences”:

“One cannot explain in purely normative terms how the universe of those who come together to regulate their common life by means of positive law should be composed.”<sup>102</sup>

Instead, we should perhaps treat the boundaries of communities as arbitrary historical facts, as defined by historical chance and power struggles rather than by principle. But this view might cede too much too soon and throw out the baby with the all-affected principle. In the next section, I shall consider some alternatives that do not rely on the all-affected principle, yet attempt to justify in normative terms the boundaries of political communities.

### 3.4 THREE ALTERNATIVE BOUNDARY CRITERIA

The all-affected principle, I have argued, is not a useful tool for setting the boundaries of democratic community. So without the principle which has spurred recent claims for taking democracy to the transnational level, would the quests for transnational democracy be vapid as well? Not necessarily. If we do reject the all-affected principle, could we perhaps find a substitute that would rescue quests for transnational democracy? Let us now consider three such modifications of or replacements for the all-affected principle and whether the proposed replacements would advance transnational democratic theory. The first modification involves restricting the scope of the all-affected principle so as to avoid some of its peculiar consequences, whereas the latter two modifications opt for replacing the all-affected principle with different principles that would allow us to determine the proper bounds of political community.

#### 3.4.1 *Procedures, not decisions*

So far I have argued that the all-affected principle is indeterminable, virtually impossible to apply, and leads to some rather peculiar guidelines for decision-makers who take it seriously. But should we actually take it that seriously – in the sense of reading it as a literal rule by which democratic politics must abide? After all, most normative principles are vague and ambiguous, and may lead to absurd conclusions if we try to follow them too rigidly and categorically. So perhaps we should not let the absurd implications that may arise in concrete

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<sup>102</sup> Habermas 1998b: 115f

situations lead us to abandon a principle that may be sound in a more abstract sense.

Gustaf Arrhenius defends the all-affected principle against such easy confutation.<sup>103</sup> Although the all-affected principle may be both impractical and unfeasible as a method of democratic decision making in real situations, it may still well be part of the normative ideal of democracy, Arrhenius suggests. We may cherish the principle as an end, although not as a means to that end. That's how rule utilitarians reason when they admit that attempting to maximise utility in each and every action we take may lead to absurd consequences, but nevertheless argue that we should seek personal rules of thumb and political institutions that lead to the greatest possible utility.<sup>104</sup> In a similar sense, the all-affected principle may sometimes lead to absurdities if applied in particular circumstances, but nevertheless provides a standard by which we may measure the democratic inclusiveness of practically feasible methods of decision making. And even though none of these methods will ever fulfil the principle's demands, Arrhenius concludes, the all-affected principle may nonetheless help us discriminate among better and worse decision making procedures.<sup>105</sup>

Given that the all-affected principle is difficult to apply to concrete situations, it seems reasonable to consider the principle not as a razor-sharp rule, but rather as a desirable yet not fully attainable and somewhat nebulous ideal of democratic theory. However, this is not how the advocates of the all-affected principle in transnational democratic theory really view it at all. They, and indeed Arrhenius himself, applies it to rather concrete situations of drawing political boundaries – for instance, whether it is permissible to build nuclear power plants or perform atmospheric nuclear weapon tests near the border of another state – and not just to questions of institutional design. It is difficult to determine what the all-affected principle implies as an abstract ideal rather than as a concrete rule.

However, if we could distinguish decisions from ideals, this latter way of looking at the all-affected principle would allow us to escape Whelan's logical

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<sup>103</sup> Arrhenius 2005

<sup>104</sup> cf. Kymlicka 1995: 38

<sup>105</sup> Put differently, this argument accepts that the all-affected principle cannot guide what Pogge calls first-order political decision-making, that is, substantive, everyday policy decisions; but claims that the all-affected principle may still help us make second-order political decisions, which “are about first-order political decision-making, i.e. about where, how, when and by whom everyday political decisions are to be made.” (Pogge 1998).

loop, Arrhenius suggests. Instead of entering the infinite regress of constitutive decisions, we should simply concoct a theory of interests and analyse how different institutions would affect people's interests – and then decide who ought to be included in those institutions.<sup>106</sup> (After that, presumably, the community can go back to democratic business as usual.) But who is this “we” supposed to decide on these important matters? Who should decide what affectedness means and analyse the consequences of different political choices? These too are political decisions, and taking the all-affected principle seriously, if not literally, they should reasonably be made by anyone who is affected by them. Hence, we are drawn back to the infinite regress, which Arrhenius fails to bring to a convincing end.

### 3.4.2 *Autonomy, not affectedness*

Robert Dahl has argued that given that a democratic process is desirable for a group of people, the values of the democratic process – where personal political autonomy is paramount – can sometimes better be obtained by changing the boundaries of their political unit, *ceteris paribus*.<sup>107</sup> Susan Hurley similarly endorses what she terms an endogenous approach to the boundary problem, according to which boundaries may indeed be assessed in terms of “distinctively democratic values, such as values of self-determination, autonomy, respect for rights, equality and contestability”. On this view, “some choices of boundaries and units and assignments of jurisdiction might tend to repress and others to foster the autonomy of individuals, respect for their rights, and their deliberative and rational capacities.”<sup>108</sup> Thus, political boundaries could and should be evaluated in terms of their effects – not their effects on people's interests, but on the core values integral to democracy itself.

The idea that boundaries should be drawn so as to maximise the values of democracy may suggest an alternative to the all-affected principle. This alternative advances on Arrhenius' solution by replacing the indeterminable notion of affectedness with autonomy as the criterion for deciding the boundaries of a democratic community. This principle, which we could call the maximal-autonomy principle, requires:

“that people be included in political procedures to the extent that their

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<sup>106</sup> This is the task that Held and Tännsjö wish to delegate to non-majoritarian institutions, and Arrhenius seems to nod in the same direction, and likewise supposes that we could find objective criteria for affectedness.

<sup>107</sup> Dahl 1999b: 230

<sup>108</sup> Hurley 1999: 127

inclusion yields the greatest amount of autonomy to the greatest number of people, while accounting for both those who are included and those who are excluded, and accounting for actions performed both individually and collectively.”<sup>109</sup>

Advancing this principle, Hans Agné argues that it would solve some of the problems he identifies with the all-affected principle. The maximal-autonomy principle better matches other core democratic concepts and intuitions, and it focuses on a quality more central and well-defined than affectedness, namely autonomy understood as action capacity.<sup>110</sup> Thus, it also suggests that whether globalisation challenges democracy is a matter of empirical research, not something we can establish merely by definition.

Importantly, the maximal-autonomy principle factors in both those who are included and those who are excluded by boundaries. Thus, the persons whose interests must be taken into account are to be found on both sides of the boundary once it has been drawn. This aspect of the maximal-autonomy principle solves the problem that boundaries by their very nature affect both those who are included and those who are excluded, a conceptual feature of boundaries that the all-affected principle cannot escape.<sup>111</sup> Furthermore, factoring in both insiders and outsiders renders the demos in principle unbounded and global. In practice, the legitimate self-determination of each democratic polity is derivative of this global demos as a whole, as Arash Abizadeh points out:

“The unbounded demos thesis does *not*, of course, rule out the potential legitimacy of political borders and differentiated jurisdictions. It simply confirms that the existence of political borders and their regimes of control require justification.”<sup>112</sup>

Hence, by giving equal standing to insiders and outsiders, the unbounded

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<sup>109</sup> Agné 2006

<sup>110</sup> The concept of autonomy employed here defines autonomy as “the possibilities of an actor – individual or collective – to take action in regard to itself while free from domination by other actors.” (Agné 2006) That is, the more and the more different actions an actor can perform, the more autonomous it is. Similarly, Arash Abizadeh invokes a Razian notion of autonomy, by which a person is autonomous in virtue of having not only a range of valuable options, but also the mental capacities to formulate personal projects and pursue them and by being independent, that is, free from subjection to the will of another (Abizadeh 2008).

<sup>111</sup> Cf. Abizadeh 2008. Abizadeh develops the idea that both the insiders and the outsiders constitute the relevant demos for drawing boundaries and justifies this idea from a Razian concept of autonomy.

<sup>112</sup> Abizadeh 2008: 49

demos thesis could be justified on cosmopolitan grounds. Andrew Kuper argues that a cosmopolitan theory could very well hold that the world should be divided into a system of sovereign states – with the crucial point added that the existence of states must be justified, not merely assumed.<sup>113</sup> The values of democracy could take place among the kinds of cosmopolitan values in terms of which borders must be justified on this account.

While it might be difficult to imagine what it means to justify boundaries to an unbounded, global demos, and how such justification could be achieved in practice, the maximal-autonomy principle undeniably resolves some important issues following from the all-affected principle. The fickle-boundaries objection need not apply: For individuals to exercise their democratic autonomy, political institutions would presumably need to be stable and comprehensive, something which the maximal-autonomy principle allows for.

But the maximal-autonomy principle comes with some peculiar problems of its own.<sup>114</sup> Based on a consequentialist logic, the maximal-autonomy principle seems to open for some staple criticism of classical utilitarianism’s intuitively abominable consequences. Classical utilitarianism suggests that it is morally right to throw a handful of Christians to the lions, if their pain does not outweigh the happiness of the cheering spectators in the Colosseum. Now, substituting autonomy for happiness as the quality which is to be maximised does not allow us to avoid that problem, because the problem lies in consequentialism, not in our preferred currency of consequences. Would it be legitimate to rob some people of their autonomy to maximise aggregate autonomy for everyone? Yes, it seems. The principle of maximal autonomy would allow us to disenfranchise or expatriate some persons to increase overall autonomy (on both sides of the divide between inside and outside). Not wanting to bite this bullet, Agné instead suggests that exclusion (as well as inclusion, presumably) on such terms is not compatible with his principle because “Political participation for the exertion of autonomy does surely not benefit from the fear created by such measures.”<sup>115</sup>

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<sup>113</sup> Kuper 2006

<sup>114</sup> This problem is unrelated to the unbounded demos thesis that both insiders and outsiders should be taken into account when drawing boundaries. It follows from the ambition to maximise aggregate autonomy.

<sup>115</sup> Similarly, Richard Arneson, a staunch defender of a strict consequentialist justificatory theory of democracy, argues that exclusion from the demos (for example, in the form of weighted voting) is impermissible even if doing so would lead to better outcomes in terms of liberal rights (his preferred measure of good consequences), because it would damage people’s psychological health (Arneson 2004). I believe many people would be no less worried having their rights to participate depend upon so contingent a

This retreat position seems to bring back in a concern for the affected. Moreover, this consequentialist formulation of the autonomy principle also seems to remove boundary decisions from the ambit of democratic decision-making. Like the objective approaches to affectedness, the maximal-autonomy principle does not seem to require that boundary decisions should be actually justified to those who are included and excluded. Instead, it suggests a criterion by which to draw and justify boundaries. In that sense, even though it elevates autonomy as the criterion by which to include and exclude people, this principle seems to be at odds precisely with the idea of democratic autonomy. For who is to judge whether a certain boundary maximises autonomy? We can't vote about it. Just like the all-affected principle, the maximal-autonomy principle would have to rely on some boundary court, constitutional assembly or law-giver to determine the boundaries.

Against democratic consequentialisms of this kind, Jeremy Waldron argues that “any theory that makes authority depend on the goodness of political outcomes is self-defeating, for it is precisely because people disagree about the goodness of outcomes that they need to set up and recognize an authority.”<sup>116</sup> That problem is not solved by the maximal-autonomy principle either.

### 3.4.3 *Subject to the law, not affected*

As we noted at the beginning of this chapter, the all-affected principle may seem intuitively appealing because it builds upon core values in the democratic tradition. Democratic autonomy implies living by laws that you have given yourself and having means by which to protect your interests against the government. A different way to express the congruence between governing and being governed, between making decisions and being affected by them, would be to declare that “The citizen body in a democratically governed state must include all persons subject to the laws of that state”.<sup>117</sup> This subject-to-the-law principle, as I shall call it, solves some, if not all, of the problems that follow from the all-affected principle.

Just like the all-affected principle, the subject-to-the-law principle can be justified in terms of the general ideals of democratic autonomy as self-

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psychological fact and in most real societies, some people have more reason than others to fear exclusion and expatriation.

<sup>116</sup> Cited in cited in Arneson 2004

<sup>117</sup> Dahl 1989: 122. Dahl calls this the “principle of full inclusion”, and it comes with some qualifications, such as excluding “transients and persons proved to be incapable of caring for themselves” from the right to participate, and specifying what a reasonable level of participation requires.



government or as government requiring the consent of the governed. In that way, it can be formulated to be compatible with either a republican or a liberal normative model of democracy, and their respective concepts of law and participation.<sup>118</sup> The republican version stresses that the citizens of a state should themselves be the authors of the laws that constitute their polity, which requires that they participate actively, whereas the liberal version regards the right to participate in making the laws as instrumental to protect individual liberties and personal interests, a right that citizens may practice by electing representatives.<sup>119</sup> Indeed, the subject-to-the-law principle seems to make better sense of these fundamental democratic ideals than the all-affected principle does, since it does not take the detour over the troubling concept of affectedness.<sup>120</sup>

How does being subject to the law differ from being affected by decisions?<sup>121</sup> The two principles do not necessarily overlap: You may be subject to laws that do not affect your interests in any tangible sense, and vice versa.<sup>122</sup> Unlike the consequences implied in the all-affected principle, however, being subject to the law cannot always be expressed as a calculus of costs and benefits. Furthermore, laws normally specify to whom they apply: usually people living within a territorial state.<sup>123</sup> For that reason, the subject-to-the-law principle of-

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<sup>118</sup> Habermas 1998b: Ch. 9; López-Guerra 2005: 220

<sup>119</sup> Dahl 1999b: 145

<sup>120</sup> Someone might object that the subject-to-the-law principle is only an explication of the all-affected principle which relies on a special conception of affectedness purporting that individuals have an interest of some sort not to be subject to laws that they have not given themselves, and that such a theory is just as disputable as other theories of what's in a person's interests. On the other hand, the basic assumption underlying the subject-to-the-law principle could be hinged on many different ideals; but I think no normative democratic theory could do without a baseline assumption about a human propensity for autonomy – about human beings being capable of creating laws for themselves.

<sup>121</sup> The subject-to-the-law principle seems compatible with different conceptions of law. We may either think of it as the general body of law governing a community, or a constitution, or as particular laws. Depending on which conception we use, different conclusions might follow and the ambiguity of the concept of law opens for interesting applications of the principle.

<sup>122</sup> Claudio López-Guerra suggests expatriates as an illustration of this difference: They are generally not subject to the laws of their countries of origin, but may sometimes be affected by their decisions (López-Guerra 2005)

<sup>123</sup> Cf. Beckman 2006a. However, the state's authority and jurisdiction does not always halt at the borders of its territory. From the mid-nineteenth century to the Second World War, Western states claimed exclusive jurisdiction over their citizens in non-Western, non-colonized countries. For example, when a US adventurer in China killed a

fers no internal solution to the boundary problem, since it merely presumes that the relevant community is already determined and that there is already a state in place to maintain the laws and do the subjecting.<sup>124</sup> The principle only states that where there is law, those subject to it have a legitimate claim for inclusion in its making.

The point is, however, that the subject-to-the-law principle sets clearer (if not self-evident) criteria for illegitimate inclusion/exclusion than does the all-affected principle. We can easily think of cases when people are subject to laws that they have not even indirectly or passively participated in making, or cases when people participate in making laws to which they are not even potentially subject themselves. Such cases constitute illegitimate exclusion or inclusion, respectively.<sup>125</sup> Moreover, given that it is easier to determine who is and who is not subject to law than who is affected by a particular decision, illegitimate inclusion and exclusion seem to be more readily identifiable by the subject-to-the-law principle than by the all-affected principle.<sup>126</sup> Hence, the subject-to-

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Tibetan Buddhist lama in 1907, he was tried (and acquitted) by the US District Court for China. In the 1920s, a total of 121 consular courts of Japan, Great Britain, the United States and France operated in China. Extraterritoriality was abolished as Western states came to recognise non-Western states' claims of sovereignty and exclusive territorial jurisdiction (Kayaoglu 2007). Like the all-affected principle, the subject-to-the-law principle might seem to justify more fluid constituencies if extraterritoriality frays the integrity of legal sovereignty.

<sup>124</sup> Habermas similarly suggests that in modern, complex societies, we must regard the medium of law as a matter of fact, and suggest that this helps us avoid the problem of having to justify the prior creation of a community of legal persons:

“we can take the medium of enacted, coercible law more or less at face value as effective and unproblematic. Unlike classical contract theory, the proposed model does not treat the creation of an association of legal persons, defined as bearers of rights, as a decision in need of normative justification. A functional account suffices as justification because complex societies [...] seem to have no functional equivalent for the integrative achievements of law.” (Habermas 1998c)

<sup>125</sup> A colonial power imposing a legal system on a colony springs to mind as an illustration of such illegitimate exclusion (of the colonials subject to the law) and inclusion (of colonial power legislators not themselves subject to colonial law).

<sup>126</sup> Susan Marks blurs the distinction between these two principles when she ponders about how the all-affected principle may solve problems of jurisdiction over foreign businesses:

“[Congruence between decision-making and its outcomes] is lacking when those in one country are made subject to the jurisdiction of another. But, from the perspective of the latter, congruence is also lacking when those in one under-

the-law principle is more specific as to what should be democratically controlled, namely, the power to make law, but not necessarily all and any power to make decisions or take action, individually or collectively, which may affect someone else. Furthermore, we need not fear the absurd policy recommendations that seem to follow from the all-affected principle, because law (ideally at least) applies to all its subjects regardless of their individual properties, even though law may affect them differently.<sup>127</sup>

Notably, both cosmopolitan democracy and deliberative democracy could probably accommodate the subject-to-law-principle in theory. For instance, while the problematic reference to “all possibly affected persons” remain in the discourse principle, self-legislation is a central tenet in Habermas’s theory of the legitimacy of the law: The law achieves its positivity in virtue of being authored by those subject to it.<sup>128</sup> In cosmopolitan democratic theory, law and political autonomy also play a fundamental role, so it seems that cosmopolitan democracy could also accept the subject-to-the-law principle as a better principle for establishing when a legitimate claim to democratic government arises: When people are subject to the law, they have a right to participate in making it, whether it is the law of a nation-state or a future system of cosmopolitan democratic public law. So there seems to be no decisive reasons why a theory of deliberative democracy or cosmopolitan democracy could not accommodate

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take activities which constrain the options available to another country, yet escape its control.” (Marks 2000: 114)

Marks actually alludes to two different kinds of illegitimate exclusion: Her first sentence concerns the subject-to-the-law principle, whereas the second sentence concerns the all-affected principle. This demonstrates why the two principles do not overlap, and why they may even conflict.

<sup>127</sup> On the other hand, just like that version of the all-affected principle requires citizens to be equal and uniform, so that they cannot shield themselves from being affected by political decisions, equality before the law may require that citizens are fairly equal in socio-economic terms: “in a society characterised by great inequality, the rich and poor do not enjoy genuine equality before the law. Laws will often impact differently on people, depending on their wealth and income” (Bertram 2005: 83). Furthermore, even legislation approximating Rousseau’s requirement that all laws be “general in form” (Rousseau 1762: Book I, Ch. 6; Book II, Ch. ) may serve narrow interests (Goodin 1996).

<sup>128</sup> Habermas includes this notion that legitimate law requires consent of those subject to it in what he calls the democratic principle, which applies the discourse principle to legal norms and states that “only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted” (Habermas 1996a: 110). On the other hand, some theorists of deliberative democracy criticise Habermas for being too concerned with law and constitutionalism. Those theorists would probably not accept the subject-to-the-law principle as an advancement over the all-affected principle.

the subject-to-the-law principle as the proper explication of the ideal of democratic autonomy.

Thus, the subject-to-the-law principle seems to be less ambiguous and more applicable, while spelling out in clear terms the same abstract democratic ideals that seemed to resonate with the all-affected principle. If the subject-to-the-law principle is indeed sounder and simpler, does it lend support to claims for transnational democracy? Notably, the principle shifts the grounds for justifying transnational democracy. The crucial question in justifying transnational democracy now is not whether people are affected by transnational decisions or institutions, but whether they are subject to transnational systems of law. This turns out to be a contested empirical issue, with a diverse group of scholars arguing that we are today increasingly witnessing an emerging global system of hegemonic law or a world constitution.<sup>129</sup> I shall consider two sorts of empirical claims about transnational law, which in conjunction with the subject-to-the-law principle may seem to underpin calls for transnational democracy.<sup>130</sup> Considering them in detail serves to outline the content and limits of the subject-to-the-law principle.

Hauke Brunkhorst suggests that we are today already subject to a system of “world law” or “global hegemonic law”, which “extends from the *Lex Mercatoria* to the comparatively fixed domestic as well as supranational positive system of human rights”.<sup>131</sup> Because the democratic ideal of autonomy requires that those subject to the law are also its authors and because people are subject to law that is issued by global or supranational agencies, democracy must also become global in scope, Brunkhorst argues. He lists a number of sources of global hegemonic law: binding decisions made by the United Nations General Assembly and Security Council; agreements made by the World Trade Organization; the statutes of the Organization for Security and Cooperation in Europe and the Council of Europe; international and transnational organizations such as the World Bank and the International Monetary Fund; private organisations such

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<sup>129</sup> See for example Brunkhorst 2005; Habermas 2004; Weller 2002; Tännjö 2006. These claims are related to the Held’s claims about emerging cosmopolitan realities which I address in Chapter 5, and in both cases, I dispute the claims about a nascent cosmopolitan legal order.

<sup>130</sup> A related theme is Held’s claim about “emerging cosmopolitan realities”, which I discuss in Chapter 5.

<sup>131</sup> Brunkhorst 2002. David Held & Anthony McGrew similarly argue that “Increasingly aspects of international law are acquiring a cosmopolitan form. By cosmopolitan law, or global law, or global humanitarian law, is meant here a domain of law different in kind from the law of states and the law made between one state and another for the mutual enhancement of their geopolitical interests.” (Held & McGrew 1998; cf. Held 2002)

as the International Olympic Committee: and intergovernmental institutions like the G8 summits and the Organisation for Economic Cooperation and Development, which “have far-reaching authority for regulating the entire global economy”.<sup>132</sup> Brunkhorst argues that:

“As a whole, the ‘network of agreements’ [...] has led to a new form of international and supranational comprehensive jurisdiction [*Allzuständigkeit*], which is no longer the distinctive property of the sovereign state, but rather is claimed by a multitude of post-national organizations, partly in direct competition with the states that are linked with them.”<sup>133</sup>

Now, let me point to a few problems in justifying transnational democracy on the basis of this empirical claim. First, under the rubric of global hegemonic law, Brunkhorst includes international agreements, statutes of international organisations, international organisations themselves, standards set by private, non-governmental organisations, and mere decisions and resolutions taken at international summits or by the United Nations. By pointing to this vast, multifarious and pervasive body of world law, Brunkhorst can boost his argument for extending democracy to the transnational level. At the same time, however, he also undermines the argument. For what is it about law that makes it so important for those subject to it to be its authors? Its character of being coercive, binding and enforceable on individual citizens, a characteristic not shared by any of the instances on his list. Moreover, stretching the concept of law to include these international institutions also renders the democratic requirements of the subject-to-the-law principle unclear: we are back at being affected by decisions, rather than being subject to the law.

Second, international law proper has certainly gained in content, scope and importance over the past century. But international law is not law in the same sense as positive law within a state. Its sources, its enforcement, its subjects, even its normative and ontological status is different. International law is predicated on the recognition of state sovereignty. Thus, its authority depends on states to voluntarily formulate, observe and enforce it. There is neither an established compulsory judicial system to settle disputes nor a coercive penal system. And while there is, arguably, a tendency in international law increasingly to implicate non-state actors, such as corporations and individuals, its subjects and parties are still predominantly states. Even when international law

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<sup>132</sup> Brunkhorst 2005: 129

<sup>133</sup> Brunkhorst 2005: 130

concerns individuals (refugees, minority groups or war criminals, for instance) it addresses states, not non-state actors, to respect international human rights. And it is still exceptional that international organisations are recognised as parties to international law. Thus, international law turns out to be law of a different kind than that addressed by the subject-to-the-law principle. It is law of states, not of self-governing citizens.

Third, while undoubtedly international institutions have gained in importance too, they are not examples of global hegemony. They result from agreements between states. To the extent that they get implemented, revised, monitored and enforced, sovereign states perform these tasks. Like international law, international organisations do not imply the end of sovereignty – they are implicated on sovereignty. Moreover, the tendency toward increasing juridification or legalization of transnational institutions, that is, to express international agreements in a law-like form, does not necessarily imply actual law-making and law-enforcing capabilities.<sup>134</sup>

The European Union, however, might be a special case. Indeed, in international law the EU stands out because community law has precedence over the national law of member states. Moreover, the European Court of Justice has successively widened its jurisdictional mandate and by the doctrine of direct effect, community law imposes obligations and confers rights upon individual legal subjects in the member states.<sup>135</sup> Thus, by the subject-to-the-law principle, European Union citizens would have a strong and legitimate claim to be the authors, if only indirectly, of its laws. On the other hand, the EU still relies on national judiciaries and other governmental agencies of the member states for implementing and, more importantly, enforcing its legislation.<sup>136</sup>

Finally, coupling the subject-to-the-law principle with the thesis of global hegemonic law in order to revivify claims for transnational democracy creates a problem similar to the one we identified with the all-affected principle. The subject-to-the-law principle depends on sovereignty: It needs a sovereign law-giver, the subjects of which have a legitimate claim in democratic participation. But the thesis of the global hegemonic law disperses the authorship of the law to a multitude of post-national organizations, overlapping and competing with each other's jurisdictions, as well as with states. Along these lines, some legal theorists similarly dispense with the sovereign law-giver altogether. Drawing on Luhmannian systems theory and in opposition to traditional legal doctrine,

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<sup>134</sup> Cf. Zürn 2005

<sup>135</sup> Cramér 1994

<sup>136</sup> Thompson 2006. Notably, scholars all but agree what sort of political institution the EU is (Pollack 2005).

these scholars suggest that a legal system should not simply be understood as the implementation of a sovereign will, but rather as an autonomous system in charge of codifying the code legal/illegal. This holds especially well, they argue, since globalisation has undermined the traditional doctrine that legislation ultimately depends on a constituent power (the sovereign). The upshot of this systems theory version of the global law claim is that there already exists a closed, decentred or polycentric, autopoietic global legal system, producing valid legal norms:

“The global political constitution is not produced by legislation but through decentered legal self-reflection and through a global community of courts, which ascertain legal validity and legal violations.”<sup>137</sup>

Thus, this approach decouples the concept of legal validity from the concept of sovereignty. Breaking the link from the global legal subsystem to sovereignty, this account of global law seems difficult to adjoin with the subject-to-the-law principle to support a claim for transnational democracy. If laws are not made by an identifiable, sovereign law-giver, the subject-to-the-law principle lacks a clear target for its claims about democratic autonomy. The subject-to-the-law principle requires a sovereign, a law-giver, something which the systems theoretical account of global law denies.<sup>138</sup>

Of course, like the all-affected principle the subject-to-the-law principle lacks a preference for levels. Even if global hegemonic global law exists in the extent that Brunkhorst and others suggest, we could conclude that the power to legislate should be brought back to national legislatures, rather than that transnational legislation should be brought under transnational democratic control. On this point, the two principles are equally indeterminate and would have to be complemented by some claims about why re-nationalisation is either unfeasible or undesirable, or both. But re-nationalisation might be the more compelling alternative, since, as Dominique Leydet argues, we cannot expect that the “totality of addressees” of global norms will ever be able to exercise its sovereignty rights.<sup>139</sup>

Thus, while the subject-to-the-law principle could lend some support to transnational democratisation, its consequences are more restricted and spe-

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<sup>137</sup> Cohen 2004: 10

<sup>138</sup> Cohen 2004: 7. Hereby, I only indicate a possible inconsistency between the subject-to-the-law principle and certain claims about a dispersed, autopoietic system of global law; I do not, of course, suggest that such claims should be rejected because of this inconsistency.

<sup>139</sup> Leydet 2006

cific than those following from the all-affected principle. It does not, I have argued, justify sweeping claims for global democracy, but it might suggest that specific institutions like the European Union and other international legislative bodies should be democratically accountable to those who are subject to the laws that they issue. However, whether such institutions do in fact enact law turns out to be a contested empirical, or even ontological, matter.

### 3.5 CONCLUSION

Now, our conclusion may be somewhat awkward. I have argued in this chapter that the all-affected principle should be rejected, because it does not help us draw the proper boundaries of political community and because it may have some rather unpleasant consequences if we were to try to approximate it anyway. For transnational democrats, the question now is what remains of their calls for transnational democracy if they simply discard the all-affected principle, which has been so central in tying their diagnosis of a globalising world with a call for transnational democratisation. While solving some of the problems with the all-affected principle, the three alternatives I have considered here do not solve the fundamental boundary problem, and thus cannot fully amend transnational democracy. The subject-to-the-law principle seems to be least problematic, because it substantiates the more well-defined claim that any already existing lawgiver should be democratically governed. But even so, it does not give an internal solution to the boundary problem.

I believe these attempts to solve the boundary problem in democratic theory demonstrate what many political theorists have known for a long time: That the problem is unsolvable in principle, which means that a democratic community cannot lift itself by the hair and provide its own justification in democratic terms. Of course, that does not mean that we can never solve boundary problems in both theory and practice, only that we cannot in advance justify our solutions in terms of democracy. Chris Brown argues that the quest for a democratic legitimacy of borders is symptomatic of a wider problem, by which political theory is reduced to moral theory and all social arrangements are regarded as in need of rational justification. But, as Brown suggests, we have no reason to believe that such justification is always going to be available:

“Politics is about practical action in a realm where no answer can be other than provisional, not about the application of formulae concerning matters such as social justice – and it ought not to be surprising that



when formulaic approaches are made to subjects such as the legitimacy of borders the argument quite soon breaks down.”<sup>140</sup>

Even, or especially, some would say, in an allegedly globalising world, boundaries are ubiquitous. Drawing, defending, transgressing and challenging the boundaries between inside and outside are among the most political of issues, and as I hope to have demonstrated in this chapter, it is at best naïve to think that we could find some formula by which to bridge the gap between the people and its constitution and, once and for all, make the drawing of boundaries uncontroversial and, effectively, apolitical.<sup>141</sup>

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<sup>140</sup> Brown 2000

<sup>141</sup> Cf. Näsström 2003



## 4. Democracy versus human rights

Most of us would probably spontaneously hold that both democracy and human rights are important. We are so used to speaking and hearing of them in conjunction that we often regard them as more or less synonymous. Or we may think of human rights and democracy as sibling concepts, both expressing a common notion of human autonomy, dignity and freedom. Moreover, we usually see them not only as compatible in practice but also as conditions for each other – we cannot have democracy if human rights are not safeguarded and where democracy is lacking, the respect for human rights is usually wanting or worse.

However, despite our common intuitive and plausible notion that human rights and democracy are like two sides of a coin, so that we cannot have one without the other, we may also easily think of cases where the two seem to be in tension or outright conflict with each other. For instance, should a constitution with a bill of rights or international human rights conventions lay constraints on what the sovereign people may decide in a democratic order? And if so, could such individual rights be decided democratically? If we perceive these questions as troubling, we also see why human rights and democracy may stand in a more problematic relation to each other than the common sense notion reveals. It is hardly surprising that human rights and democracy may conflict. After all, constitutions and international human rights treaties alike serve to restrict what a self-determining polity, however democratic its political system, may do towards its own members.<sup>1</sup>

The problem is as old as democratic theory: What is the proper relation and priority between popular sovereignty and individual rights, between majoritarian procedures and minority protections, between the liberties of the ancients and the liberties of the moderns? Traditionally, debates have focused on whether a self-governing, democratic community should and could constrain

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<sup>1</sup> Gould 2004: 190

itself by a constitution protecting the rights of minorities and individuals against the tyranny of the majority. While liberal democrats traditionally have endorsed such constitutional constraints on democracy to safeguard the liberties of citizens, republican and radical democrats have often criticised and rejected such constraints. While the debate over human rights has often followed parallel tracks, human rights differ from constitutional civil liberties in some important respects.<sup>2</sup> Certainly, we often think of both constitutional rights and human rights as giving legal and political expression to a common conception of individuals as bearers of fundamental moral rights. Sometimes international human rights commitments even gain the legal status of constitutional and legal rights. However, constitutional rights are obligations towards its citizens which a political community accepts by adopting a constitution, whereas human rights are obligations to its subjects which a state accepts by ratifying international treaties.<sup>3</sup> You hold constitutional rights in virtue of being a citizen of a constitutional state, while you have human rights, as they are commonly understood, because you are a human being.<sup>4</sup>

In this chapter, we turn to the question of human rights and democracy. Theorists of transnational democracy usually seek to express a commitment to both human rights and democracy as fundamentally important. Much like our common-sense intuition, some theorists argue that democracy and human rights depend on and constitute each other while others argue that they are not in fact in conflict because they are based on a common foundation of human freedom and autonomy. These theorists claim that we can resolve the tension without subordinating either leg of the dilemma, and that democracy and human rights, properly understood, presuppose each other.

I shall argue, however, that theorists of cosmopolitan democracy and deliberative democracy, here mainly represented, respectively, by David Held and Jürgen Habermas, have been unsuccessful, albeit in different manners, in presenting a theory of the relation between human rights and democracy. Although they seemingly agree that human rights and democracy are two sides of a coin and although they tap similar resources in building their argument (basically, a theory of the modern legal state and a conjunction of liberalism

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<sup>2</sup> And this is to say nothing about the substantive content of each class of rights, their moral status or their political and juridical enforceability – aspects which may add to the distinction of constitutional rights and human rights.

<sup>3</sup> Both sort of obligations may be positive or negative, or both.

<sup>4</sup> As Jack Donnelly puts it, “constitutional rights are held by human beings without their being necessarily human rights; that is, they are rights of persons without being among the rights of man.” (Donnelly 1982)

and republicanism), on closer inspection they end up in quite different positions. Theorists of cosmopolitan democracy give an extensive scheme of human rights a priority so strong that democratic procedures, and the corresponding rights, are effectively reduced to a minimum. Conversely, by insisting that human rights and democracy are “co-original” and internally related, theorists of deliberative democracy have difficulties providing a theory of international human rights.

The chapter is arranged in two sections. First, I turn to the central role that David Held assigns to human rights in his theory of cosmopolitan democracy in which the tension between human rights and democracy is resolved by a conceptual shift. I argue that by defining democracy in terms of the realisation of a fixed scheme of human rights, cosmopolitan democracy gives too little elbow-room for democratic politics. Second, I turn to Jürgen Habermas’s claim that human rights and democracy are “co-original”, interdependent and internally related. After reconstructing Habermas’s claim, I discuss three problems inherent in his approach, most notably that if we anchor the system of rights in actual deliberative procedures, it becomes difficult to justify international human rights in the absence of global legal and democratic institutions.

#### 4.1 HUMAN RIGHTS IN COSMOPOLITAN DEMOCRACY

David Held, Daniele Archibugi and other theorists of cosmopolitan democracy claim to turn cosmopolitanism into a political project by coupling it with democracy. That is, they claim to successfully combine the universalism of cosmopolitanism, whereby all humans belong to a single moral community, with the ideal of democracy, usually conceived as particularistic in the sense of presupposing a delimited self-governing political community. Cosmopolitan democracy promises to combine institutionally a strong account of universal human rights with democratic self-determination.

Is cosmopolitan democracy a successful innovation in this sense? I shall argue that it is not. While its advocates present themselves as democrats with a radical agenda, wishing to expand democracy to transnational levels and within and between states, they resolve the tension between human rights and democracy by defining democracy as the implementation and institutionalisation of an extensive, fixed and non-negotiable scheme of rights. Paradoxically, democratic processes become dispensable or, at any rate, get scaled down to a mere apolitical technicality. In the following, I start by reconstructing the cosmopolitan democracy approach to rights and democracy, starting from a principle of autonomy extending into a global “democratic public law”, and there-

after address some problems in this cosmopolitan conception of rights and democracy.

#### 4.1.1 *Autonomy and the democratic public law*

David Held starts his journey to cosmopolitan democracy from a principle of autonomy, as the smallest common denominator in modern democratic political thinking. “Autonomy”, he suggests, “is the capacity of human beings to reason self-consciously, to be self-reflective and to be self-determining”.<sup>5</sup> While the principle of autonomy expresses aspirations for self-determination in republicanism and Marxism, the liberal democratic tradition alone expresses it fully, Held argues, because radical democratic traditions “overly rely upon a ‘democratic reason’ – a wise and good democratic will – for the determination of just and positive political outcomes.”<sup>6</sup>

The principle of autonomy, Held argues, requires that everyone has equal rights and duties to participate in constituting the political system which determines their collective life conditions, provided that they do not thereby violate other persons’ rights:

“Persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them: that is, they should be free and equal in determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others.”<sup>7</sup>

Hence, we may understand autonomy, in Held’s view, as the ultimate baseline value, the promotion of which justifies both democracy and human rights, and which thus provides the key to resolving the alleged tension between the two.<sup>8</sup> Two things are worth noting about this principle of autonomy. On the one hand, it ascribes to persons rights and duties to participate in determining their political framework – a positive conception of liberty, rather than the liberal concept of individual freedom from intervention. This indicates a first definitional shift serving to resolve the tension between rights and democracy, because the rights following from this conception of autonomy seem to restrict the scope of basic rights to collective self-determination: The basic rights that

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<sup>5</sup> Held 1995a: 146

<sup>6</sup> Held 1995a: 149

<sup>7</sup> Held 1995a: 147

<sup>8</sup> Carol Gould similarly argues that the “democratic paradox” can be resolved since both democracy and human rights fall back on a common principle of autonomy (Gould 2004; 2006).

people should have are those that enable them to be self-determining. On the other hand, this resort to autonomy as an underlying, axiomatic value may also prepare the ground for an instrumentalist justification of democracy: Democracy is desirable to the extent that it fulfils or realises the principle of autonomy better than practicable alternatives. Thus, as Simon Caney notes, “valuing autonomy not only does not commit one to valuing democracy: it may lead one to wish to circumscribe democratic government.”<sup>9</sup>

So how does cosmopolitan democracy move from this principle of autonomy to a scheme of rights? Rights are supposed to safeguard individuals from being deprived of their autonomy in various social and political institutional settings – what Held calls sites of power. Such deprivation consists in everything from war and violence to malnourishment and improper schooling, but takes different expressions in each site of power.<sup>10</sup> Each site of power also corresponds to a cluster of rights – health rights, cultural rights, political rights, and so on – necessary to enable citizens to participate on free and equal terms in regulating their own associations, that is, necessary for all citizens to be equally autonomous.<sup>11</sup> Taken together, the rights that are supposed to enable people to be equal participants in the political and social affairs of their society make up what Held calls the “democratic public law.” The democratic public law sets up a democratic meta-framework, which provides “criteria by which one can judge whether or not a given political system or set of arrangements is democratic.”<sup>12</sup> It lays down the agenda for democratic politics, Held suggests, but leaves open exactly how and in what order each of the items on the agenda should be interpreted and implemented in particular circumstances.

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<sup>9</sup> Caney 2005: 155

<sup>10</sup> Held suggests that human life can be cut down to seven such sites of power: (1) the body, (2) welfare, (3) culture, (4) civic associations, (5) economy, (6) violence, and (7) the state. For example, the body as a site of power regards the individual’s physical well-being and deprivation here means that you don’t have the resources or opportunities, for example means of subsistence, that you need to be able to engage in social interaction. Likewise, economy concerns how to organise the way in which goods and services are produced, distributed, exchanged, and consumed, a site of power where systematic inequalities in social and economic resources lead to a lack of autonomy. But Held is less clear as to why precisely these seven sites of power are the most important ones (or indeed all there are) and whether they should be regarded as analytical constructs or as something that could and should be institutionalised as forms of governance.

<sup>11</sup> In practice, however, the ideal of autonomy might not always be fully attainable, but it is still worth striving for, Held argues. By anticipating an ideal autonomy and defending that it is desirable, we do not claim that it is also attainable and feasible. It should rather be regarded as a counterfactual posit.

<sup>12</sup> Held 1995a

Now, in the following I shall argue, first, that the rights enshrined in the democratic public law can hardly serve as an agenda for democratic politics, because reasonable people may legitimately disagree over the goals of politics in a democracy and rights may themselves often be the source of conflicts in society. Secondly, I shall argue that by defining democracy as human rights, cosmopolitan democracy comes to present a political ideal that is both too wide, because it claims to encompass all spheres of society, and too thin, because it gives little room for actual democratic participation. It fails to bring together the various democratic models it claims to draw upon.

#### 4.1.2 *Rights as an agenda*

A first criticism of cosmopolitan democracy's account of human rights concerns precisely its conception of rights as an agenda for politics. Theorists of cosmopolitan democracy argue that rights could and should serve a steering role in the political process. The scheme of rights as expressed by the democratic public law both set the agenda for democratic politics and serves as an arbiter when interests conflict. Against this view, which seems to assume that rights implementation is a fairly technical matter, I shall argue that the conception of rights in cosmopolitan democracy makes them inapt both to serve as goals for political development and as arbiters when goals and interests conflict.

Cosmopolitan democracy, Held writes, "connotes nothing more or less than the entrenchment of and enforcement of democratic public law across all peoples – a binding framework for the political business of states and societies and regions, not a detailed regulative framework for the direction of all their affairs."<sup>13</sup>

And yet many of the rights he specifies in the democratic public law are detailed and specific, including rights to universal childcare, universal education and community services, rights to active membership of civic associations, and a guaranteed minimum income. Once rights to childcare, minimum income, and so on have been 'entrenched and enforced across all peoples', what scope remains for political disagreement and decision-making? By posing this fixed list of substantive rights as the very measure of democracy, Held suggests restrictions on democratic politics (or in fact on all sorts of politics, democratic or not). Other rights suggested by Held are notably open-ended, but may prove just as problematic when serving as an agenda for democratic politics. Exactly what are people entitled to in order to enjoy their rights to "physical and emo-

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<sup>13</sup> Held 1995a: 233



tional wellbeing”, or their rights to toleration, “peaceful coexistence” and a “lawful foreign policy”?<sup>14</sup>

Notably, Held does not address how the democratic public law could be changed, amended, replaced, or even abolished. He assures us that there is room for interpretation and deliberation by the democratic assemblies, courts and other institutions that are set to implement the provisions of the democratic public law. Priorities will differ in different contexts, Held argues. But the scope for negotiation concerns only how to interpret and implement the democratic public law. And it must be so, Held argues, since if we do not recognise that democratic principles provide this “non-negotiable set of orientation points for political practices”, then “democratic rights would be no more than rhetorical, and democratic politics would be without a *constitutive core*” – the very feature that allows it to be characterised as democratic.<sup>15</sup> It largely follows from the instrumentalist justification of democracy and the principle of autonomy that the democratic public law cannot in itself be up for grabs in the political process, if it is to serve as an agenda and ultimate arbiter when political ends conflict (“to guide and resolve disputes”). Additionally, this approach seems to assume that the broad scheme of human rights form a harmonious, indivisible and interdependent unity. Thus, for example, rights of different kinds presuppose each other.<sup>16</sup> The claim that rights form a unity seems to be central if rights are to serve as agendas for political reforms.<sup>17</sup>

But the claim that rights are unitary might seem to miss that rights are often themselves a source of conflict. Rights are political and they may give rise to conflict when people claim them. Expressing a political understanding of human rights, Micahel Ignatieff argues that declarations, covenants, and conventions produced by the international human rights regime are not a harmonious, unitary, and balanced moral system. To the contrary, the noble human ends that these declarations proclaim conflict. And because these ends conflict, the rights that define such ends as entitlements conflict too. Even demands within a single right may conflict with each other, such as when the right to proselytize conflicts with the right to practise one’s religion.<sup>18</sup> Such conflicts

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<sup>14</sup> Held 1995a: 192ff

<sup>15</sup> Held 1995a: 201

<sup>16</sup> Goodhart 2005

<sup>17</sup> Or is it? A list of rights which prioritises between different rights, suggesting, for instance, that some rights are more basic than others, could presumably better set the priorities of implementing institutions and also serve better as arbiters when rights claims conflict.

<sup>18</sup> cf. Gray 2000: 111

can be settled, but rights themselves rarely provide the means to settle them. It is thus naïve to believe that rights can serve to resolve political disagreement:

“When political demands are turned into rights claims, there is a real risk that the issue at stake will become irreconcilable, since to call a claim a right is to call it nonnegotiable, at least in popular parlance.”<sup>19</sup>

In order to reach closure in a political disagreement, we need other factors than rights-claims. Closure is reached when parties are exhausted with conflict or begin to recognise and respect each other, Ignatieff argues. But we may also reach closure by subjugating the dissenting party or by joining forces against a new common enemy. And the process is entirely political. Human rights is a kind of politics “that must reconcile moral ends to concrete situations and must be prepared to make painful compromises not only between means and ends, but between ends themselves.”<sup>20</sup> Thus, a scheme of rights is not likely to function as an arbiter or even as an agenda to be implemented by political assemblies, even if we could get all parties to agree to the actual content of rights.

Moreover, as we have already seen, many of the rights suggested in the democratic public law are indeed not abstract and universal at all, but specific and particular. The rights’ specificity make them less universal in scope – they are in fact modelled on contemporary, industrialised Western welfare states, and we can at least imagine societies where wage labour is not a predominant institution and where, consequently, such political concerns as childcare, terms of employment, or minimum income are simply irrelevant or undesirable.<sup>21</sup> But moreover, these are precisely the kind of topics that are contested and debated in the democratic process, even in those historically particular welfare states. Why couldn’t a democratic political order allow ends like these to be fundamentally challenged? In democratic politics, conflicts concern the ends just as much as the means. As Jeremy Waldron argues, “Disagreement on matters of principle is [...] not the exception but the rule in politics.”<sup>22</sup> And that is why we need democratic processes to make up our collective mind. A conception of democracy that rules out such disputes over the goals of collective decision-making appears to be neither very realistic, nor very democratic. Cosmopolitan democrats here seem to put the carriage before the horse, since

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<sup>19</sup> Ignatieff 2001

<sup>20</sup> Ignatieff 2001

<sup>21</sup> cf. Gray 2000: 110; Gould 2004: 56

<sup>22</sup> Waldron 2001

they presuppose a given, non-negotiable answer to all the important questions democracy is supposed to answer. To conclude, cosmopolitan democracy implies a rather strange move from a principle of autonomy which gives persons equal rights to be collectively self-determining to a strict substantive agenda for politics.

#### 4.1.3 *Redefining democracy as human rights*

Moreover, cosmopolitan democracy seems to resolve the tension between democracy and human rights by conflating the terms. Democracy is thus not only justified in terms of human rights, but defined as the realisation of a scheme of human rights. A consequentialist or instrumentalist justification of democracy holds that democracy is justified if, and only if, it produces better outcomes (according to some standard such as the common good, civic virtue, equality or respect for basic rights) than do other available decision-making procedures.<sup>23</sup> Cosmopolitan democracy however, goes farther than such general consequentialist justifications of democracy, by suggesting, in effect, that democratic procedures are *democratic* if and only if they lead to the desirable outcomes in terms of the democratic public law.

A consequentialist justification of democracy may well admit that there are cases where non-democratic procedures would result in better outcomes in terms of justice, utility or whatever standard is used for justification. Consequentialists about democracy do not balk at suggesting that institutions such as families, workplaces, courts, central banks, or international institutions should not be governed by majoritarian democratic procedures, since they would only have to prove that having them put under direct popular control would not lead to better consequences.<sup>24</sup> Consequentialist democrats are therefore sometimes charged with being authoritarian, elitist, and undemocratic.<sup>25</sup>

Theorists of cosmopolitan democracy seemingly wish to avoid such allegations. In claiming that institutions and decisions are democratic if and only if they conform to the democratic public law, Held seems to try to collapse the distinction between human rights and democracy, but he can do so only at the expense of the democratic procedure as a legitimating mechanism. This conflation between rights and democracy is problematic, and the case for cosmopolitan democracy would probably benefit from being understood as a plain in-

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<sup>23</sup> Arneson 2003; 2004

<sup>24</sup> cf. Arneson 1993; Majone 1996.

<sup>25</sup> Perhaps most deservedly so when they propose voting weighted by competence (Mill 1991 [1861]), disenfranchising the elderly (Van Parijs 1998), or abolishing local democracy (Arneson 1993), all in the name of the best outcome (but by different standards).

strumentalist justification of democracy, that is, by acknowledging limits on democratic rule for what they are.

But Held seems unwilling to acknowledge such limits. For sure, he motivates the principle of autonomy from two basic ideas, shared, he claims, by all proponents of the modern state project: that people should be self-determining and that democratic government must be limited government. Combined, he argues, these two ideas are supposed to keep at bay both the idea of the all-powerful state and the idea of the all-powerful people. Thus, Held identifies the modern state with a liberal democratic model of the constitutional state, an institutional order where political power is legally circumscribed, checked and balanced. On the other hand, Held also criticises the liberal democratic model for being too concerned with representative, constitutional government, a focus which he argues makes liberal democracy blind to power inequalities and “at best, a very partial form of democratic politics. [...] for democracy to flourish it has to be fully entrenched in and among those sites of power which have unnecessarily restricted its form and efficacy.”<sup>26</sup>

However, these claims both to incorporate the liberal democratic model and to extend democracy to all sites of power bring into the theory the very contradiction it aims to resolve: Powerful institutions restricting the “form and efficacy” of democracy are an essential part of the liberal democratic model. Within this model, different institutions are empowered to take on different tasks and objectives, not all of which concern fulfilling an agenda of a democratic public law, or even protecting basic rights, if this institutional order is to be preserved. Moreover, as William Scheuerman points out, Held and Archibugi misread the concept of rule of law, the *Rechtsstaat*, which requires that state action rests on legal norms that are general in character, clear, public, prospective and stable. In liberal jurisprudence this notion of rule of law helps setting the limits on legitimate state intervention in the sphere of individuals. But in cosmopolitan democracy, rule of law merely implies that legislators and courts are to act in accordance with the rights enshrined in the democratic public law:

“Archibugi and Held redefine the *Rechtsstaat* in terms of a set of basic rights purportedly able both to ‘empower’ legal actors and effectively ‘circumscribe’ them. But [...] courts ultimately are destined to take on weighty discretionary authority. [...] Given the fact that these rights ‘must be defined broadly’, one wonders how they, in fact, might succeed in effectively binding or circumscribing state authority.”<sup>27</sup>

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<sup>26</sup> Held 1995a: 153; cf. Marks 2000

<sup>27</sup> Scheuerman 2002.

While disagreeing with aspects of cosmopolitan democracy, Michael Goodhart presents a conception of transnational democracy which, just like Held's, defines democracy as the implementation and institutionalisation of a broad scheme of human rights. Indeed, Goodhart calls his approach "democracy as human rights", which "understands democracy as the political commitment to universal emancipation through securing the equal enjoyment of fundamental human rights."<sup>28</sup> Following this definition of democracy, democratisation comes to mean:

"extending the social guarantees of fundamental human rights beyond the familiar limits of the political as it has traditionally been understood to encompass all those conceptual domains [for instance, family, workplace, civil society, transnational sphere] where governance occurs and where domination and interference are thus likely. [...] But 'democratization' does not mean creating majoritarian representative institutions; it means creating secure institutional guarantees for human rights."<sup>29</sup>

Thus, Goodhart here seeks to redefine the terms, so that democracy comes to mean the institutionalisation of human rights. The problem with this approach is not so much that it conflates the terms of democracy and human rights, so that democracy comes to mean nothing more and nothing less than the institutionalisation of human rights. After all, reformulating concepts is a legitimate task of a political theorist. More severely, first, the political aspects of democracy – democracy as a collective political process whereby people get along together even though they disagree – become subsumed, at best, under an institutional scheme designed to implement rights on behalf of people. Moreover, this institutional scheme is extended to include virtually all aspects of social life, while leaving few channels for citizens to actually influence the process of realising and securing their rights.

By thus redefining democracy as the institutionalisation of human rights, this brand of cosmopolitan democracy takes on a paternalist quality. This paternalism becomes evident in Andrew Kuper's account of representation as responsiveness. While asserting that a theory of representation in democracy should construe "citizens as agents with a degree of active control over rulers and policies", Kuper attempts to steer a middle course between letting the public judge its own best interest and handing over such judgment to rulers.<sup>30</sup> At

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<sup>28</sup> Goodhart 2005: 150, emphasis removed

<sup>29</sup> Goodhart 2005

<sup>30</sup> Kuper 2006: 80f.

the same time, he rebuts what he calls the subjectivist views, according to which interests are best judged by considering what individuals actually choose for themselves or what they would choose under ideal conditions. People may be misinformed about their true interests and systematically acting in ways which are not good for them, Kuper argues, and since ideal conditions, such as what we would choose if we had perfect knowledge, are unattainable, they are of little use in determining our best interests. From this rejection of subjectivism, Kuper constructs his own argument for making political institutions more responsive to the people's interests, but not by means of electoral representation alone or even primarily, but via a broad range of accountability and advocacy agencies empowered to safeguard individual and collective interests.<sup>31</sup>

However, Kuper misconstrues the liberal view he criticises: The point is not that by letting individuals themselves judge what is in their own best interest, we could gain objective knowledge about what those interests are. Rather, the point is, first, that being the judge of one's own best interests is an integral part of being treated as an autonomous person. It is not an epistemic claim, but a moral claim that it is wrong not to treat people as the best judges of their own interests. Second, liberals argue that while individuals might be mistaken about their true interests and make suboptimal choices, the alternatives to letting them judge themselves are almost always worse, not only because it disrespects their autonomy, but also because people tend to be at least as poor judges of other people's interests as of their own.<sup>32</sup>

Thus, the scheme of rights takes a strong priority over democracy in cosmopolitan democracy. Gillian Brock gives a clarifying account of Held's view on the relation between rights, democracy and legitimacy. It is not democratic processes, but the democratic public law that confers legitimacy upon decisions, policies and institutions:

“Held believes that under the cosmopolitan democracy model, systems would enjoy legitimacy to the extent that they enacted democratic law, so direct consent of the people is not always necessary for all policies to have legitimacy. Ideally, people would consent, but consent is not always necessary for all policies to have legitimacy.”<sup>33</sup>

Democratic participation is actually not necessary to convey legitimacy to political decisions and institutions; it is only desirable, presumably, since the

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<sup>31</sup> Kuper 2006

<sup>32</sup> Dahl 1989: Ch. 4-5; Mill 1991 [1859]

<sup>33</sup> Brock 2002

right to “direct involvement and/or elector (sic) of representatives in political bodies” is inscribed in the democratic public law as one right among many.<sup>34</sup> But then we have come a far way from Held’s principle of autonomy, granting persons equal rights and duties in determining the political framework within which they live.

Along similar lines, David Chandler criticises cosmopolitan theorists for extending the concept of rights beyond the confines of the sovereign state without supplying mechanisms by which these new rights institutions can be made accountable to their subjects.<sup>35</sup> Chandler argues that the cosmopolitan framework can legitimise that existing rights of democracy and self-government are abolished, while the new democratic rights of cosmopolitan citizens remain tenuous. By placing the democratic public law above democratic procedures, cosmopolitan democrats seem to engage in a sort of contradiction. They suggest that we need democratic governance beyond the nation-state because nation-states have lost an important part of their political autonomy to increasingly independent international institutions. But the democratic public law turns out to be an international institution just as independent and unaccountable as the institutions it is supposed to override.

To conclude: the self-declared ambition in Held’s theory of cosmopolitan democracy is to bring together the universalism of cosmopolitanism, granting universal and equal rights to all human beings everywhere, with the particularism of democracy, according to which people have a right to participate in determining their communities. But, as I have argued here, cosmopolitan democracy is inconclusive precisely in this respect. By defining democracy in terms of the institutionalisation and implementation of a scheme of human rights, cosmopolitan democracy essentially collapses the former concept into the latter, so that the democratic aspects of the model virtually disappear. While Held claims to draw upon both participatory and liberal ideals of democracy, in the end, the model of cosmopolitan democracy neither includes the mechanisms of active, popular participation in self-government nor the liberal institutional model constraining government. And in that case, it remains unclear why we need to hold on to the concept of democracy, if it means nothing more and nothing less than implementing a scheme of rights.

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<sup>34</sup> Held 1995a: 194

<sup>35</sup> Chandler 2003; Thaa 2001

## 4.2 DELIBERATIVE DEMOCRACY AND THE CO-ORIGINALITY THESIS

Like most scholars approaching the problem of transnational democracy, some theorists of deliberative democracy have taken a profound interest in the relation between democracy and human rights. But whereas cosmopolitan democrats suggest that democracy should be understood as the realisation of human rights, theorists of deliberative democracy, and most notably Jürgen Habermas, instead argue that human rights and democracy are interdependent, co-original and co-constitutive. A central argument in deliberative democratic theory, the so-called co-originality thesis suggests that the values or principles of human rights and democracy are not only both fundamental and mutually support each other, but also co-original and co-constitutive – they “reciprocally presuppose each other”.<sup>36</sup> As formulated by Jürgen Habermas, the co-originality thesis promises to solve what he suggests is a paradox between human rights and popular sovereignty in modern political theory.

In this section, I shall examine the co-originality thesis as a central claim in deliberative democratic theory.<sup>37</sup> Several critics argue that the co-originality thesis proves difficult to maintain and that it ultimately founders on the very dilemma it is supposed to overcome. I shall present three problems with the thesis that human rights and democracy are co-original. First, since the co-originality thesis implies that the precise content of individual rights must be articulated through actual deliberative procedures, it becomes difficult to justify such procedures unless we assume a principle of legitimacy demanding respect for persons as free and equal. Second, insisting on this view leads to a vicious regress, because everything seems to be up for grabs in the deliberative procedure among free and equal persons – even the conditions constitutive of deliberative procedures. Third, and crucially for a theory of transnational democracy, if we stick with the co-originality thesis, it becomes difficult to justify an account of international human rights, as distinct from the individual rights of citizens, because rights cannot be given particular content in the absence of

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<sup>36</sup> Habermas 1996a; 1998b; cf. Rummens 2006; Bohman 1998; Cohen 1999

<sup>37</sup> I do not claim that Habermas is representative or typical of the motley stock of deliberative democratic theory. Rather, his argument merits to be considered because he comprehensively and sophisticatedly elaborates and defends the co-originality thesis. Some deliberative theorists concur with the claim that human rights and democracy are interdependent (Thompson 1999; cf. Bohman 1998), while others elaborate no prominent normative function for human rights in the theory of deliberative democracy (Dryzek 2006; 1999; 2000).



universal democratic procedures. Before addressing these problems, however, I shall provide a brief outline of Habermas's thesis on co-originality and how he claims to resolve the alleged tension between human rights and democracy.

#### 4.2.1 *The co-originality of human rights and democracy*

"Which comes first", Habermas asks, "the individual liberties of the members of the modern market society or the rights of democratic citizens to political participation?"<sup>38</sup> Giving an historical account of how the principles of rule of law and popular sovereignty united into the seemingly paradoxical concept of constitutional democracy, Habermas develops his argument that human rights and democracy are internally related and co-original. The alleged paradox consists in that if we wish to justify constitutional democracy consistently, it seems that we must rank the two principles, human rights and popular sovereignty.

Liberalism, as Habermas understands it, has traditionally prioritised individual rights over democratic procedures, while republicanism has inversely regarded popular sovereignty as more fundamental than individual liberal rights. Put differently, while both traditions stress the value of autonomy, according to Habermas, liberalism privileges private autonomy and people are thus free to the extent that they can realise themselves and pursue their individual aspirations (without impinging on the same right of others), whereas republicanism privileges public autonomy: the collective self-determination of the political community; and citizens are free to the extent that they live by laws that they have given themselves.<sup>39</sup> Stuck between these two options, "political philosophy has never really been able to strike a balance between popular sovereignty and human rights, or between the freedom of the ancients and the freedom of the moderns."<sup>40</sup> That is what the co-originality thesis promises: To reconcile at a conceptual level the one with the other; public with private autonomy.<sup>41</sup>

Posing the question like a paradox, Habermas prepares the ground for his own solution: that human rights and popular sovereignty presuppose each

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<sup>38</sup> Habermas 2001a

<sup>39</sup> By extension, Habermas suggests that liberalism and republicanism correspond to his distinction between the moral and the ethical. More generally, Habermas wedges in his own discursive theory of democracy between liberalism and republicanism, suggesting that it rescues, reconciles and synthesises the best insights from the liberal-representative and republican-participatory models of democracy (cf. Habermas 1995).

<sup>40</sup> Habermas 1998b: 258

<sup>41</sup> Habermas 1996a: 84

other and are internally related to each other.<sup>42</sup> Neither comes first, or both, like the proverbial hen and egg:

“as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected. Consequently, the sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized.”<sup>43</sup>

That is, if people are to be able to exercise their popular sovereignty by participating in making the laws that govern their society, they must also be endowed with the rights that make it possible for them to communicate and deliberate rationally with each other. Now, this solution seems only to justify the kinds of rights that enable people to engage in deliberation with each other – rights to participate and to speak freely, for instance – but not those other rights that we may also consider important, such as civil liberties safeguarding individual privacy from government intervention. Equal rights to participate in political procedures are more or less by definition implied in the concept of democracy, but it is the other kind of rights, the non-political liberties, that account for most of the alleged paradox, precisely because they are not already implied in the democratic procedure. In that case, Habermas would only be able to justify rights instrumentally: Only those particular rights are justified that enable people to participate in democratic procedures.<sup>44</sup>

Presumably acknowledging this possible objection, Habermas argues that the non-political rights are already implied by the legal order as such.<sup>45</sup> Citizens

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<sup>42</sup> Cf. Taylor 2000. Joshua Cohen suggests that while other theorists too stress that individual rights and democracy are equally fundamental and interrelated, Habermas’s claim about the co-originality of private and public autonomy is best understood as a theory about why the two forms of autonomy are co-original (Cohen 1999). Moreover, Habermas’s co-originality thesis can also be read as an historical thesis about modern constitutional democracies, which incorporated a certain concept of positive and legitimate law and – eventually – both human rights and popular sovereignty into “their normative self-understanding” (Habermas 1996a: 94). But the relation is not simply an historical accident, but also conceptual or internal, in Habermas’s terms.

<sup>43</sup> Habermas 1996a: 104

<sup>44</sup> Furthermore, if the prime purpose of human rights is to enable people to participate in democratic procedures, then rights should be assessed as to whether they actually do so, and they might legitimately be restricted to the degree that they do not.

<sup>45</sup> Habermas 1998a: 176; 1998b: 259

of modern, complex societies must regulate and coordinate their interaction through the medium of law and law as such grounds a basic scheme of rights by constituting citizens as legal persons. Thus, the legal order that protects the private autonomy of the citizens also provides the institutional conditions under which citizens can address each other collectively as a democratic community, as authors of legitimate law, and that would explain why citizens must also be warranted classic liberal civil liberties in order to be both authors and addressees of legitimate law.<sup>46</sup> This solution is premised on Habermas's understanding of law and legitimacy, ultimately founded on the discourse principle, so we need to explicate the terms of the solution further.<sup>47</sup>

As a basic social fact, social life in modern, complex societies must be coordinated and regulated through law. Law also establishes a basic scheme of minimal personal liberty. A system of rights defining the status of legal persons is thus constitutive of the legal medium as such.<sup>48</sup> First, law allows people to decide whether to comply for strategic or normative reasons, and thus grants individuals the minimal liberty not to give account of their reasons for complying. Legally granted rights thus entitle you "to *drop out of* communicative action."<sup>49</sup> Second, modern law concedes to agents a certain "latitude to act"; people are free to do whatever they wish unless the law prohibits it.<sup>50</sup>

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<sup>46</sup> Habermas 1998a: 176

<sup>47</sup> As Jon Mahoney helpfully clarifies, Habermas relies on three arguments to justify rights: (a) The functional or sociological argument claims that "in complex modern societies there are no practical alternatives to the idea of a positivistic rule of law." Positive law is necessary to solve coordination and cooperation problems in such societies, but we still need to justify normatively the political model by which such problems are solved. (b) The normative argument is grounded in the discourse-theoretical idea that only norms to which all affected persons can assent are valid. (c) Combining (a) and (b), a functional-normative argument holds that "being able to address complex problems of social cooperation through discourses and institutions arranged so as to maximise accountability to democratic deliberation, can be achieved only if an institutionally enforced system of rights also exists. [...] Rights are conditions for the possibility of a democratic rule of law." (Mahoney 2001)

<sup>48</sup> Habermas 1996a: 119

<sup>49</sup> Habermas 1996a: 120, emphasis in original. In Habermas's terms, the rights presupposed by the legal medium thus guarantees private autonomy by suspending the obligation of communicative freedom to respond to one's counterpart. That is, you are free not to explain yourself to others, to withdraw from communicative interaction.

<sup>50</sup> Habermas 1998b: 256. As Cohen suggests, the existence of a legal code only suggests that some individuals have some rights of private autonomy (not that each person is entitled to the same liberties as others), and it does not specify what might be prohibited or for what reasons (Cohen 1999). Rummens similarly notes that Habermas's reconstruction of private autonomy fails to explain why individual liberties should be

However, the legal code alone only gives a minimal account of equal liberties. Moreover, the legality or positivity of the law does not explain why it is also legitimate. In order to explicate the legitimacy of the legal order and to give a fuller account of equal liberties, Habermas invokes the discourse principle, which sets the conditions under which action norms, whether moral or legal, are valid. Remember, the discourse principle states that “[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.”<sup>51</sup> Unlike moral norms, however, legal norms are not only symbolic systems of knowledge, in Habermas’s view, but they can additionally be binding at the institutional level as a “system of action”. To specify what the discourse principle means for action norms that take a legal form, Habermas introduces the principle of democracy, which establishes a procedure of legitimate lawmaking. The principle of democracy states that “only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted.”<sup>52</sup>

Habermas emphasises that rights are not things or natural endowments that individuals possess prior to politics, but rather relations that individuals mutually recognise and confer on each other when they agree to regulate their common life via the medium of positive law. Thus, there is a connection between positive law and individual liberty, implying that “insofar as individuals undertake to regulate their common life through the legal form they must do so in a way that grants to each member an equal right to liberty.”<sup>53</sup> A coercive political order creates “legally secured spaces in which citizens can exercise their freedom without undue interference.”<sup>54</sup>

What is the system of rights, more precisely? What particular rights follow from this account of co-originality? Habermas suggests that five different categories of basic rights can be deduced from the conjunction of the legal code and the discourse principle. The first category of rights concerns the maximal equal liberties of all. The legal form provides the legal status of citizens and the discourse principle supposedly explains why each person should have the greatest

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granted in the greatest possible measure: “Indeed, we can envisage laws that embody very traditionalistic conceptions of society, granting very little individual liberty. Nevertheless, even these laws have the formal characteristic of the medium of law Habermas refers to.” (Rummens 2006: 476)

<sup>51</sup> Habermas 1996a: 107

<sup>52</sup> Habermas 1996a: 110

<sup>53</sup> Baynes 1995: 210

<sup>54</sup> Cronin 2006

possible measure of equal liberties compatible with the same measure for all. The second category concerns rights that regulate membership in a determinate association of citizens, distinguishing members from non-members. The third category suggests that there must be rights that someone can invoke who feels that her rights have been infringed. These three categories of basic rights – to equal liberties, membership and legal remedies – grant citizens the status as addressees of law. But the categories do not in themselves provide a full account of classic liberal basic rights or any particular rights at all, because particular rights, Habermas maintains, can only be formulated and interpreted by a legislature.<sup>55</sup> Turning to citizens as authors of law, the fourth category of basic rights grants these now constituted legal subjects equal opportunities “to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law.”<sup>56</sup> A fifth category, finally, grants citizens the necessary “living conditions” for exercising their rights to private and public autonomy. This category is not absolute, Habermas suggests, but rather relative and instrumental to the other categories of rights.<sup>57</sup>

It might seem here that Habermas presents a list of substantive (if abstract) rights, but he underscores that his system of rights is “unsaturated”; the system only takes concrete, determinate content when it is articulated in actual discourses by a particular historical legislator, and citizens must have a say in that process.<sup>58</sup> Moreover, rights are not derived from a theory of practical reason or a concept of moral autonomy.<sup>59</sup> For that reason, too, the system of rights is not imposed on the legislator from the outside: “legal persons can be autonomous only insofar as they can understand themselves, in the exercise of their rights, as authors of just those rights which they are supposed to obey as addressees.”<sup>60</sup> Hence, while arguing that we can deduce these five categories of

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<sup>55</sup> Habermas argues that we are still not “dealing with an organized state authority against which such rights would have to be directed,” but moreover, the rights specified here are “unsaturated placeholders” for specific, particular rights (those that we find on bills of rights), because they “must be interpreted and given concrete shape by a political legislature in response to changing circumstances.” Habermas 1996a: 125f

<sup>56</sup> Habermas 1996a: 123

<sup>57</sup> For a radical critique of Habermas’s scheme of rights, see Noonan 2005.

<sup>58</sup> Habermas 1996a: 125

<sup>59</sup> Mahoney 2001: 28: “To do so would, in his [Habermas’s] view, burden the discourse theory with a natural law conception of rights, which Habermas thinks is inconsistent with postmetaphysical thought.”

<sup>60</sup> Habermas 1998b: 258. The co-originality thesis also sheds light on Habermas’s two-track model of the democratic process: The weak public sphere of civil society, where

rights from the legal form and the discourse principle, Habermas leaves the actual particular rights and their content open, as they can only be specified in actual discourses. As Joshua Cohen argues:

“In particular, specifically liberal rights – to conscience, to bodily integrity, privacy, property, etc. – do not emerge simply from the requirement that the legal code be specified through a process that satisfies the discourse principle, but emerge instead (if they do) from the actual exercise of civic autonomy under particular historical conditions”<sup>61</sup>

Insisting that the system of rights is unsaturated until it is articulated by a legislative assembly follows the procedural approach of discourse ethics. It aims to specify no particular moral norms that we ought to follow, just the rules by which we should decide what we ought to do: We should follow only those norms which we believe could be reasonably accepted by all affected, but the content of those norms would have to be decided through actual public deliberation.<sup>62</sup>

Thus, Habermas makes the bold claim to have solved what he believes to be a paradox that has haunted modern political theory since Kant and Rousseau, at least, who both failed, but for different reasons, to account for both human rights and popular sovereignty. Habermas’s solution consists in claiming that human rights and popular sovereignty are co-original, a co-originality that follows from the legal code wed to the discourse principle. Already here, we anticipate the problems this theory of rights will run into as a theory of international human rights. By premising human rights so strongly on the legal code and actual discourses, Habermas has difficulties explaining how there can be universal human rights in the absence of a global democratic legal order. Before turning to the problem of international human rights, however, let us consider some critical remarks on the co-originality thesis as such. The first objection strikes at the heart of the co-originality thesis and suggests that contrary to Habermas, the discourse principle presupposes a liberal principle of autonomy, and that principle sets constraints on deliberative procedures. The second objection rather focuses on the consequences of Habermas’s proceduralist account of democracy. If democracy is to go all the way down, that is, if nothing is placed outside the purview of democratic deliberation, then we face a regress

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social problems are identified, interpreted and articulated, is sustained by the protection of private autonomy, whereas public autonomy is rather exercised via the more formalised strong public sphere where binding collective decisions are made.

<sup>61</sup> Cohen 1999

<sup>62</sup> Gilabert 2005

problem, because even the construal of persons as free and equal, which sets the parameters of democratic procedures, would seem to be up for grabs.

#### 4.2.2 *The moral content problem*

The first problem with Habermas's view of rights and democracy as co-original and co-constitutive concerns their alleged lack of a moral content. Habermas aims to synthesise the best of both liberalism and republicanism by ameliorating on their failure to recognise the internal relation between rights and democracy. He charges liberalism with giving human rights a priority over popular sovereignty, whereas he thinks republicanism subjects public autonomy to the ethical values of a particular community.

While the promise certainly is outstanding, to crack the age-old nut of rights and democracy and synthesise the best in both liberalism and republicanism, many theorists have criticised Habermas for failing to anchor individual rights in the deliberative procedures stipulated by the discourse principle. Indeed, some like John Rawls and Charles Larmore even charge Habermas with misunderstanding his own theory – it does have the moral content of a fundamental respect for persons as free and equal, as a basic liberal ideal of legitimacy:

“[The discourse principle] has moral content, and we can bring it to light by asking the simple question: Why should we believe, as this principle requires, that norms of action must be rationally acceptable to all whom they are to bind?”<sup>63</sup>

Habermas's own answer to that question, Larmore maintains, is not adequate. Habermas sometimes resorts to “universal pragmatics”, suggesting that the discourse principle somehow follows from the communicative modes of reaching understanding, but this resort is insufficient to ground the discourse principle. Larmore argues that applied to both moral, inter-personal norms and political principles, which are norms backed by force and coercion, the discourse principle has moral content. First, as regards moral norms, reasonable people disagree about the general validity of the discourse principle, and:

“this disagreement turns on different moral convictions about the conditions under which we may judge others morally and no doubt, too, on different appreciations of the moral ideal of individual autonomy. This suffices to show that contrary to Habermas, [the discourse principle],

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<sup>63</sup> Larmore 1999; 1995

taken as a general principle, has a moral content and a controversial one at that.”<sup>64</sup>

Secondly, regarding political principles, the discourse principle requires merely that because political principles are coercive, they must be rationally transparent to those whom they bind. But then, Larmore argues, the discourse principle boils down to the liberal principle of legitimacy, which in turn is morally based in a respect for persons, since such a respect for persons explains why it matters that people can reasonably agree with those political principles that they are coerced to obey. And such a principle of legitimacy cannot be independent of antecedent moral commitments. “If we believe our political life should be organized by some principle such as [the discourse principle], that is only because we embrace the moral principle of equal respect for persons.”<sup>65</sup> This moral principle refers to a right of every person to be bound only by political principles whose justification he or she can rationally accept. And this individual right does set limits to democratic self-rule, Larmore argues, because it determines what sort of expressions of the popular will that shall count as democratic. The familiar constitutional rights of free expression, property and political participation, too, have this rationale independent of democratic self-rule, although they no doubt also serve to enable democracy.

Similarly, Rawls argues that even if we could derive, by way of the internal relation, the civic liberties ensuring private autonomy from the political liberties enabling public autonomy, the civic liberties have an at least equally sufficient justification in that they protect the freedoms of persons as members of civil society with its social, cultural and spiritual life – in churches, associations, universities, media and so on (the public sphere, if you want). Taking part in them, citizens value these activities and that value constitutes “at least a sufficient, if not a vital basis for the rights of private autonomy.”<sup>66</sup> That is, civic liberties are justified because they enable people to participate in civil society, not only or even primarily because such participation also enables people to enjoy the political liberties of public autonomy. Habermas seems to cede as much when he suggests that rights of private autonomy “obviously” have an intrinsic value which cannot be subsumed in their instrumental value for democratic will-formation.<sup>67</sup>

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<sup>64</sup> Larmore 1999

<sup>65</sup> Larmore 1999: 621

<sup>66</sup> Rawls 1996: 420

<sup>67</sup> “Diese Rechte, die jedem eine chancengleiche Verfolgung privater Lebensziele und umfassenden individuellen Rechtsschutz garantieren sollen, haben offensichtlich einen



I believe these critical points rightly indicate that the co-originality thesis is difficult to support. Stefan Rummens suggests that while Habermasians should accept the criticism from Rawls, Larmore and others that the discourse principle contains non-trivial moral presuppositions, those presuppositions can be extracted from Habermas's discourse ethics, while toning down Habermas's reliance on the medium of law to explain or justify rights. It is not the medium of law as such which shapes individual liberties, Rummens argues, but the moral preconditions of deliberative practices. On the other hand, one might suspect that accepting such moral presuppositions, discourse ethics would betray its core idea that such moral presuppositions must be dialogically formulated, which leads us to the problem of regress.

#### 4.2.3 *The regress problem*

A further problem follows from insisting that the democratic procedures do not presuppose moral content, but that collective norms, in a broad sense, should always be the product of actual, rational deliberation among free and equal persons. We shall now consider why this insistence leads to a regress, and then consider three potential ways to put an end to the regress.

As we have seen, the co-originality thesis entails that rational deliberation requires individuals already constituted by law as free and equal. A premise for rational deliberative procedures is, as formulated by Frank Michelman, "a set of basic institutionally supported norms – one might as well call them rights – that govern the treatment of persons by one another in respects pertinent to participation in public discourse."<sup>68</sup> However, even such fundamental norms, such as the basic rights constituting individuals as free and equal, are legitimate only if they might claim the agreement of citizens in a discursive process open to all. Note that this is not merely a hypothetical claim – it must always be possible to submit these issues to an actual deliberative procedure.

"For Habermas, a crucial proposition is that no political philosopher or lawgiver, or select group of them, unaided by actual live dialogic encounter with the full range of affected others, can reliably presume to see and appraise a set of proposed fundamental laws as all those others will reasonably and justifiably see and appraise them."<sup>69</sup>

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intrinsischen Wert – und gehen nicht etwa in ihrem instrumentellen Wert für die demokratische Willensbildung auf." (Habermas 1998a: 176)

<sup>68</sup> Michelman 1997: 158

<sup>69</sup> Michelman 1997: 161

The regress results from the combination of a claim (a) that norms can only be legitimated through public deliberative procedures and (b) that the fundamental parameters of such procedures – even specifying what ‘free and equal persons’ means – must be legitimated through democratic deliberative procedures. That is, the procedure through which we democratically examine the laws in order to make them valid must itself be legally constituted. We need a legally constituted democratic procedure to deliberatively examine the laws (and thus confer validity to them) and to bring forth valid fundamental laws. But if so, we enter a regress, because:

“then the (valid) laws that frame *this* lawmaking event must themselves be the product of a conceptually prior procedural event that was itself framed by (valid) laws that must, as such, have issued in their turn from a still prior (properly) legally constituted event. And so on, it would appear, without end.”<sup>70</sup>

How could Habermasian deliberative democrats avoid the regress problem? Joshua Kassner discusses two solutions to regress problems of this sort. First, one way to halt the regress would be to argue that everything is up for grabs in the deliberative procedure, except for some core of participatory rights. “Free and equal” may state a sort of backstop for deliberative democratic procedures – this you may not put in question. We could argue that for a collective decision to deserve respect, it must “treat each individual affected by the problem as a separate moral agent.”<sup>71</sup> Individuals thus must have a fundamental right to participate as free and equal in order for a deliberative procedure to be legitimate, and to be able to produce legitimate results.<sup>72</sup>

But there is no principled reason for excluding the values of democracy from the requirement that fundamental laws must be constantly resubmittable to actual deliberative procedures, and hence we again go into the regress. Whereas there might be practical reasons to assume the right to participate (for example, to avoid the risk of a regress, we might simply decide that everything, save for this very right, is up for grabs), doing so would be inconsistent with the co-originality thesis.

A second approach would state the right to participate as an initial condition, so that even if deliberation would eventually go all the way down, it would not do so in the initial phase. This solution too is inconsistent with the co-

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<sup>70</sup> Michelman 1997

<sup>71</sup> Kassner 2006

<sup>72</sup> Rummens 2006

originality thesis, since it makes rights, if even only the right to participate as a free and equal person, conceptually prior to the democratic procedure.

Similarly, a third solution might regard the constitution as out of reach most of the time, but not always. Against the allegation that judicial review forecloses democratic discussion of the constitution and the rights enshrined in it, one might hold that constitutional rights are up for debate and discussion, but not all the time. People may discuss and debate constitutional issues in the public sphere, and they certainly do, but the additional step of modifying and changing the constitution is subject to various constraints (such as requiring two successive decisions by parliament interjected by a general election). Similarly, regress-troubled deliberative democrats could argue that the rights of persons to be free and equal in deliberation ought to be up for grabs, but just not all the time. It would then dispense with the idea that fundamental norms are constantly resubmittable to actual public deliberation.<sup>73</sup> In general, of course, deliberative procedures on any issue must be able to reach such closure, if only until next time the issue is raised. But again, this solutions seems to presuppose that there are certain values that are more fundamental than, and thus legitimately put constraints on, the deliberative democratic procedure itself. This is what the co-originality thesis denies. Again, it seems that solving the problem on any of these terms would require concessions to liberalism.

Being aware of the regress problem in his account of democratic constitutionalism, Habermas argues that the regress is benign rather than vicious. Deliberative democracy will necessarily be “a recursively or self-referentially structured practical idea”, but that does not make it logically or procedurally impossible.<sup>74</sup> Although such recursive processes may be infinite, they may sustain themselves. As Habermas writes, “the idea of the rule of law sets in motion a spiralling self-application of law.”<sup>75</sup> In that sense, the original constitutional moment lays down a system of rights which is legitimated retrospectively by the constitutional project it initiates.<sup>76</sup> In the long run, we should understand

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<sup>73</sup> Rawls argues, in response to Habermas, that the liberties of the moderns are subject to the constituent will of the people at the stage when a constitutional convention draws up the principles and rules which are to govern its constitution. This stage may be reopened when new circumstances call for it. Civil liberties would thus not be externally imposed on public deliberation and they are open to public deliberation, but just not all the time (Rawls 1996: 406).

<sup>74</sup> Michelman 1997: 151

<sup>75</sup> Habermas 1996a: 39

<sup>76</sup> Cronin 2006

the constitutional project as a “self-correcting learning process” involving the collective of citizens.<sup>77</sup> This recursive justification might gain further credibility if we understand the co-originality thesis not only as a normative claim, but also as a historical claim about constitutional rights and democracy.<sup>78</sup>

Solving the regress problem in this way, by emphasising how an initial constitutional founding might be recursively justified by consecutive generations of consociates under law, also serves to underscore that the co-originality claim presupposes not only a state in the form of a legal system, but also a particular constitutional project, which is to be recursively justified. But if so, how can we claim that human rights, and not just the public and private autonomy of citizens, are internally related to democracy? This leads us to the final problem of justifying human rights by means of the co-originality thesis.

#### 4.2.4 *The problem of international human rights*

We finally turn to a problem that arises from the claim that human rights and democracy are co-original once we read it not as a justification of the public and private autonomy of consociates under law, but as a theory of human rights. I shall argue that by insisting that human rights are both normatively and historically internally related to democracy, this Habermasian variety of deliberative democracy has difficulties explaining why people should enjoy human rights in the absence of a universal democratic order, precisely because the theory claims that private and public autonomy are internally related, co-original and interdependent, and that individual rights and democratic procedures are mutually constitutive.

Habermas anchors his thesis about the co-originality of rights and democracy in the legal medium of the modern state, not only as an account of how they have developed historically in tandem, but also, as we have seen, in order to explicate their normative interrelation. According to this view, using the terms civil liberties and human rights as interchangeable, virtually synonymous terms, is not a conceptual confusion. Being a citizen of a legally constituted democratic community is a necessary condition for having substantive rights.

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<sup>77</sup> Habermas 2001a

<sup>78</sup> Habermas thus recognises that common identity and sympathy serve an important practical function in enabling democracy: “Constitutional principles can neither take shape in social practices nor become the driving force for the dynamic project of creating an association of free and equal persons until they are situated in the historical context of a nation of citizens in such a way that they link up with those citizens’ motives and attitudes.” Habermas 1996a: 499

However, if individual rights must be articulated through actual democratic deliberation, as Habermas insists, there can be no international human rights without institutionalising such procedures globally. This pertains not only to particular, substantive rights, such as those typically declared in human rights conventions, but also the abstract, unsaturated categories in the scheme of rights. Not even in the abstract sense can rights exist before consociates under law decide to regulate their common affairs by the medium of law. And if individual rights do not exist prior to the state, then they also seem not to exist outside of the state. Thus, in the absence of a global legal-political order, self-sustained through deliberative democratic procedures, it becomes difficult to maintain the co-originality thesis and to justify the idea of universal human rights. As Thomas McCarthy argues: “Insisting, as Habermas does, on the internal connection between individual rights and democratic politics implies that there could be no adequate institutionalization of human rights on a global scale without a corresponding institutionalization of transnational forms of democratic participation and accountability.”<sup>79</sup> If democracy and human rights are interdependent, so that the one cannot be adequately realised without the other, it would not appear acceptable to have a system of human rights institutionalised internationally while democratic procedures remain provided for (at best) nationally. This is the problem we shall address in this final section.

Habermas’s cosmopolitan theory is a complex work in progress, but it has evolved into a distinct three-tiered model of global governance aiming to establish what Habermas calls a global domestic politics without a world government.<sup>80</sup> In the following, I shall discuss the resources within this model of global governance for maintaining the claim that human rights and democracy are co-original, interdependent and mutually constitutive. My aim here is not to assess the merits of Habermas suggested order of global governance, but to address how the co-originality thesis fits into this scheme.

Habermas’s model distinguishes global governance at three different levels, dominated by different types of actors: the supranational level, where a reformed world organisation takes pride of place, the transnational level, where functional regimes regulate diverse issues of “world domestic policy”, and the national level, which remains an important source of authority and legitimacy. As I have argued, following the co-originality claim through would seem to require a democratic world government, but Habermas explicitly rejects the idea

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<sup>79</sup> McCarthy 1999: 198

<sup>80</sup> Habermas 1996a; 1998b; 2001b; 2004; 2007. For commentaries on Habermas’s cosmopolitan theorising, see Mertens 1996; McCarthy 1999; Fine & Smith 2003; Moon 2003; Lupel 2004; Anderson 2005; Hedrick 2007; Lafont 2008; Scheuerman 2008.

of global democracy. But the sources of democratic legitimacy he does endorse at the three levels turns out to provide at best a weak support for an international human rights regime.

Habermas rejects cosmopolitan democracy because the necessary bonds of solidarity would not be strong enough at the global level to underpin a cosmopolitan democracy. While he sees no structural reason why national civic solidarity and welfare-state policies could not extend beyond the nation-state, the global arena would simply lack an ethical-political identity and cosmopolitan solidarity that could bear the weight of a global democracy. Moreover, holding a surprisingly Schmittian objection against cosmopolitan democrats' call for an all-inclusive global democratic community, Habermas argues that democratic self-determination requires an enclosed rather than unbounded community:

“Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. The self-referential concept of collective self-determination demarcates a logical space for democratically united citizens who are members of a particular community.”<sup>81</sup>

However, Habermas still sees a potential for international law to gradually evolve into a binding legal order that puts passive constraints on global governance. The trick is to decouple the concepts of the state, as an hierarchical organisation for the exercise of power, and the constitution, defining a horizontal association of free and equal citizens.<sup>82</sup> Thus, the supranational level could still be constitutionalised without depending on a global state or a world federation to enforce it, nor on a particular demos and a constitutional founding moment. While this nascent global constitution is supposedly detached from democracy and governmental authority, it must remain connected to the “communicative flows” of legitimacy from democratic, constitutional states and national parliaments.<sup>83</sup>

Moreover, states still are the sole members of the world organisation, which Habermas suggests should be charged with two tasks: Securing peace and implementing human rights globally. But it does not take on the enormous tasks of a world domestic policy, such as economic redistribution, environmental problems and collective risks, issues which are assorted to the diverse, over-

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<sup>81</sup> Habermas 2001b: 107

<sup>82</sup> Habermas 2004: 135

<sup>83</sup> Habermas 2004: 139; 2007: 159

lapping international regimes operative at the transnational level.<sup>84</sup> Habermas suggests that what goes on at the supranational level (in the United Nations or the International Criminal Court) are legal rather than political matters. This assurance rings hollow, Todd Hedrick argues: “as if there are no political controversies surrounding the substantive content, application, and enforcement of human rights.”<sup>85</sup> Moreover, this also implies that international human rights, and the broader global legal framework, is precisely imposed on democracy (or on any political community) from the outside, beyond the control of consociates under law.

Now, Habermas might be right that there is little prospect for truly democratic procedures at the supranational level, so that we shall have to settle with a more limited, reformed international order, where any democratic legitimacy must be transmitted from national parliaments. But this must remain highly problematic for Habermas’s theory of legitimacy, as Todd Hedrick argues:

“Discursive democracy is called for among any group of any scope that wants to shape its social life through the medium of law. [...] Habermas’s thesis about the internal connection between the rule of law and democracy is a general one: it applies to all contexts in which the rule of law is institutionalized.”

On the other hand, suggesting that both the supranational and transnational level rely on the “flows of legitimacy” from democratic, constitutional states, Habermas indicates that the ultimate anchor of democratic legitimacy rests with nation-states.<sup>86</sup> If all or most states were reasonably democratic, the absence of supra-national democratic procedures might seem less of a threat to the co-originality thesis. While relying on democracy at a national level to provide higher levels of the world order with legitimacy might seem both more feasible and more desirable, this fallback position also comes with a trade-off: the cosmopolitan ambition in the co-originality claim. Human rights would presumably be rather differently institutionalised in different democratic states. The result would not be a system of universal human rights interdependent with democracy, but (at best) a series of parallel systems of rights, legitimated and substantiated within each constitutional project and thus possi-

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<sup>84</sup> Habermas 2007: 169

<sup>85</sup> Hedrick 2007: 407

<sup>86</sup> Donald Moon suggests that Habermas actually requires a great deal of conformity from the states in the international system. Unlike Rawls, for example, Habermas cannot allow for toleration of non-liberal but decent people: All states would need to become rights-based, constitutional democracies (Moon 2003).

bly quite differently institutionalised in each state.<sup>87</sup> This is more or less what Habermas admits when insisting that substantive rights must be formulated by a particular legislature. Moreover, this solution fails to provide a justification and specification of human rights in all cases where democratic procedures are absent, and one might suspect that those are the situations where such justifications are most desperately called for.

### 4.3 CONCLUSION

This chapter has concerned how theories of transnational democracy construe the relation between human rights and democracy. While we often think of human rights and democracy as synonyms, they may also be thought to conflict with each other. Advocates of cosmopolitan democracy and deliberative democracy, here represented by David Held and Jürgen Habermas, have both addressed the alleged conflict, tension or even paradox between rights and democracy, albeit from very different approaches. They both claim to give expression and justification to our commonsensical notion that human rights and democracy are two sides of a coin. I have argued that their accounts are unconvincing. In Held's theory of cosmopolitan democracy, with its demanding idea of a global 'democratic public law' derived from a principle of autonomy, democracy gets redefined as the global institutionalization of human rights, an approach which leaves only a shrinking room for democratic decision-making to interpret and implement a non-negotiable set of rights. Habermas account of deliberative democracy seeks to synthesize the best of liberalism and republicanism and maintain that human rights and democracy are co-original, but we I have argued that this co-originality claim is difficult to sustain. As some liberal critics have argued, it seems difficult to justify democratic procedures unless we assume some underlying value of respect for persons.

Although attempting to walk the middle road between human rights and democracy, Held and Habermas actually slide down on opposite sides of the road. But the problems they face are similar. If we follow Held in defining democracy as the implementation of a stiff scheme of human rights, not only is democracy emptied of much of its substance that has little to do with rights enforcement, but also, human rights become less relevant for a democratic politics. Habermas, by contrast, has difficulties justifying universal human rights in the absence of a global democratic regime. Instead, he comes to endorse an international human rights regime and a binding framework of international law

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<sup>87</sup> Fine & Smith 2003: 471f



that has no grounding in the sorts of legitimating procedures he argues are necessary if citizens are to regard themselves as both authors and addressees of law. In that sense, neither Held nor Habermas successfully provides us with a theory by which to reconcile the tension between human rights and democracy.

In the light of these attempts, is there still a middle road to walk down, between Held's reinterpretation of democracy as the implementation of human rights and Habermas's insistence on the co-originality of human rights and democracy? Taking a step back, we may ask why we should assume, in the first place, that we could take two abstract concepts like human rights and democracy and align them perfectly under the same lodestar.

In *Two concepts of liberty*, Isaiah Berlin argues that the doctrine of monism – “the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realized” – is demonstrably false.<sup>88</sup> Berlin argues that since human beings have different ends and goals in life, and since not all of them are compatible with each other, we cannot avoid conflict and tragedy in human life. And there is no measure, such as utilitarian happiness, by which we can sort out such fundamental conflicts of value. “The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.”<sup>89</sup> And because those claims are absolute, choosing always comes at a cost. Berlin insists, in a nutshell, that fundamental human values are many, that they are often in conflict and that sometimes we cannot rationally solve such conflicts, since the values involved are incommensurable and cannot be measured along some single, common standard of arbitration. John Gray has portrayed Berlin's position as an agonistic liberalism, different from other contemporary liberalisms by this notion of value-pluralism:

“By contrast with the dominant liberalisms of our time, which in their claim that fundamental liberties, rights or claims of justice are (or indeed must be) compatible and harmonious are Panglossian in their optimism, Berlin's is a stoical and tragic liberalism of unavoidable conflict and irreparable loss among inherently rivalrous values.”<sup>90</sup>

I think the two projects of transnational democracy that I have scrutinised in this chapter both illustrate the problem in liberalism that Berlin put his finger on. While liberal value-pluralism might be a paradoxical oxymoron just as dis-

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<sup>88</sup> Berlin 1969: 169

<sup>89</sup> Berlin 1969: 214

<sup>90</sup> Gray 1996

putable as liberal democracy, it could offer an alternative to the unsuccessful attempts to bring the sometimes contradictory values of human rights and democracy together under one harmonious monist umbrella, by suggesting that we simply may have to learn to live with the tension, since there might not be a single standard by which we can rationally relate these rivalrous values to each other.<sup>91</sup> On this account, it would not always be possible to solve the tension and provide a universal account of how democracy and human rights go together.

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<sup>91</sup> Gray 1996; Galston 1999; Crowder 2002. While not usually associated to these liberal thinkers, Rawls too argues that any liberal democracy faces a true dilemma, a choice between two propositions that are both true but mutually incoherent: “One says: no moral law can be externally imposed on a sovereign democratic people; and the other says: the sovereign people may not justly (but may legitimately) enact any law violating those rights. These statements simply express the risk for political justice of all government, democratic or otherwise [...] No special doctrine of the co-originality and equal weight of the two forms of autonomy is needed to explain this fact.” (Rawls 1996: 416)

## 5. The political order of cosmopolitan democracy

In this chapter, we turn to the political order of cosmopolitan democracy, since “any complete account of global political theory must address the question of what political institutions are appropriate” and how they can be sustained.<sup>1</sup> It should also indicate how we, or the powers that be, could reach the desirable order from our present outset. Cosmopolitan democracy both sketches an ideal political order, based on sovereignty dispersed to multiple sites and levels, and stakes out a roadmap for how to get there.

However, in this chapter I dispute the claims that the political order of cosmopolitan democracy would provide an ideal that is both stable and feasible or attainable. I shall argue that cosmopolitan democracy underestimates the problem of order in the absence of final authority and the ways in which a multi-level, multi-sited order actually might counteract cosmopolitan ambitions. Cosmopolitan democracy also presents an ambiguous account of change: On the one hand, it suggests that states have become embedded within a complex system of global governance; while on the other hand, states and their leaders are to fault for not bringing cosmopolitan democracy about.

In the first part of the chapter, I outline the political order of cosmopolitan democracy. Focusing on stability in the second part of the chapter, I argue that the principles that cosmopolitan democrats suggest to regulate political authority seem plausible only under ideal conditions assuming full compliance from social agents. If we assume that individuals and groups use political institutions to pursue diverging interests, the cosmopolitan political order has difficulties engendering the kind of stability that we expect from a political order.<sup>2</sup> Turning to feasibility in the third part of the chapter, I argue that cosmopolitan democrats provide a frayed and ambiguous account of how its ideal political

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<sup>1</sup> Caney 2005: 148

<sup>2</sup> Thus, I do not claim that multi-level, multi-sited government is undesirable or unfeasible per se, but merely that the mechanisms cosmopolitan democrats suggest cannot lead to a stable political order.

order could or would come about. Even institutional developments that cosmopolitan democrats welcome as an emerging cosmopolitan legal framework, such as the international human rights regime and the International Criminal Court, are in fact manifestations of an international order based on sovereignty. In the end, and somewhat contradictory to their own account of globalisation, theorists of cosmopolitan democracy must rely on the good will of political leaders of states to foment the cosmopolitan order.

Notably, my argument is not premised on realist or society-of-states theories of international relations. I take it to be largely consistent with so-called second image, liberal international theory, which explains international outcomes by pointing to individuals and societal groups pursuing diverging interests through states and other political institutions.<sup>3</sup> While earlier discussions of the political order of cosmopolitan democracy have largely focused on the abstract concepts of sovereignty and international order, attention to actors provides an additional key to assess the prospects of cosmopolitan democratic reform.

#### 5.1.1 *Realism, stability and feasibility*

Paraphrasing Jean-Jacques Rousseau, John Rawls suggests that in sketching a realistic utopia, we should design laws as they might be, while taking men as they are, “to bring together what right permits with what interest requires so that justice and utility are in no way divided”.<sup>4</sup> Rawls, however, goes further than merely designing institutions for intelligent devils.<sup>5</sup> Just social arrangements, he argues, should generate their own support over time and thus be stable for the right reasons:

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<sup>3</sup> Maoz & Russett 1993; Moravcsik 1997. The argument is also not necessarily dependent on Rawls’s approach to international ethics, which starts from a hypothetical two-stage contract (where parties representing individuals come together in a first original position to choose principles of justice to govern their society, and representatives of liberal peoples in a second stage decide principles for international affairs), although there are certain affinities between the two liberal approaches (Rawls 1999b). Moreover, my argument need not presuppose liberal nationalism, as it does not rely on arguments about national culture, solidarity, senses of belonging and the like (Lægaard 2006). However, for a critique of cosmopolitan democracy that draws on liberal nationalism, see Tan 2008. Finally, the tradition of liberal international theory with which my argument is consistent should not be confused with neo-liberal institutionalism, which like structural realism starts from an assumption about states as unitary rational actors, rather than from an assumption about the primacy of domestic representative institutions.

<sup>4</sup> Rousseau 1762; cf. Rawls 1999b.

<sup>5</sup> Kant 1984 [1795]: 31

“Stability for the right reasons describes a situation in which, over the course of time, citizens acquire a sense of justice that inclines them not only to accept but to act upon the principles of justice.”<sup>6</sup>

Thus, a set of principles or a political order must be self-sustaining by inclining individuals to uphold it. An institutional order is stable for the right reasons if its stability is not a mere *modus vivendi*, a balance of power, but rests in part on an allegiance to the principles themselves.<sup>7</sup> Rawls, however, is mostly concerned with whether the social arrangements he elaborates will give individuals the right motivations to act upon the principles of justice. If a political order fails, in this sense, to generate its own support from the actors who take part in it, then that is a strong objection against it, as Chris Bertram suggests:

“One way in which this [failure] might happen is if citizens systematically disidentify with the decisions taken within the structures that constitute that institutional embodiment [of a conception of justice]. For example, if citizens do not see its decisions and processes as being their own but rather as being imposed upon them by technocratic or bureaucratic elites. [sic]”<sup>8</sup>

While stability is not an end in itself, it is an important value of any political

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<sup>6</sup> Rawls 1999b; 1999a

<sup>7</sup> This distinction is not exhaustive or systematic: There might be other causes of stability than balance of forces and affirmation of the principles of justice. Instead, one might follow Lægaard in distinguishing between (a) normative stability, which is for the right reasons, and (b) factual stability, for whatever reasons other than affirmation of the principles of justice (Lægaard 2006).

Ian Hurd (1999) discusses a similar notion of stability, where he uses a thought experiment based on ideal types to explain the stability of the international order. Noting that the norm of sovereignty and non-intervention in the international system is old and that states comply with it more often than not (sometimes even against their own self-interest), Hurd asks what kinds of reasons for compliance would best account for the norm's success. While coercion and self-interest might lead states to comply with international institutions, Hurd argues that those motives cannot account for the stability of sovereignty, since coercive means and opportunity structures have shifted frequently, and the resulting rule would be correspondingly short-lived. The reason states comply with the norm of sovereignty and non-intervention, Hurd concludes, is that they find the norm legitimate. The sovereignty norm, thus, would be stable for the right reasons; it is not merely a *modus vivendi*, an order which the actors uphold simply because they are coerced to do so or because it happens to be in their short-term self-interest, but an institutional order that is acted upon by the actors of the international system.

<sup>8</sup> Bertram 2005: 77

order. Stability, however, should not be confused with feasibility. Whereas stability concerns the goal, the ideal once it has been realised, feasibility also concerns the road toward realising it:

“Stability concerns whether an ideal, if realized, remains so, i.e. whether institutional implementations of the ideal would be durable, e.g., not self-undermining. Full feasibility requires more than stability, namely realisability, i.e., that it is possible to move from a state of affairs in which the ideal is not realized to one in which it is. Where stability may be said to concern the statics of ideals, or rather of their implementations, realisability concerns dynamics.”<sup>9</sup>

Assessing stability and realisability means that we must accommodate normative ideals to practical realities, which raises the issue of just how much of our ideals we should yield to realism and just how sensitive we should be to current facts about the world. It might be useful to think of feasibility as a continuum between idealism and realism.<sup>10</sup> Toward the idealist end of the continuum, we do moral theory in the abstract but risk presenting normative ideals that are simply too far from real constraints on the possible to be of any practical use, whereas toward the realist end, we narrow the gap between ‘is’ and ‘ought’, but risk reifying and justifying unjust realities, reaffirming the status quo.

My critique of the political order of cosmopolitan democracy tends to the realist side of the continuum.<sup>11</sup> It is an argument in non-ideal theory – indeed, part of my critique is that theorists of cosmopolitan democracy assume full compliance from actors. In the following, I shall argue that the cosmopolitan political order would lack both stability and realisability, for a common and rather serious reason: It misconstrues the agents who are supposed not only to uphold its political order but to bring it into existence in the first place. As ought implies can, this flaw compromises their utopian vision. But before we can start criticising the cosmopolitan vision, we need to outline it in greater detail.

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<sup>9</sup> Lægaard 2006: 406

<sup>10</sup> Farrelly 2007; Lægaard 2006; Carens 1996

<sup>11</sup> Which is not to say that it adheres to political or international relations realism, schools of thought which rather tend toward moral scepticism or nihilism. The sort of normative realism with which we are concerned here “is concerned with the feasibility of ideals under given contingent circumstances, and as such it is not a departure from morality” (Lægaard 2006)

## 5.2 GLOBAL ORDER REFORMS

In what kind of political order would cosmopolitan democracy result? David Held presents a broad and detailed scheme of institutional reforms necessary to realise cosmopolitan democracy, and since other theorists of cosmopolitanism and cosmopolitan democracy have evaluated and elaborated his scheme, it serves well to illustrate what the political order of cosmopolitan democracy would look like.<sup>12</sup> After having outlined this order, I suggest that whether or not it should be classified as a world state is beside the point, and then turn instead to the arguments offered in support of the cosmopolitan political order.

First, the United Nations features on virtually all schemes for a cosmopolitan global order. Advocates of cosmopolitan democracy regard the United Nations system as an essential stepping stone for a truly cosmopolitan order, but at the same time, as a nation-state based organisation, the United Nations tends to be trapped in great power politics. The Security Council with its veto for permanent members should be reformed “to give developing countries a significant voice”.<sup>13</sup> The General Assembly representing states should be complemented by a second chamber, more or less directly elected by the citizens of the world, as a global parliament with revenue-raising capacity.<sup>14</sup> The UN should also be endowed with greater coercive capabilities by means of a standing international military force and, in the long term, by permanently shifting a growing proportion of states’ coercive capability to regional and global institutions, with “the ultimate aim of demilitarization and the transcendence of the war system.”<sup>15</sup>

Second, the system of international law should be reformed with the long-

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<sup>12</sup> Archibugi 1995; Held 1995b; 1995a; 2002; 2004; Held & McGrew 1998. I here take the liberty of borrowing arguments in support of cosmopolitan democracy from theorists who perhaps would not approve of being regarded as proponents of Held’s model. However, while scholars writing on institutional cosmopolitanism are often less directly concerned with institutional design, Simon Caney and Luis Cabrera both refer to Held’s scheme as a plausible sketch of the kind of order institutional cosmopolitanism would require (Caney 2005; Cabrera 2004).

<sup>13</sup> Held 1995a: 279; cf. Falk 1998

<sup>14</sup> Additionally or possibly alternatively, Andrew Kuper suggests that the United Nations’ membership criteria should be reworked so as not to privilege states as members, but allow other kinds of actors membership too, for instance non-governmental organizations, transnational corporations and local governments, provided that they fulfil certain criteria, such as being internally democratic and sincerely concerned with basic human needs (Kuper 2006: 165ff).

<sup>15</sup> Held 1995a: 279

term objective of creating an “interconnected global legal system, embracing elements of criminal and civil law.”<sup>16</sup> International courts with extended jurisdiction are key players in strengthening international law, such as an International Criminal Court (which was actually created in 2003), an international human rights court and “a cosmopolitan court for transnational corporate wrongdoing.”<sup>17</sup> Also, the range of actors who have standing before the International Court of Justice should be expanded from states and UN bodies to include individuals, intergovernmental organisations and non-governmental organisations and its remit should be broadened to upholding and protecting individual human rights.<sup>18</sup>

Third, the institutions of international economic governance should be made accountable to global or regional parliaments. Furthermore, their activities need more coordination at regional and global levels, preferably under the supervision of “a new economic institution with an overview for all economic matters that can coordinate the [International Monetary Fund], [the World Trade Organization] and the World Bank in the pursuit of global norms of distributive justice.”<sup>19</sup>

Fourth and finally, the scheme of cosmopolitan democracy also requires new venues for participation, representation, advocacy and accountability. Such venues include regional parliaments (modelled on the European Parliament) and cross-border initiatives by which citizens of different states could bring about referenda on issues that jointly affect them.<sup>20</sup> It might also include creating new “advocacy and accountability agencies” modelled on ombudsmen, consumer watchdogs and audit agencies, charged with making political authorities more responsive to the demands of citizens.<sup>21</sup>

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<sup>16</sup> Held 1995a: 279

<sup>17</sup> Caney 2005: 161f

<sup>18</sup> Kuper 2006: 149f; Caney 2005: 161f

<sup>19</sup> Caney 2005: 162; cf. Held 1995a. Held also proposes other alternative modes for governing the economy. Cosmopolitan democracy would systematically experiment with “different democratic organizational forms in the economy” and introduce “strict limits to private ownership of key ‘public-shaping’ institutions: media, information, and so on.” In the long run, his ideal includes a “multisectoral economy” with plural forms of ownership and a mixture of government steering and market regulation.

<sup>20</sup> Held 1995a

<sup>21</sup> Kuper 2006: 107; cf. Gould 2004. Michael Goodhart similarly suggests that in addition to democratic representative institutions, “direct functional institutions” – schools, the police and health services, for example – should be reconceived as agencies for securing human rights, while “indirect functional institutions [...] responsible for oversight and enforcement of human rights in governance regimes” are crucial in providing guarantees for basic rights through holding democratic institutions accountable and auditing



### 5.2.1 *A world state?*

While critics may think that the institutional scheme of the cosmopolitan political order might look like a proposal for a world state with a world government, its advocates usually underline that it is not.<sup>22</sup> It is a scheme for global democratic governance without world government, they claim. However, the ultimate cosmopolitan political order seems to share many institutional features with modern states: A bicameral parliament with fiscal competence, an executive branch, a standing military force, a legal system upheld by an independent judiciary, authorities for monetary and economic regulation, a redistributive welfare system, and various auxiliary institutions for holding power wielders to account. What is not state-like about this global political order?

Cosmopolitan democrats would respond that the institutional structure that they outline is not a world state because unlike states, it does not rest on sovereignty and final authority. To the contrary, power is to be shared and separated in interlocking and overlapping levels and sites of authority. The decisive difference between the cosmopolitan political order and a world government, thus, is not its particular institutional setup, but the way authority is divided and distributed within it. Accordingly, Simon Caney argues that while the cosmopolitan political order is global in scope, it is not a world state ruled by a world government, because the institutions sketched operate at different levels and address different issues, and thus lack essential qualities of a sovereign state. The cosmopolitan political order lacks comprehensiveness: a unity of political functions that entails “authority over all issues and not simply some.”<sup>23</sup> Furthermore, a system in which no institution enjoys comprehensiveness also lacks supremacy: a final authority to decide in cases of conflict.

However, this argument seems not to establish enough conceptual difference between the cosmopolitan order and sovereign states. If the cosmopolitan political order is not a world state with a world government in virtue of lacking comprehensiveness and supremacy, then neither are the real-existing states in the international system really sovereign states with sovereign governments, because they too usually lack comprehensiveness and supremacy in this sense.

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non-democratic and non-governmental institutions, such as prisons, families, intergovernmental organisations and trans-national corporations (Goodhart 2005: 168ff, 72). The indirect oversight and accountability function applies to all systems of governance at all levels, from the local to the supranational, and might require institutions such as audits, human rights courts, local human rights commissions, world conferences and the like.

<sup>22</sup> For variants of this critique, see for example Urbinati 2003; Baker 2002; Nagano 2006

<sup>23</sup> Caney 2005: 150

In most modern states, governments, parliaments, courts, armies and central banks have authority over different issues and there are usually semi-autonomous municipalities, federal sub-units and other levels below the central government of a state, just as there would be in the political order that cosmopolitan democrats sketch. So the concepts of comprehensiveness and supremacy are not sufficient to distinguish the cosmopolitan political order from a world state/government.<sup>24</sup> Indeed, as we shall see, cosmopolitan democrats explicitly rely on an analogy to federalism and other separation-of-powers arrangements to demonstrate that their institutional sketch would be viable, as vertically and horizontally dispersed authority could promote both efficacy and democracy. And this analogy relies on a conceptual similarity between the cosmopolitan political order and (federal) states.

On the other hand, accepting that the political order of cosmopolitan democracy is state-like at least in these respects is not necessarily an argument against it. It might actually strengthen the cosmopolitan case to argue that their global political order is neither more nor less comprehensive and supreme than modern states typically are. Indeed, Luis Cabrera proposes a similar institutional scheme as a world state, necessary in order to realise cosmopolitan objectives.<sup>25</sup> Branding the political order of cosmopolitan democracy as a world state with a world government does not demonstrate that it is undesirable or unfeasible.

### 5.2.2 *The merits of multiple sites and levels*

While their concrete reform proposals may differ, theorists of cosmopolitan democracy agree that the global political order that they envisage should not

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<sup>24</sup> Following this distinction, one wonders whether any state, short of an ideal absolutist Hobbesian Leviathan, would meet the criteria of comprehensiveness and supremacy. Historically, such political regimes have been rare (Gaubatz 2001) Here it seems that the argument must rely, if only tacitly, on a fictional account of unlimited state sovereignty. But as Omar Dahbour argues, a broad range of classical theories of popular sovereignty suggest that the ultimate source of authority is the people, a claim which implies an internal constraint on sovereignty. Externally, states in an international system are always already limited in their sovereignty by the very existence of other states, as Dahbour argues: “external sovereignty *just is* the idea that there ought to be constraints on state actions – for instance, their right to wage wars against other states. Sovereignty, regarded as a principle of relations between states, is definitely not the idea that states – or even peoples – ought to have unlimited authority.” (Dahbour 2006: 112; cf. Nardin 2000; Weinert 2007)

<sup>25</sup> Cabrera 2004. Cabrera defends a world state on cosmopolitan grounds, but one rather wonders whether his model is sufficiently supranational a world state, given the prominence it gives to states and regional organisations like the European Union.

vest all authority with one global governmental agency or at one level. They envisage a model where authority is vertically and horizontally dispersed, to multiple agencies, multiple sites and multiple levels or layers, overlapping and interlocking each other.<sup>26</sup> As Thomas Pogge declares this cosmopolitan vision:

“[P]ersons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of state. And their political allegiance and loyalties should be widely dispersed over these units: neighborhood, town, county, province, state, region, and world at large.”<sup>27</sup>

Now, why should we prefer authority to rest with a plethora of overlapping and competing agencies and levels, rather than with one level, one site, such as one global sovereign, or for that matter, a number of independent sovereigns? One reason why cosmopolitan democrats depict a multi-level and multi-sited political order is that they wish to seize a middle ground between those two positions: A global world government holding final authority over the entire planet and a system of rivalling sovereign states. But that does not explain why we should prefer a cosmopolitan political order to those two alternatives: the world state and the world of states. A more thorough argument should convince us why vertically and horizontally dispersed sovereignty is preferable to a unitary political order.

Theorists of cosmopolitan democracy offer both normative and functional arguments for why their multi-level and multi-sited political order is preferable to both a centralised world government and an international order. Normative arguments stress the intrinsic or instrumental value of divided or dispersed sovereignty as a safeguard against oppression and for making institutions responsive to citizens’ needs, while functional arguments hold that dispersed sovereignty is particularly suitable to address certain complex, pressing social and political problems or issues.<sup>28</sup>

Turning first to normative arguments, the cosmopolitan idea of dispersed sovereignty could draw on theories of federalism and separation of powers. Notably, classical theorists of federalism and of separation of powers criticise absolutist conceptions of both internal and external sovereignty. Locke and Mon-

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<sup>26</sup> Held 2002

<sup>27</sup> Pogge 2002: 178

<sup>28</sup> Admittedly, this distinction is slightly misleading, since functional arguments are normative arguments too, as they claim that dispersed sovereignty is desirable given certain empirical premises (complex issues).

tesquieu, for instance, disputed the doctrine of absolute power. Balanced government must be divided government. But likewise, many Enlightenment philosophers saw a federal association of states as the solution to the war problem inherent, as they saw it, in the international order of rivalling sovereigns. For instance, Rousseau proposed a strong confederation of European monarchies, while Kant included a weaker voluntary “*pacific federation*” among free republics in his sketch for perpetual peace.<sup>29</sup> Thus, federalism and separation of powers has figured historically as a solution to the problems associated with sovereignty in both political and international theory.<sup>30</sup>

A negative normative argument for dispersed sovereignty suggests that it serves as a safeguard against oppression and abuses of power by creating checks and balances on political authority. In the horizontal dimension, different branches of government should be able to balance against each other, to ensure that neither branch gains too much power. Likewise, in the vertical dimension, the central level is supposed to be able to intervene to protect individual liberty or minority rights against oppressive sub-unit authorities, while sub-units are supposed to be sufficiently powerful to resist oppressive policies resulting from the central level. Obviously, this requires a careful balance of power on both dimensions.<sup>31</sup>

By contrast, a positive normative argument for dispersed sovereignty holds that unlike a sovereign order (whether one state among others or a world state), the sort of multi-sited and multi-level authority suggested by cosmopolitan democrats offers more opportunities for individuals and groups to pursue and protect their interests.<sup>32</sup> Allocating authority at different levels could also allow for greater institutional experimentation and competition among sub-units, and for more adjustment to local circumstances and cultures.<sup>33</sup> Moreover, unlike conventional models of representative democracy based on parliamentary sovereignty, some suggest that a plurarchic cosmopolitan order adds more mechanisms to ensure that government is responsive to the needs and interests of its citizens. While not necessarily premised on a conception of positive liberty, we can call this a positive argument because it appreciates dispersed sovereignty as enabling opportunities for citizens (or their elected or

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<sup>29</sup> Rousseau 1987 [1761]; Kant 1984 [1795]

<sup>30</sup> Riley 1973; Føllesdal 2006a

<sup>31</sup> David Held approvingly cites this liberal model of balanced government (Held 1995a: 147), but as I argue in the previous chapter, he adds institutional requirements that distort the liberal model of constitutional government.

<sup>32</sup> cf. Weinstock 2001: 77

<sup>33</sup> Levy 2007; Pogge 1992; Føllesdal 2001

appointed representatives) to act out their interests and for government agencies to respond to citizens' needs, rather than as a limiting constraint on government.

Andrew Kuper offers a positive normative argument for dispersed sovereignty in his theory of representation as responsiveness. Citizens, Kuper argues, should not merely be represented by a sovereign parliament or not at all, but by a multiplicity of agencies.<sup>34</sup> Multi-level and multi-sited cosmopolitan government helps "to provide more avenues for pressing key rights and representing interests".<sup>35</sup> This is not simply to say that the more forms of representation, the better: Kuper argues that new authorities (such as advocacy and accountability agencies) are to be introduced only if "they are likely to increase the overall responsiveness of representative structures."<sup>36</sup> Still, this normative argument is premised on the idea that a plurality of powers is desirable in virtue of providing more channels and mechanisms by which to make politics respond to the needs or interests of people.<sup>37</sup>

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<sup>34</sup> However, the cosmopolitan democratic order relies surprisingly little on both direct democratic participation and majoritarian institutions. The new global and regional parliaments are the only institutions in the set that would be directly accountable to world citizens, as elected directly by them. But the global courts, the global economic planning agency, the global military command, global welfare agencies and the various accountability and advocacy agencies would only indirectly be accountable to the global citizenry, presumably via the parliamentary assemblies (or more indirectly yet by their executives) that appoint them, or yet other agencies charged with tasks of accountability and advocacy. While this mirrors, to some extent, established practice in liberal democracies, cosmopolitan democracy relies crucially on indirect, representative and non-majoritarian institutions, which is slightly surprising since they often lament the established practices of liberal democracy as merely "formal democracy" or "low-intensity democracy" (Marks 2000; Franceschet 2000).

<sup>35</sup> Cabrera 2004: 100

<sup>36</sup> Kuper 2006: 115. However, as David Runciman argues, Kuper's pluralist scheme of representation as responsiveness "relies heavily on two assumptions: first, that serious conflict will not arise between different representatives claiming to act in the name of the same individual (for example, one representing him or her as a consumer, the other as a citizen); second, that individuals will not need an outlet for their objections to the system of representation as a whole." (Runciman 2007)

<sup>37</sup> Daniel Weinstock similarly argues for an account of global democracy that takes the realisation of peoples' interests as its normative objective. Thus, the point of democracy is not to ensure the political agency or participation of citizens, but that political institutions are responsive to the needs of citizens, which can be achieved via institutions like child protectors, public insurance schemes, expert panels, auditors generals and so on, which "complement democratic institutions' ability to realize citizens' interest, but they are not themselves democratic." While he agrees with Kuper that elections and representation are only contingently and not conceptually connected to democracy,

The functional arguments sometimes offered in support of dispersed sovereignty looks to the issues at stake, suggesting that we need new political institutions to handle pressing political and social problems which transgress the boundaries of nation-states. This line of reasoning harks back to a tradition of international theory which has stressed, in different guises, interdependence between states as the propelling reason for international cooperation, integration and institutionalisation.<sup>38</sup> And as globalisation runs its course and complex interdependence increases, the number and the complexity of issues that escape the borders of sovereign states increase too. For example, David Held suggests that the “power logic” of the international order is:

“singularly inappropriate to resolve the many complex issues, from economic regulation to resource depletion and environmental degradation, that engender an intermeshing of national fortunes. Recognizing the complex structures of an interconnected world, political cosmopolitanism views certain issues as appropriate for delimited spatially demarcated political spheres (the city, state, or region), while it sees others – such as the environment, world health, and economic regulation – as needing new, more extensive institutions to address them.”<sup>39</sup>

Thus, as globalisation supposedly renders social problems more complex, their governance should also be correspondingly differentiated. Likewise, Thomas Pogge argues that certain familiar global issues (the proliferation of nuclear, biological and chemical weapons, environmental degradation, global economic inequalities, etc.) suggest that a cosmopolitan political order of vertically dispersed sovereignty would be preferable to the status quo of a system of sovereign states. These issues, Pogge suggests, require more centralised authority than the current system of states offers, and “Such centralization can best be accomplished in the context of a multilayered global order, that is, in the course of a process of second-order decentralisation.”<sup>40</sup> Extending Pogge’s argument, Kuper suggests that numerous issues, exemplified by “crime on the Internet, prosecution of violators of human rights, and environmental protection”, cannot be appropriately resolved in the vertical, territorial dimension

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Weinstock argues that “there are strong *a posteriori* reasons to insist upon some form of democratic accountability of political elites [...] People have an interest in avoiding domination.” (Weinstock 2006).

<sup>38</sup> Haas 1964; Rosenau 1997; 2000; Pierre & Peters 2000; Mitrany 1943; Keohane & Nye 1977; Keohane 1984

<sup>39</sup> Held 2002: 35; cf. Held & McGrew 1998

<sup>40</sup> Pogge 2002

(implied in Pogge's notion of multilayered governance), and therefore "there seems good reason to divide the tasks of governments on *functional* rather than territorial lines."<sup>41</sup>

Note that this functional argument relies on empirical claims that complex international interdependence leads to certain border-transgressing problems, and that states are currently incapable of managing such problems properly. Taken together, these claims supposedly suggest that pressing issues could better be handled within a multilayered, functionally differentiated global political order. By contrast, what I have called normative arguments are less situated and therefore more timeless: Institutional or constitutional mechanisms which ensure that branches and levels of government check and balance each other or that government policy responds to the needs and interests of citizens, are desirable in any governmental system, not because they fit certain complex issues or an interdependent world.

Drawing on both normative and functional arguments for dispersed sovereignty, cosmopolitan democracy brings together federalism and functionalism, two strains in international integration theory traditionally considered rivals, for example in early debates over European integration.<sup>42</sup> This turns out to be problematic, because it builds in a conflict between the mechanisms supposed to keep the cosmopolitan order stable and the mechanisms supposed to bring it about. Functional arguments and normative arguments for dispersed sovereignty may at times support each other, but they are often obviously inconsistent with each other. For example, federalist arguments tend to emphasise that sovereignty is still prevalent, which is why it needs to be dispersed, whereas functionalist arguments suggest that integration could bypass high politics and eventually render sovereignty irrelevant. Additionally, institutional designers will likely need to allocate authority differently depending on whether their objective is to solve current social problems efficiently or to create institutional balances protecting citizens against power abuses in the long term.<sup>43</sup> Re-

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<sup>41</sup> Kuper 2006: 31, emphasis in original

<sup>42</sup> Haas 1964; Groom & Taylor 1990; Mitrany 1943; Clark & Sohn 1960. Federalist theories conceive of integration as the establishment of a federal union of formerly sovereign states, based on a constitutional separation of powers between the federation and its sub-units. By contrast, classical functionalists and neo-functionalists argue that integration proceeds from cooperation between states on issues of low politics (technical, economical and social issues) to high politics (the core prerogatives of the sovereign state), thus making the sovereign state, and politics itself, increasingly irrelevant through piecemeal, gradual integration.

<sup>43</sup> For instance, the concept of spill-over in neofunctionalist theories of integration suggest that institutionalising international cooperation in one policy sector will raise de-

lying on both kinds of arguments for dispersed sovereignty, theorists of cosmopolitan order risk presenting conflicting claims about the logic of international integration and institutional stability, which becomes a problem, too, for coherently explaining why cosmopolitan order would be feasible, as we shall see in the final section. But first, let us consider the functional arguments for dispersed sovereignty.

### 5.2.3 *Against the functional argument for dispersed sovereignty*

While popular among cosmopolitan theorists, the functional argument for dispersed sovereignty invites three objections which we should address before turning to the issue of stability proper.

First, functional arguments sometimes slip from empirical premises to normative conclusions. Just because issues are complex, that does not suggest that they would better be dealt with by an order of dispersed sovereignty. To the contrary, a political order where power is shared or separated between multiple levels and sites could lead to inefficiency, since more veto points and more veto players would make pressing reforms difficult to carry out. Indeed, that is precisely one alleged advantage of federalism and separation of powers: To institutionalise inertia in the political system, in order to prevent government from taking unconstrained action. Moreover, the mere complexity of pressing political problems does not necessarily imply that they should be handled by correspondingly complex political institutions.

Second, and more specifically, there is little in the functional argument to suggest why the resultant political order should necessarily take the form of cosmopolitan democracy, with its detailed institutional scheme. To the contrary, classical functionalists are agnostic when it comes to designing political institutions. Instead, they argue that form should follow function and they see no direct need for political integration as such.<sup>44</sup> Moreover, the functional argument alone does not explain why the political order would need to be democratic, as it rather focuses on establishing whatever institutions are necessary for pragmatic and efficient problem-solving.

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mands for integration in adjacent sectors. By this logic, functional economic integration on economic issues eventually leads to political integration, from low politics to high politics. Some federalists would suspiciously regard such spill-over effects as authority migration, which they try to prevent by institutional design (Bednar 2004). Once authority has been allocated to the federal level and the federal subjects, it should preferably stay there, in order to preserve the federal order and prevent dangers of centralisation or decentralisation.

<sup>44</sup> Mitrany 1943



Third, the functional argument relies on a naïve, technical understanding of political problems. Cosmopolitan democrats claim that pressing global problems (global warming, nuclear weapons proliferation, human rights violations, world poverty, pandemics, etc.) cannot sufficiently be handled by nation-states and suggest that political authority must be reordered in order to tackle them. While nuclear weapons and starvation are certainly real phenomena, they become social and political problems only once they are articulated by political actors and put on the political agenda. Like all social problems, these policy issues are constructed through political struggles; struggles over the privilege to define the issues and control the agenda. Crucially, the scale at which to address problems is itself often a matter of contention. Even when actors agree what the problem is (say, global warming), different actors will aim to represent the issue as belonging properly at a certain level of governance, from the local to the global, in order to pursue their agendas.<sup>45</sup> So the argument that certain problems somehow naturally belong to certain levels conceals the way in which the framing of problems itself may be the subject of deep-seated political disagreement. To the extent that all key actors agree on how to understand the nature of a certain political problem and the levels at which it properly belongs, this third objection to the functionalist argument might be less consequential. Yet even if that were the case, the noble causes of cosmopolitanism are still many and even cosmopolitans prioritise differently between them. Thus, issues themselves provide no stable ground for a political order of dispersed sovereignty.

Taken together, these objections reveal an inherent fallacy in the attempt to justify a political order on the basis of the particular policy problems it is intended to solve. We need a political order precisely because we disagree about such ends. While functional arguments remain popular, I believe they are not as strong and convincing as theorists of cosmopolitan democracy assume. Ruling them out, however, might make it easier to assess whether the political order of cosmopolitan democracy would be able to sustain itself, the issue to which we now turn.

### 5.3 STABILITY AND AUTHORITY

If we prefer government to be fragmented, segmented and dispersed between overlapping, intermeshed and competing levels and sites of authority, then we should reasonably ask how to ensure that the proper balance of authority can

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<sup>45</sup> Lindseth 2006.

be sustained. The problem in justifying an order of dispersed sovereignty is, of course, that the very thing that we value in dispersed sovereignty also holds a potential for its destruction. Spreading governmental power may safeguard against oppression, but it may also invite and incite conflict. If the different sites and levels are to be sufficiently powerful to check and balance each other, they might also be sufficiently powerful to engage in power struggles and conflicts, with dissolution, secession or centralisation as possible outcomes.

Hence, in order to demonstrate that a system of multiple levels and loci of power will be sustainable, its proponents must give a convincing account of how authority will be distributed and how conflicts of authority can be resolved in a democratic, peaceful and self-sustaining manner. Conflicts of authority may arise either when two (or more) actors (levels, loci or agencies) claim exclusive jurisdiction over the same issue or, conversely, when they try to pass the buck among each other. Political systems that crucially depend on a division of authority between levels and sites (for example, consociational, confederal, federal and separation of powers systems) usually rely on specific constitutional agreements intended to harness such conflicts of authority for the common good. But even then, a system of dispersed sovereignty may be difficult to sustain; indeed, federal systems are known to be unstable in this regard.

In the following, I shall discuss arguments made to demonstrate that a cosmopolitan political order of multiple levels and sites of authority would be stable: (1) That the absence of final authority incites cooperation; (2) that federalism illustrates that a political order based on dispersed sovereignty is possible; and (3) that a principle of subsidiarity could settle conflicts of authority. Having critically examined these three arguments, I then discuss two consequences of a political order where authority is divided between different levels, both indicating that contrary to cosmopolitan ideals, such orders give states (or their equivalents) an independent standing and perpetuate inequalities along territorial cleavages.

### 5.3.1 *No final authority incites cooperation*

One account of authority in cosmopolitan democracy argues that the mere multiplicity of levels, sites and actors within a cosmopolitan political order will incite cooperation. Hence, the absence of final authority is not a problem, but actually an advantage, as Simon Caney suggests:

“There may be no one political institution that has final authority. Supra-state, regional, state-level, and sub-state levels would have no privileged status over each other. This is often said to be a problem but [...] it

is an advantage since it prevents the centralization of coercive power. It forces people and different institutions to negotiate and cooperate with each other.”<sup>46</sup>

This argument, however, begs the question. It takes for granted what it is supposed to prove: That political order without final authority is possible. It also neglects the fundamental problem of political and international order: The international order of sovereign states just is a system of non-centralised coercive power. It seems implausible that institutions and people, several of which possess decentralised coercive power, will be forced to negotiate and cooperate simply because of the absence of final authority. How could we guarantee that, for example, an entity possessing some coercive power would not use that power to get its way in cases of conflict with other actors? Usually, arguments for order in the absence of final authority need to demonstrate conditions under which self-interested rational actors can be induced to cooperate, especially so under conditions of international anarchy.

Furthermore, the issues that “people and institutions” would need to cooperate on are not just their common problems, but the extensive duties of cosmopolitan justice, including economic redistribution on a global scale. Such duties come at a cost and we can expect institutions (whether local, national, regional or functional) whose main responsibilities lie with their own constituencies to be only hard pressed to take on the obligations of cosmopolitan justice. Who should press them to cooperate in the cosmopolitan cause in case they refuse? Caney seems to be theorising merely at the ideal level, assuming full compliance. Not even under the best of foreseeable conditions does this assumption seem realistic. Ultimately, this argument is unconvincing, because if we could rely on the full compliance of benevolent actors, why would we need the cosmopolitan order of dispersed sovereignty rather than a world of states (or for that matter, rather than world government)?

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<sup>46</sup> Caney 2005: 163 Kuper seems to suggest something similar when he proposes the term horizontal responsiveness “to denote a relationship between authorities that check and balance one another in part because (despite some divergent ends and means) they need to compromise or find consensus in order to fulfil their functions, and so will be receptive to one another’s claims and counterclaims.” (Kuper 2006: 103) Pogge acknowledges the potential problem of conflicts of authority and power struggles between the branches of government in constitutional democracies, but argues that “we have learned that such crises need not be frequent or irresolvable. From a practical point of view, we know that constitutional democracies can endure and can ensure a robust juridical condition.” (Pogge 2002: 179)

### 5.3.2 *The federalism analogy*

Other proponents of a cosmopolitan political order point to federalism to argue that the problem of a lack of final authority should not be overrated.<sup>47</sup> Thomas Pogge dismisses the argument that a “genuine state of peace requires [...] an agency of last resort – ultimate, supreme, and unconstrained”, by arguing that the history of federalism and constitutional democracy demonstrates that “Law-governed co-existence is possible without a supreme and unconstrained agency.”<sup>48</sup> Federal systems rely on a vertical separation of powers between the central government and the sub-units, where both levels are partially autonomous in relation to each other. Similarly, in separation of powers systems, the executive, the legislative and the judiciary check and balance each other, without any of them having final authority over another. Thus, the argument goes, if dispersing sovereignty without final authority works well in such systems, it could serve similar functions in the cosmopolitan political order.

While more plausible, this argument might rely on a fallacious domestic analogy.<sup>49</sup> The conditions that make federalism and separation of powers feasible within (some) states might not pertain to the transnational context. Some argue, for instance, that the stability of federal regimes is not only a matter of institutional design, but also requires that citizens have “an ‘overarching loyalty’ to the federation as a whole in addition to loyalty toward their own sub-unit.”<sup>50</sup> If we believe that the intended citizens of the cosmopolitan order would lack such overarching loyalty, stability could be difficult to achieve.

Moreover, the history of federalism seems to discourage Pogge’s federal analogy, because while there are remarkable examples of stable federations, most federal systems have been short-lived, unstable and conflict-ridden. For example, a majority of all federal regimes since 1579 have lasted 30 years or less, while a majority of the federal regimes created after 1945 lasted ten years or less.<sup>51</sup> Federations end through centralisation (sometimes because one federal subject gains control of the centre), devolution or secession. And the break-up of federations are often painful and violent, precisely because authority and coercive power is divided between the central level and the federal sub-

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<sup>47</sup> Pogge 1992; Cavallero 2003; Kuper 2006; Marchetti 2006.

<sup>48</sup> Pogge 2002: 179. Note that Pogge here relies on a conflation of final authority (last resort, ultimate, supreme) and unconstrained authority. But final authority does not imply unconstrained authority: It presupposes penultimate authority, a next-to-last resort.

<sup>49</sup> Cf. Suganami 1989; Bottici 2003

<sup>50</sup> Føllesdal 2006a

<sup>51</sup> Filippov, Ordeshook & Shvetsova 2004: 80

jects. Even the maintenance of a federal order is often the result of violent power struggles, as in the civil wars in Switzerland and the United States. In that sense Pogge's analogy is unconvincing, since historical experience does not demonstrate that order is easily achieved in the absence of final authority.

Finally, the analogy to federalism and separation of powers does a poor job demonstrating the possibility of a political order without final authority, because federal and separation of powers systems do rely on final authority: the constitution and the institutions given the authority to safeguard it.<sup>52</sup> A constitution usually describes not only a fixed allocation of powers or competences between branches and levels of government, but also how to resolve conflicts of authority.<sup>53</sup> Moreover, existing federalism usually entrenches in the constitution only two levels of decision-making authority, rather than the plethora of levels from the local to the global suggested by Pogge.<sup>54</sup>

In fact, cosmopolitan democracy, too, must rely on such mechanisms to solve conflicts of authority. The democratic public law and the institutional design as such describe the tasks of various institutions and also suggests boundary courts with the authority to solve conflicts of jurisdiction between them. As Held points out, "Cosmopolitan democracy demands the subordination of regional, national, and local 'sovereignties' to an overarching legal framework, but within this framework associations can be self-governing at diverse levels."<sup>55</sup> It is no coincidence that sovereignty is put within ironic quotation marks, for the political order of cosmopolitan democracy, as sketched by its advocates, must depend on supremacy and final authority, their claims to the contrary notwithstanding.

To conclude: The point is not simply that Pogge's argument for dispersed sovereignty lacks some institutional feature, but that it underestimates the dif-

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<sup>52</sup> Besides, externally federations are no less sovereign than non-federations to the extent that their final authority within their territories is internationally recognised. Nobody seriously doubts that federations like Germany, the USA or India are sovereign states.

<sup>53</sup> For example, the constitution of the United States includes a supremacy clause (Article VI, Clause 2), stating that the constitution is "the supreme law of the land" and thus holds final authority over state laws and constitutions. Likewise, the European Union, often suggested as a model of multi-level and multi-sited government, relies on the doctrine of direct effect, by which laws enacted in Brussels become directly applicable in member states, and the doctrine of supremacy, which gives the European Court of Justice the competence to increase its own competence (Eriksen 2000). While the legal and political status of these doctrines is disputable, they indicate that where final authority is absent or unclear, it needs to be invented.

<sup>54</sup> Levy 2007

<sup>55</sup> Held 2005: 26

facilities of designing a stable and self-sustaining federal political order, and the analogy to federalism thus fails. Indeed, the analogy highlights precisely that weakness in his argument, as achieving a stable federal design is the puzzle that has always haunted federal theorists – and federations too.

### 5.3.3 *Subsidiarity*

Realising the problems of how to allocate authority, how to manage the appropriate balance between levels and between sites, and how to resolve conflicts of authority and responsibility in the cosmopolitan political order, some theorists advocate a principle of subsidiarity to determine where authority ought to rest. Its proponents usually formulate the principle of subsidiarity as stating that decisions should be taken as closely as possible to the individual citizen. Originating in Calvinist and Catholic thought, the idea of subsidiarity has resurfaced as an answer to the problem of allocating authority in the European Union. A principle of subsidiarity was written into the 1992 Maastricht Treaty on European Union (and clarified in the 1999 Amsterdam Treaty) and it is intended to regulate and distribute authority among the European Union and its member states. Similar to the all-affected principle, the subsidiarity principle draws upon democratic intuitions that political authority should optimally reside as close as possible to citizens, to the people over whom authority is exercised.<sup>56</sup>

Along these lines, some cosmopolitan democrats suggest that a principle of subsidiarity could be employed to settle conflicts of authority and to distribute power and responsibilities within the multi-level system of cosmopolitan governance.<sup>57</sup> David Held even suggests subsidiarity as one of the fundamental principles of cosmopolitanism:

“[C]ollective decision-making is best located when it is closest to and involves those whose life expectancy and life chances are determined by significant social processes and forces. On the other hand, this principle also recognizes that if the decisions at issue are translocal, transnational, or transregional, then political associations need not only to be locally based but also to have a wider scope and framework of operation.”<sup>58</sup>

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<sup>56</sup> Føllesdal 1998b; 2006b

<sup>57</sup> Usually, subsidiarity is intended to regulate authority vertically (between different levels of government) rather than horizontally (between different branches of government), but it could apply to horizontally segmented political orders too.

<sup>58</sup> Held 2005. Thomas Pogge similarly suggests that “The authority to make decisions of some particular kind should rest with the democratic political process of a unit that (i)

Likewise, Andrew Kuper advocates a principle of distributive subsidiarity, “which aims to allocate power according to the functional capacities at each level or locus of governance, and combining functions into clusters, with a view to effective governance.”<sup>59</sup>

Thus, the principle of subsidiarity, these cosmopolitan democrats argue, offers a simple yet ostensibly democratic solution to the problem of allocating authority in a multi-level political order; an independent standard for settling political conflicts over where power belongs. Subsidiarity thus assumes a functional conception of political problems and issues: Political institutions should provide certain goods and services, and we should allocate their provision at the lowest level that still can manage them properly and efficiently.<sup>60</sup> In that sense, the subsidiarity principle saddles us with double objectives when allocating authority: securing that decisions are taken close to citizens pulls authority down, while guaranteeing efficacious problem-solving might often pull in the opposite direction.

However, unless we specify the principle of subsidiarity substantively, it says virtually nothing about where authority and responsibility ought to reside. It depends – on efficacy and democratic closeness. When we apply the subsidiarity principle we always judge how best to balance these two partially conflicting concerns in any particular case. But if we start specifying the principle substantively – these issues belong at the central level, while those belong

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is as small as possible but still (ii) includes as equals all persons significantly and legitimately affected by decisions of this kind.” Pogge 1992: 67

<sup>59</sup> Kuper 2006: 114. Kuper contrasts distributive subsidiarity from the delegative subsidiarity he claims dominates the EU, which allegedly is based on the idea that power is derived ultimately from the member states, and in turn of their internal democratic constitution.

In contrast to Held and Kuper, Luis Cabrera suggests that a principle of subsidiarity (dictating that “issues should be addressed and policy set at the lowest appropriate level”) should be balanced by a principle of supremacy, by which lower levels are bound by the laws, judgments and policies produced at successively higher levels of government. Supremacy “is necessary to help ensure that the fundamental rights of individuals within states and other governing units are respected, as well as to ensure adequate governing capacity at the higher levels.” At any rate, he suggests that lower levels should be able “to lodge a formal jurisdictional challenge against higher bodies” while supremacy would obtain in “those areas where its necessity could be demonstrated, for example, trans-state pollution or regulation of the global trade and finance infrastructure.” (Cabrera 2004: 95) As Cabrera writes, the European Union has learned that a principle of supremacy (as established through a series of cases in the European Court of Justice) is necessary if the union is to function properly, because otherwise member states would have full discretion in applying EU law as they see fit.

<sup>60</sup> Kahler & Lake 2003

with sub-units – we betray the principle, because then levels may start owning issues, independently of whether they are in fact the level closest to the citizen or the level that can deal with them most efficiently. And in that case, we need not confuse the matter by referring to subsidiarity as such, but instead refer directly to other principles or values which ought to guide the allocation of authority, such as efficiency, justice, liberty, democracy or security.

Moreover, the subsidiarity principle seems to rely on the assumption that issues and problems (the responsibility for which it asserts) are themselves apolitical. In their study of institutional design for federal stability, Filippov, Ordeshook & Shvetsova argue that the advocates of subsidiarity ignore that we cannot theoretically determine at which level a particular issue belongs: “even if a good or service is strictly and wholly public in consumption, it remains private in production and thereby entails bargaining in the determination of its supply.”<sup>61</sup> So the principle of subsidiarity, in its various formulations, “amounts to little more than convoluted restatements of the fact that, absent any compelling theoretical basis for doing things one way or another, jurisdictional boundaries and allocations of power between the center and federal subjects are determined as much by politics as by anything else.”<sup>62</sup>

Like the all-affected principle, the subsidiarity principle concerns where power should optimally reside, which raises the question: Who is the ultimate arbiter when authority conflicts? Who enforces the cosmopolitan political order? Kuper regards the subsidiarity principle as more or less self-regulating, while Held relies on court-like institutions to determine where authority ultimately ought to rest: a global boundary court would settle conflicts of authority.<sup>63</sup> Cabrera similarly implies that lower governmental bodies should be able to take subsidiarity to court, while not suggesting any particular institutional mechanisms.<sup>64</sup> But given the subsidiarity principle’s lack of substance, it is too

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<sup>61</sup> Filippov, Ordeshook & Shvetsova 2004: 51. They illustrate this point by the example of national defence: Although everyone benefits from the security provided by a national defence, some must pay the price for providing it. And even if defence is paid for via a perfectly fair tax system, the instruments of its production are also private in both costs and benefits: If one federal subject benefits from having a military base on its territory, some other subject cannot enjoy the benefits (job opportunities etc) of that same base.

<sup>62</sup> Filippov, Ordeshook & Shvetsova 2004: 69

<sup>63</sup> Held couples the subsidiarity principle and the all-affected principle into a “principle of inclusiveness and subsidiarity. But this combination does not improve the determinacy of either principle, it merely seems to confuse the problems of drawing boundaries and allocating authority even further. It is an indeterminate principle leading an indeterminate principle, like the proverbial blind.

<sup>64</sup> Cabrera 2004



indeterminate to treat as a legal norm. Conflicts over the proper allocation of power are fundamentally political, and not suitable to delegate to courts. As Jacob Levy argues, deciding on a case-to-case basis how local a level of government can make a particular decisions is the wrong approach to jurisdictional questions in general and constitutional design in particular: “It presumes a fantastic level of competence, knowledge, and disinterestedness on the part of the body that *allocates* decision-making authority in each case – itself usually one of the contenders for the authority at stake.”<sup>65</sup>

Indeed, the experience of living with subsidiarity over more than fifteen years in the European Union is telling. A subsidiarity principle without substance is not suitably determined by courts, because it is a tool for political power struggles between entrenched interests:

“The precise content of subsidiarity is part of an everyday battle. At no instance, however, does it settle matters decisively, as a legal approach would suggest. Because subsidiarity is a political institution, it constrains as well as enables actors. By consequence, it need not mean the end of the inter-state game, not even in a setting as highly institutionalised as the EU.”<sup>66</sup>

On both theoretical and empirical grounds, then, we can conclude that a principle of subsidiarity will do little to settle conflicts of jurisdiction and authority. But what will, then? In the end, there is a tried and common solution to such conflicts: final authority. It does not necessarily imply comprehensive authority over all issues, nor must it imply unconstrained authority, as a final authority is called upon when non-final authorities, with a limited authority over some issues, fail to settle conflicts of jurisdiction. This is not to suggest that order is impossible in the absence of final authority, but rather that it is a lot more difficult to achieve and sustain than theorists of cosmopolitan democracy seem to realise, and therefore, they might be well-advised to recognise that even a cosmopolitan political order must rely on such mechanisms of institutional design.

#### 5.4 MULTI-LEVEL ORDER AND COSMOPOLITAN IDEALS

Now, even if we conclude that the political order of cosmopolitan democracy needs to rely on final authority, a deeper problem occurs: A political order

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<sup>65</sup> Levy 2007: 462

<sup>66</sup> van Kersbergen & Verbeek 2004

based on allocating authority at multiple levels is difficult to reconcile with core cosmopolitan principles and values. This amounts to a rather troubling tension in cosmopolitan democratic theory. On the one hand, it embraces the idea of a political order based on dispersed sovereignty, while on the other hand rejecting the political consequences of such an order. I shall illustrate this tension by way of two arguments: First, some cosmopolitans have argued that aggregating individual preferences in a two-level procedure violates cosmopolitan and democratic principles of individualism and equality. Second, some cosmopolitans employ a luck egalitarian argument suggesting that inequalities between one place and another are unjust, but a multi-level order not only tends to produce such inequalities but institutionalises them. These arguments indicate reasons for cosmopolitan democrats to reconsider their commitment to dispersed sovereignty and the ideal of a multi-level political order.

#### 5.4.1 *Aggregating preferences in two steps*

An interesting example highlighting the problem of multi-level authority is suggested by Andrew Kuper in his criticism of Rawls's two-stage approach to international justice. Cosmopolitans have criticised Rawls for not assuming a global original position, extending his liberal egalitarian principles to the whole world.<sup>67</sup> Instead, Rawls suggests a two-stage procedure to determine just principles for international law and practice. In the first original position, representatives of free and equal citizens work out principles of justice for domestic society, modelled as closed and isolated from other societies.<sup>68</sup> In the second original position, rational representatives of liberal peoples convene to determine just principles and norms to rule their interaction.<sup>69</sup>

Kuper offers a thought experiment that is intended to demonstrate why Rawls's two-stage contract approach to international justice does not take the interests of all individuals into account, and thus violates its egalitarian foundations. Imagine a world of two states, Underdeveloped (U) and Developed (D), Kuper suggests. The government of each intends to act rationally so as to secure the interests of persons in their territories to the maximal extent possible. For D, it might be rational to restrict immigration so as to avoid social dumping

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<sup>67</sup> Beitz 1979; 2000; Buchanan 2000; Brown 2002; Caney 2002; Costa 2005; Meckled-Garcia 2007

<sup>68</sup> “[P]ersons enter only by birth, and exit only by death.” Rawls also models society in ideal theory as in “no need for armed forces, and the question of the government’s right to be prepared militarily does not arise and would be denied if it did.” (Rawls 1999b: 26).

<sup>69</sup> Rawls 1999b: 32

and lowered standards of living for its citizens, whereas for U, limiting emigration might be rational in order to avoid brain-drain. Now:

“If two parties representing these states, though they did not know which, had to establish a law governing their relations, it would be one that allows for only highly restricted movement of persons between the two from U to D.

Yet it is not true in principle that this law best secures the rights and well-being of all the persons in both countries.”<sup>70</sup>

Indeed, Kuper argues, if all persons in U and D were directly represented in the original position, rather than via representatives of the states they happen to inhabit, they might well determine that “allowing some more movement of people between the two would result in a gain for those who are worst off or even in a more extensive scheme of basic liberties for all”.<sup>71</sup> While this argument in ideal theory aims to refute Rawls’s two-step contract, it also highlights a kind of conflict over authority that may arise, not only in both ideal and non-ideal theory, but in the real world, whenever we face a similarly structured choice of allocating authority either with the constituent units or at the compound central level. That is, such conflicts would arise within any political order where authority is allocated at more than one level, including the political order of cosmopolitan democracy.

Raffaele Marchetti suggests a similar example. Consider three bordering democratic states: A, B and C, which need to decide whether to build a nuclear power plant that is in the territory of country A but on the borders of B and C. A, B and C each have 100 citizens entitled to vote, whose preferences are unevenly distributed. In A and B, a slight majority supports the decision to build a nuclear power plant, whereas a strong majority in C is against it. How are these three countries and their citizens to decide democratically whether or not to build the power plant? Marchetti offers them two general decision making procedures: They can either take a majority vote within each country and then in a second step sum up majorities on a country basis, or take a majority vote among all citizens of A, B and C directly, in one step.<sup>72</sup> If preferences are dis-

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<sup>70</sup> Kuper 2006: 16

<sup>71</sup> Kuper 2006: 16

<sup>72</sup> However, there are other decision making procedures available, for instance, to aggregate by majority vote on a country basis but decide by consensus at the intergovernmental level, which is closer to the practice of many international organisations. Moreover, the example merely assumes, perhaps by means of the all-affected principle,

tributed as we assumed, the outcome would differ depending on how we choose to aggregate the majority view.

	Yes	No
Citizens of A	55	45
Citizens of B	55	45
Citizens of C	30	70
Two-level aggregate outcome (winner)	2	1
Single-level aggregate outcome (winner)	140	160

Like Kuper, Marchetti argues that cosmopolitans (and democrats, too) ought to prefer the single-level approach to the two-level approach, presumably because the single-level approach gives equal weight to all individuals across A, B and C, whereas the two-level approach gives undue consideration to the collectives into which individuals happen to be grouped.<sup>73</sup>

The point of these two hypothetical examples is to demonstrate situations in which individuals and states have different interests, and where the cosmopolitan, concerned as she is with treating individuals as the ultimate units of moral concern, ought to side with individuals rather than with states (or any other grouping of people). As Kuper concludes from his example, “what is rational to agree upon at the level of two parties representing two sets of persons’ interests (that together exhaust the set of existing interests) is not the same as what is rational if it is the interests of each and every person that are being considered.”<sup>74</sup>

But do these examples really support the cosmopolitan conclusion?<sup>75</sup> Both

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that the citizens of countries B and C, or their governments, have a legitimate claim to be included in deciding whether to build the power plant.

<sup>73</sup> As it is practiced in the international system today, Marchetti argues, the two-level approach is based on two false assumptions about democratic legitimacy: “[1] national decisions are to be respected to the extent that they are the product of democratic self-determination within sovereign jurisdictions [and] [2] international decisions taken by intergovernmental organisations are to be observed since ultimately they are taken to be the indirect expression of the same democratic self-determination”. Taken together, these two assumptions “warrant and preserve a political system that excludes structurally relevant social agents from political agency.” (Marchetti 2006: 293)

<sup>74</sup> Kuper 2006: 16f

<sup>75</sup> Notably, Kuper and Marchetti pick rather easy cases, chosen because they underline the cosmopolitan point of view. But what if the compound majority of A, B and C vehemently opposes that A builds, say, a synagogue rather than a nuclear power plant?

examples seem to invite the standard social choice challenge to democratic theory: “that there is no rule for aggregating individual preferences that is obviously fair and rational and thus superior to other possible rules, and that virtually every rule is subject to strategic manipulation”.<sup>76</sup>

The problem is that a multi-level political order builds exactly on the divergence between different groupings of interests, and institutionalises the aggregate interests of sub-units. A multi-level order attaches independent weight to the lower levels that comprise higher levels, and may therefore lead to different outcomes than a unitary order. If sovereignty is to be dispersed vertically between two or more levels, we will regularly face situations of this sort, where the two-level aggregate outcome differs from the single-level aggregate outcome. The point just is to attach independent weight to sub-units. Federal government can be justified precisely as a two-stage compact or contract, where the contracting parties are not individuals but collective units, such as sovereign governments or groups within a government.<sup>77</sup>

Furthermore, as these examples show, allocating authority may often be a matter of political disagreement in its own right, and that matter cannot be settled by referring to the substantive issue at stake. If you belonged to the Yes camp in Marchetti’s example, you would have a good reason to favour the two-level procedure (or even simpler, to argue that the decision is A’s alone), while if you belonged to the No camp, you would have an equally good reason to prefer a single-level procedure. Either way, the procedure chosen would determine the substantive outcome. But why should you, in principle, accept that majority decisions should be taken at the central level rather than by each country separately? Arguing that it takes the interests of all (of all affected?) into account misses the point, since those that are in the minority (by either method) will have good reason to suggest that their interests would better have been taken into account by the other procedure, which would have placed them in the decisive majority. Also, appealing to the principle of subsidiarity will not help to resolve the conflict, because the issue at stake does not concern which level can most efficiently provide the public goods (the nuclear power plant); the issue concerns whether the public goods (and the corresponding bad) should be provided at all. As Filippov, Ordeshook & Shvetsova argue:

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What if U and D decide to regulate not migration but tax evasion? In such cases, the standpoint to side with individuals against their aggregate communities seems harder to defend for a cosmopolitan democrat.

<sup>76</sup> Miller 1992

<sup>77</sup> Filippov, Ordeshook & Shvetsova 2004: 18

“because each rule implies specific outcomes in favor of some and not other participants, people will derive their preferences over rules from their preferences over outcomes. With the bargaining problem merely moving up one or a few institutional levels, what guarantee is there that the only thing that will be ‘produced’ is not endless discussion as opposed to the public good that was the original source of disagreement?”<sup>78</sup>

Put differently, the issue at stake when deciding rules for allocating authority is not primarily ‘Who ought to do it?’ but the more fundamental political question ‘What ought to be done?’.<sup>79</sup> Moreover, these examples may lead us to ask whether cosmopolitans really ought to prefer a political order where authority is dispersed over multiple levels and sites. In fact, there is a vexing tension between the cosmopolitan blueprint for political order and the cosmopolitan ideal of universal equality, to which we now turn.

#### 5.4.2 *Multi-level authority and cosmopolitan equality*

Few things determine one’s life-chances as much as where one is born. For example, even if you are born in Europe the life you lead will likely take a different shape depending on in which country you are born. Life expectancy at birth for men is 65.4 years in Lithuania, but 75.8 years in Sweden (2005). In Romania, 15 per 1,000 live-born infants die before reaching the age of one, but less than 3 per 1,000 in Sweden, Finland and the Czech Republic (2005). And still, all countries in Europe and most people living in them are well-off compared to most other countries. In a global perspective, key social indicators diverge even more.

From the cosmopolitan point of view, these inequalities indicate an intolerable injustice, since cosmopolitanism (at least of the variety we are dealing with here) accords people the same universal rights and duties, regardless of arbitrary state borders. David Held, for instance, argues that this is a central claim of cosmopolitanism:

“Focused on the claims of each person as an individual, these [cosmopolitan] values espouse the idea that human beings are in a fundamental sense equal, and that they deserve equal political treatment: that is, treatment based upon the equal care and consideration of their agency,

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<sup>78</sup> Filippov, Ordeshook & Shvetsova 2004

<sup>79</sup> Cf. Riley 1973: 98

irrespective of the community in which they were born or brought up.”<sup>80</sup>

Here it might be helpful to consider the claims that cosmopolitans are denying and criticising. They position themselves against the idea that (distributive) justice applies (if at all) only within a state, an implicit assumption or explicit argument common in much political theory. For example, Rawls argues that the difference principle does not apply globally, since persons must participate in shared institutions (a state) for justice claims to apply between them. Hence, duties of distributive justice would not apply globally.<sup>81</sup> Cosmopolitans dispute this claim that distributive justice is morally restricted to relations within a state. They argue both on factual grounds that, for example, interdependence does bind persons together in transnational institutions which constitute a scheme of social cooperation, in the Rawlsian sense, and that principles of justice thus would apply globally, and on more theoretical or normative grounds, for example that we should not model states as a given in constructing principles of justice or that moral obligations do apply even where people are not bound by common institutions.<sup>82</sup> Thus, these cosmopolitans put considerable effort into arguing that people should have equal rights, liberties, opportunities, duties, and so on, irrespective of arbitrary facts such as being born in one place or one country rather than another.

However, any political order based on dividing the world into distinct, partially autonomous entities will likely produce inequalities in terms of life-chances between one place and another. Christopher Bertram provides a simple yet compelling example to suggest why the sort of luck-egalitarian arguments employed by cosmopolitans are too demanding: Consider two adjacent local governments, A and B, with a fair initial distribution of resources, which democratically choose policies producing differences between them:

“If there are democratic structures in place and the council in area A decides that education is more important than health, whereas the council in area B decides the reverse, with the result that a sick person in A is worse off (through no fault of her own) than she would be in B, whereas a child in B would be better educated in A, it is unclear that injustice is

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<sup>80</sup> Held 2004: 388. Simon Caney similarly argues that it is “wrong that someone should get less simply because he or she lives in one place rather than another. The cosmopolitan point is simply to radicalize this and to see through its logic to the global level.” (Caney 2005: 122)

<sup>81</sup> Cf. Caney 2005: 102

<sup>82</sup> Beitz 1979; Kuper 2006; Eckersley 2007; Sangiovanni 2007

being suffered. Moreover, to correct for these inequalities would negate democratic decision-making and deprive *individuals* of access to an important range of participation goods.”<sup>83</sup>

Thus, if different societies choose different policies, inequalities might arise between their citizens. But in so far as such differences are the result of democratic decision-making (and do not threaten to undermine continued democracy), they are acceptable. Moreover, correcting for such inequalities would discourage citizens to do their part in contributing to uphold political institutions, as citizens would risk having their choices overridden by cosmopolitan egalitarian ambitions. And to that extent, it is hard to see how the cosmopolitan political order could be stable, as citizens would not act upon its principles.

Thus, there is a tension between cosmopolitan egalitarianism and the political order that they suggest to institutionalise it. A political order based on at least partially autonomous sub-units will likely produce inequalities between them, inequalities which the egalitarian cosmopolitan regards as unjust to the extent that they determine people’s the life-chances.<sup>84</sup>

And not only would the multi-level cosmopolitan scheme produce such inequalities, but also institutionalise them. Rather than dissolving prevailing boundaries and inequalities or embedding them within and overarching framework, Andreas Føllesdal argues, federal orders often perpetuate “cleavages along state borders. This embedded partitioning may limit mutual respect, and reduce the interest in political participation beyond subunits, as witnessed in consociational arrangements.”<sup>85</sup> This argument also extends beyond issues of equality and distributive justice. A political order based on multi-level governance allows discrimination between members and non-members, between citizens and non-citizens, on other parameters as well. As Başak Çali argues:

“If the world-state and global citizenship are rejected in favour of a multilevel system of governance, one also concedes justifications for making distinctions between members and non-members of a political community. These distinctions, however, bring together differences of treatment of human beings based on membership ties. This is a premise rejected by cosmopolitan theories.”<sup>86</sup>

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<sup>83</sup> Bertram 2006; cf. Schemmel 2008; 2005.

<sup>84</sup> Bertram admits certain qualifications: If the level of inequality reaches a level where the internal democratic order will be impossible to sustain, a duty to assist might arise on part of the better-off nations.

<sup>85</sup> Føllesdal 2001; cf. Beramendi 2007; Levy 2007

<sup>86</sup> Çali 2006



Responding to this criticism, proponents of cosmopolitan democracy might argue that they mainly offer the idea of dispersed sovereignty as an answer to the suspicion that they present a blueprint for a potentially despotic world government, a planetary Leviathan, or as a concession to practical realities, since even a benevolent global regime will necessarily need to delegate tasks to lower levels of authority. But if cosmopolitans are serious about multi-level order and dispersed sovereignty, they should not treat it as a mere practical concession, because it opens up a widening rift between core cosmopolitan values and the political order they suggest in order to institutionalise and sustain those values.

Jacob Levy argues that the mainstream in contemporary political philosophy, where liberalism is thought to be synonymous with moral universalism, largely has ignored federalism because it is an unsuitable topic for arguing about what the best or most just policies and laws would be: “[Such arguments] often assume that, once one has determined what justice requires, there can be no interesting argument for allowing it to vary from place to place.”<sup>87</sup> It is therefore all the more surprising that theorists of cosmopolitanism, who take this moral universalism to its most radical conclusion, espouse an ideal political order which, like federalism, allocates authority at different levels, because such an order will be difficult to reconcile with central cosmopolitan ideals of equality.

## 5.5 THE FEASIBILITY OF COSMOPOLITAN DEMOCRACY

Any political order should be stable in the sense of being able to sustain itself, but in order to be fully feasible, it should also demonstrate how it might be realised or how it might become realisable. We now turn to address whether the political order of cosmopolitan democracy is realisable: How can we move from the current world order to one in which cosmopolitan democracy has been realised? Addressing this issue requires us to ask both what the current world order is like and whether it harbours any prospects of change preparing for the desired ideal order. While these questions belong to the eternal problems in international political theory, I shall restrict my argument to assessing the account of world order and change in cosmopolitan democratic theory.

However, cosmopolitan democracy turns out to present an ambiguous account of the current international order and of its prospects for change. On the one hand, theorists of cosmopolitan democracy claim that states are today em-

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<sup>87</sup> Levy 2007: 463

bedded as but one layer in a system of global governance and that cosmopolitan norms are increasingly rivalling state sovereignty as the ordering principle of the international system. From this perspective, cosmopolitan democracy is already well under way to be brought into being, pushed on by the processes of globalisation. On the other hand, theorists of cosmopolitan democracy also maintain that states remain as the most important actors, who will have to shoulder courage and responsibility to transcend their own sovereignty in order to transform the current international order into a full-fledged cosmopolitan order. From this second perspective, the prospects for change look rather bleak, as even democratic states turn out to be hard to convince of the cosmopolitan project. Importantly, these two perspectives on change seem to contradict each other, because the first perspective denies what the second perspective affirms: The prevalence of international order based on state sovereignty.

In the remaining part of this chapter, I shall first discuss these two cosmopolitan perspectives on order and change, and then assess them in turn. Against the first perspective, I shall argue that cosmopolitan democracy mistakes elements of international order for a nascent cosmopolitan world order. While this might seem to reaffirm the second perspective, I shall argue that theorists of cosmopolitan democracy have largely misunderstood how existing institutions serve to counteract cosmopolitan ambitions.

In staking out the path toward cosmopolitan democracy, David Held presents a linear temporal model of stages in the history of the international system “from the modern state to cosmopolitan governance”.<sup>88</sup> The medieval order, characterised by overlapping authorities with weak administrative capabilities, was transformed around the peace of Westphalia in 1648 through a structural shift into a system of modern, centralised, territorially bounded nation-states. Hence, the so-called classic regime of sovereignty was established, which treated sovereigns as formal equals, drew a strict division between the principles governing domestic and international affairs and effectively delegitimised all non-state actors that sought to contest territorial boundaries.<sup>89</sup> But this classic regime of sovereignty is now mostly history, Held claims. The UN Charter of 1948 marks the consolidation of a regime of liberal international sovereignty. While classic sovereignty was based exclusively on effective control over territory, the liberal international sovereignty regime allows the norms of self-determination, human rights and democracy to compete with territorial control as the foundation of state sovereignty.

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<sup>88</sup> Held 1995a

<sup>89</sup> Held 1995a; 2002; cf. Patomäki 2003

Now, while states have sanctioned these changes in sovereignty, changes have now “acquired a status and momentum of their own.”<sup>90</sup> Held traces a number of disjunctures, “between on the one hand, the formal domain of political authority [which sovereign nation-states] claim for themselves and, on the other, the actual practices and structures of the state and economic system at the national, regional and global levels.”<sup>91</sup> These disjunctures include, perhaps most remarkably, (1) international law expanding from a mere law of states to a thick legal-regulatory framework constraining state action, including rules of warfare and weaponry; a legal system holding both states and individuals responsible for war crimes; the international human rights regime, indicating the beginnings of a “universal constitutional order”; and international environmental law.<sup>92</sup> Moreover, (2) political decision-making has become internationalised through international regimes and organisations; (3) hegemonic powers and international security structures have embedded states in military hierarchies, networks and power blocs – a stratified and institutionalised “world military order”; (4) national identities and culture have become globalised through a global media and communications system; and finally (5) the world economy has become increasingly interconnected on a regional and global scale, thus eroding the boundaries between previously separated markets.<sup>93</sup> Together, these five disjunctures indicate that states operate in an

“ever more complex international system [which] both limits their autonomy (in some spheres radically) and impinges increasingly upon their sovereignty. [...] Sovereignty itself has to be conceived today as already divided among a number of agencies – national, regional and international – and limited by this very plurality.”<sup>94</sup>

Does this spell the end of sovereignty? Held qualifies his claim to argue that state sovereignty becomes reconstituted, renegotiated or reconfigured, but that states remain “of the utmost importance to the protection and maintenance of the security and welfare of citizens.”<sup>95</sup> But by this reconstitution or renegotiation of sovereignty Held implies that states no longer have final authority within their territories, similar to how sub-units in a federal order lack

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<sup>90</sup> Held 2002: 5

<sup>91</sup> Held 1995a: 99

<sup>92</sup> Held 2002

<sup>93</sup> Held 1995a; 2000b; Held & McGrew 1998

<sup>94</sup> Held 1995a: 135

<sup>95</sup> Held 2002

final authority. Having such final authority is what sovereignty entails.<sup>96</sup>

Although the ever more complex international system resulting from the five disjunctures might sound fairly similar to the multi-level, multi-sited political order proposed by cosmopolitan democrats, it is still wanting from a cosmopolitan perspective:

“The limits of the liberal international order may have been reached. For while this order seeks the means and mechanisms to delimit and divide public power, it does not have a legitimate and adequate basis to tackle the transborder overspill of national decisions and policies, and the collective problems that emerge from the overlapping fortunes of national communities.”<sup>97</sup>

Thus, while this perspective describes how globalisation has come to embed states in an increasingly complex system of global governance, it lacks the force to transform itself into the political order of cosmopolitan democracy. And this is where we approach the second perspective, picturing a vanguard of democratic states as the necessary agents of change.

As some critics note, cosmopolitans often speak in the passive voice and avoid pointing out who is responsible for realising the cosmopolitan vision of political order.<sup>98</sup> Held, however, sometimes indicates who ought to be in charge of implementing cosmopolitan reform: cosmopolitan democracy would start from “a nucleus, or cluster, of democratic states and societies”.<sup>99</sup> Thus, all or even most states would not need to become democratic before the nucleus can set the cosmopolitan project in motion, it suffices that some of them are. This vanguard cluster of democracies would need to create their own transnational democratic institutions. For example, Held suggests that:

”The establishment of an independent assembly of democratic peoples, directly elected by them and accountable to them, is an unavoidable institutional requirement. To begin with at least, such an assembly is unlikely to be an assembly of all nations; for it would be an assembly of democratic nations, which would, in principle, draw others in over time.”<sup>100</sup>

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<sup>96</sup> Dahbour 2006; Donnelly 2004; Navari 2007

<sup>97</sup> Held 2002: 17; cf. Kaldor 2006: 188

<sup>98</sup> Meckled-Garcia 2007; cf. Patomäki 2003

<sup>99</sup> Held 1995a: 22

<sup>100</sup> Held 1995a: 273

”In the first instance, cosmopolitan democratic law could be promulgated and defended by those democratic states and civil societies that are able to muster the necessary political judgment and to learn how political practices and institutions must change and adapt in the new regional and global circumstances.”<sup>101</sup>

Thus, Held argues that initially, insightful democratic forerunners must go it alone, but eventually others will come to understand why cosmopolitan democracy is necessary and why democratic ideals are superior. Even authoritarian leaders will realise that they need to become members of the cosmopolitan system simply to regain legitimacy in the eyes of their own populations.<sup>102</sup>

To the extent that cosmopolitan reform is an actor-driven process, Held ascribes the fundamental agency to states and their leaders, democratic or not. To participate in Held’s cosmopolitan framework comes down to a decision on the part of state leaders and other key actors, who need to realise that cosmopolitan democracy is necessary and must muster courage and judgment to bring it about.<sup>103</sup> Held also refers to globalisation as a process of increasing interdependence and internationalisation that would compel states to participate in the cosmopolitan scheme. Ultimately, states will have no choice but to face up to the effects of globalisation, as it successively reformulates sovereignty and limits the autonomy of states. States should ”reform now”, or else world order will face ”apocalypse soon”.<sup>104</sup>

But, one might ask, why would they? As Molly Cochran notes, the cosmopolitan account of international reform says little about the kind of pressure that would credibly convince governments, democratic or not, to give up final sovereign authority – ultimately, it means handing over military command to the United Nations, albeit reformed – and range under the political order of cosmopolitan democracy. But Held ”does not consider the ways in which states, even democratic ones, could prove to be powerful sites of resistance to a phenomenon which takes as its focal point the establishment of democratic law between individuals rather than states.”<sup>105</sup>

To conclude, there is something paradoxical about this theory of international change, because it seems both to affirm and deny state sovereignty as a crucial obstacle for cosmopolitan democracy. We need to explore both legs of

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<sup>101</sup> Held 1995a: 232

<sup>102</sup> Held 1995a: 232

<sup>103</sup> Cf. Cochran 2002

<sup>104</sup> Held 2006

<sup>105</sup> Cochran 2002: 522; cf. Lotz 2007

this contradiction, turning first to the claims about an emerging cosmopolitan order.

### 5.5.1 *An emerging cosmopolitan order*

Admittedly, it is difficult to assess Held's claims about the transformation of state sovereignty, not only because of their sheer scale but also because they border on ontological issues about the constituent units of world order and their interaction. Thus, an assessment will necessarily only be partial.

In Chapter 3, I disputed claims about global hegemonic law, suggested by some to provide the foundation for a cosmopolitan democracy. Here, I shall focus on two institutional changes in world order which cosmopolitan democrats hail as crucial indicators of an emerging cosmopolitan order. Paramount among these institutional changes, many cosmopolitans argue, is the international human rights regime. As Held & McGrew suggest:

“Human rights regimes and human rights law [...] sit uneasily with the idea of accepting state sovereignty alone as the sole principle for the organization of relations within and between communities. They can be thought of as an element of an emerging cosmopolitan legal framework, along with the law of war, the law governing war crimes and environmental law.”<sup>106</sup>

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<sup>106</sup> Held & McGrew 1998; Held 2000b; 2002; cf. Gould 2004: 189. This is a popular claim in cosmopolitan and post-sovereigntist writing. David Beetham (1998) similarly considers the international human rights regime a model for cosmopolitan democracy, demonstrating that a truly universalist, cosmopolitan order is possible. John Montgomery sees the UN human rights institutions as an emerging global regime, and argues that in spite of its enforcement problems, the notion of human dignity that underpins human rights declarations have taken on a life of their own, “something like autarky, transcending sovereign uniqueness and producing cohesive behavior.” For example, he suggests, both corporations and state bureaucracies have come to adapt to human rights standards, even where human rights declarations have not gained formal law-like status (Montgomery 1999). James Rosenau sees the international human rights regime as evidence that the international order based on state sovereignty has been transcended: “the emergence of human rights as a central issue of post-international politics testifies eloquently to the erosion of national sovereignty as an organizing principle” (quoted in Goodhart 2005: 132). Seyla Benhabib carefully suggests that the rise of the human rights regime merely alters, not erodes, sovereignty: “The spread of cosmopolitan norms and transformations of sovereignty inevitably accompany each other. The rise of an international human rights regime, which is one of the hallmarks of post-Westphalian changes in sovereignty, also heralds alterations in the jurisdictional prerogative of nation-states.” (Benhabib 2007: 21)

A similar case which cosmopolitan theorists regard as an important advance in institutionalising cosmopolitan democracy is the International Criminal Court (ICC).<sup>107</sup> Held, for instance, suggests that the proposals for establishing the ICC “add further testimony to the gradual shift toward a ‘universal constitutional order’.”<sup>108</sup>

Let us look closer at these alleged examples of an emerging cosmopolitan legal framework. Regarding them as critical cases, I shall argue that both are actually compatible with international order rather than cosmopolitan order, and that grasping this difference is important for understanding their respective prospects of constraining state action. As Takeshi Nagano points out, the United Nations is firmly based on the principle of national self-determination, which is universally accepted, while the rival principles of universal human rights are rarely acted upon. No state accepts and acts upon the universal obligations that correspond to principles of universal human rights:

“I mean not only that there are still non-liberal-democratic states which do not respect human rights, but also that even liberal democratic states in reality endorse only the rights of their own national citizens. Strictly speaking, no state realizes the principle of universal human rights.”<sup>109</sup>

This is not to deny that a concern for human rights sometimes rein in governments, nor to suggest that the principle of national self-determination is normatively superior to principles of human rights. The point is simply that to the extent that states respect principles of human rights, they usually give priority to safeguarding the rights of their own citizens, and not the rights of all human beings everywhere, as this brand of cosmopolitan universalism would seem to require.<sup>110</sup> For example, even liberal democracies that generally pride themselves to respect human rights seem less inhibited to violate the rights of non-citizens than of citizens: by expelling terrorist suspect non-nationals to countries where they might be tortured; by coercively deporting asylum seekers; by detaining migrant children or denying them access to education and medical

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<sup>107</sup> Archibugi 2004; Tännsjö 2006

<sup>108</sup> Held & McGrew 1998

<sup>109</sup> Nagano 2006: 5.

<sup>110</sup> Similarly, Jack Donnelly argues that “universal human rights have been embedded in a statist system of national implementation. The international human rights obligations of states are solely to their own national (and others under their territorial jurisdiction). States have neither a right nor a responsibility to implement or enforce the human rights of foreigners on foreign territory.” (Donnelly 2004)

treatment, etc.<sup>111</sup> Moreover, in order to assess to what extent states act on the principles of universal human rights, official foreign development aid (as opposed to military aid) from developed states is a telling indicator: It has actually decreased from 0.33 percent of combined gross national income in 1985 to 0.23 percent in 2002.<sup>112</sup>

This is hardly surprising, since the international human rights regime is an international regime, rather than a global governance regime.<sup>113</sup> But the human rights regime differs from the other major international regimes that were established after the Second World War in two important respects. The international institutions governing trade, monetary, security, or environmental policy are designed primarily to regulate policy externalities arising from societal interactions across borders. By contrast, international human rights institutions are designed specifically to hold governments accountable for internal activities. On the other hand, whereas international regulatory regimes have some authority (if not always the capability) to enforce their rules, the human rights regime is generally not enforced by interstate action. Instead, human rights regimes are distinctive because they empower individual citizens “to bring suit to challenge the domestic activities of their own government.”<sup>114</sup> But the establishment of human rights norms “has by no means eliminated the central role of states and sovereignty in the international politics of human

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<sup>111</sup> Seyla Benhabib argues that while the civil and social rights of migrants, aliens and denizens have been recognised in international human rights documents, in actual practice states, even those states that generally respect the basic rights of their own citizens, still regularly deny and violate the rights of non-citizens: “most liberal democracies since September 11, 2001, and even before then, had already shifted toward criminalizing the refugee and asylum seeker” (Benhabib 2007: 19, 20) Thus, not even Kant’s basic cosmopolitan right of universal hospitality is generally respected (Kant 1984 [1795]).

<sup>112</sup> Cabrera 2004. This is not to argue that a commitment to human rights necessarily obliges a state to foreign development aid. Perhaps states reckon that international aid is an inefficient way to further the rights of people elsewhere, and vice versa, development aid might serve other purposes than promoting universal human rights. But most cosmopolitan democrats argue that global redistribution is an important means for realising cosmopolitan objectives. Thus, aid might serve as an indicator of whether states are willing to shoulder cosmopolitan obligations.

<sup>113</sup> Donnelly 1986

<sup>114</sup> Moravcsik 2000. Indeed, this is one of the main reasons for democratic states to join human rights regimes. As Moravcsik argues, domestic actors in democratising states have an interest in locking their own state in and to preserve democracy at home. It has little to do with promoting the human rights of all people everywhere, but rather with ensuring that their own state sticks to liberal democracy.



rights.”<sup>115</sup> While the international human rights regime has established procedures for defining and monitoring human rights, its institutions lack power to enforce its norms:

“Efforts to hold states accountable [for human rights violations] mainly threaten exposure and embarrassment, not serious economic or military pressure. [...] Because the powers of international human rights agencies are very limited, their ability to produce respect for human rights from countries that seriously challenge those rights is often in doubt.”<sup>116</sup>

Thus, with few exceptions, the implementation and enforcement of human rights are left to states in their own territories.<sup>117</sup> This does not necessarily imply that the international human rights regime is powerless and subject to the whim of power politics, as realists would have it, but that the power that human rights institutions do exert, not least their normative power, mostly impacts the relation between states and their subjects. And the politics of international human rights, as it is fought by states and non-governmental organisations, is mostly about influencing sovereign states to respect and enforce the rights of their own citizens and others subject to their authority. This is fully consistent with an international order based on sovereignty.<sup>118</sup> Contrary to the claim of advocates of cosmopolitan democracy that the international human rights regime indicates an “emerging cosmopolitan reality” and the subversion of sovereignty, it rather affirms the distinctively international character of the world order.

Furthermore, the United Nations could work well without cosmopolitan principles or principles of human rights, but few countries would join and support it without the principle of national self-determination, Nagano argues:

“The principle of national self-determination enables different state regimes to participate in a common arena. It is a prerequisite for interna-

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<sup>115</sup> Donnelly 2002

<sup>116</sup> Nickel 2002

<sup>117</sup> Donnelly 2004. A plausible exception is the European human rights regime, and yet it has limited authority to implement and enforce human rights. Even in Europe, the state is the dominant agent enforcing and implementing, as well as neglecting and violating, human rights.

<sup>118</sup> As Jack Donnelly points out, already the treaties of Westphalia coupled external sovereignty with restrictions on what sovereigns could legitimately do even to their own nationals: “For example, Article 28 guarantees adherents of the Confession of Augsburg ‘the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses.’” (Donnelly 2004)

tional order. What Held refers to as cosmopolitan realities are dependent upon nationalist ones.”<sup>119</sup>

Let us turn then to the International Criminal Court (ICC), which theorists of cosmopolitan democracy also hail as an example of emerging cosmopolitan realities. After a drafting process that took literally half a century, the Rome Statute of the ICC went into force on 1 July 2002.<sup>120</sup> Currently 105 states are parties to the statute, while a further 41 states have signed but not ratified it. The United States originally signed the treaty but did not ratify it and formally withdrew its signature in 2002. Other prominent non-signatories include Russia, China and India (thus, three out of five permanent members of the UN Security Council are not parties to the treaty). The statute grants the ICC universal jurisdiction to hold individuals to account for gross violations of human rights: genocide, crimes against humanity, war crimes and crimes of aggression.<sup>121</sup>

The ICC, too, however, is an international institution which crucially depends on states for its effectiveness. First, it is based on the key principle of sovereignty that no state can be subjected to binding adjudication without its consent. Consequently, the Court has routinely discarded complaints filed against non-signatories (most notably the USA). As Luis Cabrera points out, “by restricting prosecutions to those states that have actually ratified it, the treaty observes the [...] principle of external sovereignty that prescribes respect for the independent legal personalities of states, as well as the norm of non-intervention.”<sup>122</sup> Moreover, given that the ICC treaty is based on the principle of sovereignty and consent, it grants signatory states, too, considerable room for shirking war crimes prosecution:

“the ICC treaty allows signatory states to declare themselves exempt for seven years from war crimes prosecution. [...] The ICC must also rely in significant ways on the cooperation of states in which individuals would be sought for prosecution. Prosecutors will have to depend in most cases on local law enforcement to arrest and detain those charged.”<sup>123</sup>

The court is also designed to complement national courts, leaving the primary responsibility to exercise jurisdiction in the first instance over these crimes to

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<sup>119</sup> Nagano 2006

<sup>120</sup> Weller 2002

<sup>121</sup> Economides 2003

<sup>122</sup> Cabrera 2004: 75

<sup>123</sup> Cabrera 2004

individual states. In effect, while the intent of the treaty may be read as a noble cosmopolitan ambition to protect the rights of all individuals everywhere, states, whether signatories or not, have the decisive power to shield their citizens from prosecution, and the ICC depends in all instances upon states to consent and cooperate in order to effectively prosecute war crimes and crimes against humanity. Again, this is not to dispute the normative validity of the principles underlying the human rights norms of the ICC, but merely that the ICC is not an example of emerging cosmopolitan realities or the global institutionalisation of cosmopolitan norms; it is premised on the significance of sovereign states in the international order.

This argument might extend to other institutions of global governance, too. Intergovernmental organisations are international in character and depend for their existence on states.<sup>124</sup> For example, international organisations charged with regulation of economic and financial matters, such as the International Monetary Fund, the World Bank and the World Trade Organization are distinctly international. Indeed, their international character is crucial for efficacy and enforcement, since states serve as sources of legitimacy and support and also provide the capacity to enforce rules and decisions:

“States ensure that, in a very mediated degree, international bodies are answerable to the world’s key publics, and that decisions backed by the major states can be enforced by international agencies because they will be reinforced by domestic laws and local state power.”<sup>125</sup>

Of course, this is a very thin form of accountability and the legitimacy with which states provide these organisations is not of the democratic kind that would satisfy cosmopolitan democracy.<sup>126</sup>

### 5.5.2 *Reluctant agents of change*

Now, even with globalisation and complex interdependence as an impetus for change, cosmopolitan democracy still needs to rely on states to take the decisive step in fomenting its political order. At the end of the day, globalisation merely provides the decisive, ultimate reason for state leaders to reform along the cosmopolitan scheme. Globalisation gives rise to the collective action problems which cosmopolitan democracy is supposed to solve, but the power to im-

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<sup>124</sup> Nagano 2006

<sup>125</sup> Hirst & Thompson 1999: 276

<sup>126</sup> Bodansky 1999

plement the solution rests with the key leaders of powerful states.<sup>127</sup> Thus, Held appeals to state leaders to take action on his model, but ultimately comes to distrust their ability and willingness to do what cosmopolitan democracy requires of them.

This becomes evident in the "serious deficiencies" Held traces in the regime of liberal international sovereignty, deficiencies which he ascribes to states as obstacles that cosmopolitan reform somehow needs to overcome.<sup>128</sup> For example, he suggests that as the interdependence between states increases, politics produces ever more externalities outside of states, externalities which "liberal thinking" neglects, and intergovernmental organisations cannot adequately address those issues and resolve them legitimately, because such organisations are biased toward great powers. Moreover, as globalisation is not an even process, states and regions experience it differently and international economic inequalities are growing, which the liberal international order "disregards", in Held's view.

As democratic states have proven reluctant to shoulder the responsibility for cosmopolitan democracy, some of its proponents conclude that democracy within (some) states is not a necessary first step, but an obstacle to cosmopolitan democracy. They argue that the democratic revolutions in recent decades, in Latin America, eastern Europe, Asia and Africa, have not only institutionalised a weak, "nominal" or merely electoral and formal quasi-democracy, but also counteracted cosmopolitan democracy:

"Moves to promote democracy within nation-states serve as moves to constrain democracy in international and transnational affairs. Pan-national parameters work actively, even if unintentionally, to check cosmopolitan ambitions."<sup>129</sup>

In one sense, this is a correct appraisal of the situation: Contrary to Held's claims, democracy within states and cosmopolitan democracy are rival rather than complementary goals. Even, or perhaps especially, democratic states have been hard to convince to participate in the reformist schemes of cosmopolitan democracy. And if we correctly assess the current world order as distinctly international and based on state sovereignty, it is hardly surprising that states and their leaders prove reluctant to participate in cosmopolitan reform pro-

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<sup>127</sup> Globalisation, however, undermines the capabilities of states, not their authority (sovereignty).

<sup>128</sup> Held 2002

<sup>129</sup> Marks 2000: 96; cf. Franceschet 2000; Franceschet 2002; Brunkhorst 2005

jects. An international system is institutionally biased toward states by design. As Luis Cabrera points out, even in an ideal international system, there are at least three mutually reinforcing biases against cosmopolitanism.

First, the norms of sovereignty (non-intervention, formal legal sovereign equality, etc.) are based on the idea that the state primarily is responsible for its own citizens. States and their leaders would thus subvert the mandate that they enjoy by recognition of other sovereigns, “if they distributed resources overseas at a level consistent with a plausible moral cosmopolitanism.”<sup>130</sup> Secondly, in any political regime, political elites are constrained by concerns for their constituents, even where those constituents only represent a small subset of the population, or the whole population.<sup>131</sup> Thus, “states’ leaders themselves have strong incentives to distribute resources to powerful internal constituents, rather than sending resources overseas.”<sup>132</sup> Third, the decision to take up cosmopolitan responsibilities, such as redistributing resources globally, would need to be taken by those who would have to bear the costs themselves. But we can assume that they would be naturally biased in favour of their own interests: “Those in affluent states essentially are judges in their own cases about the appropriate levels of transfers they should make, and their perceptions of their own obligations may be skewed.”<sup>133</sup> In sum, these three theoretically derived biases plausibly explain why leaders of sovereign states have been unwilling to meet cosmopolitan expectations.

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<sup>130</sup> Cabrera 2004. These biases concern not only distributive justice in the narrower sense, but apply to setting up a political order providing basic order and security too.

<sup>131</sup> The logic of this bias is largely consistent with a structural liberal theory of international relations, which posits self-interested, risk-averse and rational individuals and groups as the key actors of international politics, while regarding states not as actors in their own right, but as institutions through which actors pursue their various interests. The preferences of states will thus mirror the aggregated interests of those individuals and groups that are represented. (Maoz & Russett 1993; Moravcsik 1997; 1996; Doyle 1986). In an electoral democracy, a larger proportion of the population is usually represented than in an authoritarian regime, but no state institutionally represents the interests of non-citizens.

<sup>132</sup> Cabrera 2004. Moreover, we could also regard the electoral bias as a normative requirement: In representative democracy, governments ought to respond to their constituents’ needs and interests, and if they fail, they ought to be held to account and sanctioned by those constituents. Of course, cosmopolitans would object to the idea that such constituencies overlapping with territorial state borders are illegitimate or at least in need of justification, for example by the all-affected principle. But if we assume that territorial state borders could be justified, the unwillingness of state leaders to take on cosmopolitan responsibilities could actually indicate that they meet this normative requirement in representative democracy.

<sup>133</sup> Cabrera 2004

Realising how states, even democratic ones, have shown to be indisposed or even vigorously opposed to cosmopolitan reforms, Held does not conceal his disappointment with state leaders in failing to form the cosmopolitan democratic vanguard: "the political leaders of a state-based polity, even a liberal democracy, tend to be so arrogant and selfish that they pay little attention to global and transnational problems."<sup>134</sup> Indeed, the spread of democracy has actually aggravated the problem of political arrogance, Held claims, because state leaders now claim to act with the legitimising mandate of the people they represent:

"in the transition from prince to prime minister or president, from unelected governors to elected governors, from the aristocratic few to the democratic many, political arrogance has been reinforced by the claim of the political elites to derive their support from that most vigorous source of power – the demos."<sup>135</sup>

Similarly, Ulrich Beck criticise political elites for being unwilling to realise the cosmopolitan imperatives for reform and argues that what "prevents political actors – that is governments and political parties – from seizing these opportunities and putting them into practice is the false a priori of the indissolubility of nation and state, of politics and territory, of political influence and national sovereignty."<sup>136</sup> Hence, seeing that the cosmopolitan political order has failed to materialise, these theorists resort to faulting political leaders for being too selfish, arrogant and ignorant to realise that cosmopolitan democracy is in the best interest of all.

However, passing blame to political leaders is an argument that might backfire. First, even if political leaders today are only looking to their and their constituents' narrow self-interest, and if real-existing democracy is really that hollow and thin, do we have any reason to believe that the political order of cosmopolitan democracy would overcome such tendencies?<sup>137</sup> As I argued earlier

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<sup>134</sup> Cited in Nagano 2006

<sup>135</sup> Held 2002

<sup>136</sup> Beck 2005: 173. What further prevents such radical reforms is 'neo-liberal globalism': "the ideology of a technocratic elite and not an ideology capable of motivating the masses into action" (Beck 2005: 175). Scholte similarly suggests that ignorance and narrow-minded self-interest, along with neoliberal ideology, explain why political actors have failed to take on the challenges he himself sees in globalisation (Scholte 2005).

<sup>137</sup> Nagano 2006. As Canto-Sperber (2006: 277) argues: "There is no reason to imagine that individuals will abandon their individual preferences and renounce the promotion of their interests the instant they are citizens of a global and no longer merely national democracy. What is more, the idea that the juxtaposition of divergent interests within

in this chapter, even a cosmopolitan order based on dispersed sovereignty would produce what Held dismisses as political arrogance: biases towards the constituents whose interests are represented through political institutions at various levels. Second, even if key political actors (citizens, political parties, governments, etc.) falsely believe that the world order is distinctly international, it would still be a fact to the extent that they acted upon it. To the extent that key actors believe that the order of sovereign, territorial states is important and act accordingly, it will continue to be an international order. False or true, the international order continues to exist as an institutional fact because key actors believe it exists and act upon that belief.<sup>138</sup> On the other hand, the fact that these diverse actors act as if sovereign territorial states were still important (and consequently fail to heed the cosmopolitan call to reform) might indicate that key actors quite correctly perceive the current world order to be distinctly international. If so, the “false a priori” would rather be on the part of those theorists who claim that territoriality, sovereignty and the international order have now been substantially transformed into something qualitatively different, when obviously they have not.<sup>139</sup>

In the end, by slandering political leaders rather than giving a compelling account of how the political order of cosmopolitan democracy could be realised, theorists of cosmopolitan democracy also seem to retreat from the aspirations of institutional cosmopolitanism to a mere moral, or even moralising, cosmopolitanism. Without an understanding of actors and why they come to resist cosmopolitan world order reform, cosmopolitan democracy becomes little more than a call to leaders to realise the truth of cosmopolitan democratic norms and act accordingly. To the extent that political leaders resist, theorists of cosmopolitan democracy have little else to counter with than to question their moral character and cognitive competence. Paradoxically, cosmopolitan democrats also end up undermining their own claims about the emergence of a cosmopolitan order and an ever more complex international system, and rather seem to reaffirm classical realists’ scepticism about the prospects of international reform.

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the framework of a global democracy will magically give rise to harmony to the benefit of altruistic and beneficent interests is an illusion.”

<sup>138</sup> Karp 2008; cf. Hay 2002: 202f; Searle 1997.

<sup>139</sup> And by “obviously”, I simply mean that this fact seems to be obvious for Held, Beck and other cosmopolitan theorists too, as a disturbing anomaly which they must somehow explain, their last resort being to ascribe it to selfishness, arrogance and ignorance on the part of political leaders. The “false a priori” argument thus serves a function similar to the Marxist thesis of false consciousness.

## 5.6 CONCLUSION

The purpose of this chapter was to examine the stability and feasibility of the notion of political order in cosmopolitan democracy, based on a principle of dispersing authority to multiple levels and sites of governance. I have argued that the political order of cosmopolitan democracy insufficiently provides the basis for its own stability and fails to explain convincingly how it might be realised. First, I argued that theorists of cosmopolitan order tend to underestimate the fundamental problem of order in the absence of final authority. Moreover, while almost all theorists of cosmopolitan political order stress dispersed sovereignty as its organising principle, they seem to neglect that such an order based on multiple levels and sites of authority necessarily gives sub-units independent standing and institutionalises inequalities between them, and that it thus counteracts central cosmopolitan ideals.

Second, I argued that theorists of cosmopolitan democracy present two competing claims about how to attain their ideal political order: On the one hand, the cosmopolitan order is already being brought into existence, driven by the forces of globalisation; on the other hand, a vanguard of democratic states should take the lead in bringing about cosmopolitan democracy. Focusing on two narrow but critical claims about the allegedly emerging institutionalisation of cosmopolitan norms, I argued that the international human rights regime and the International Criminal Court are actually premised on an international order of sovereign states. Turning to the other claim, leaders of democratic states have proven unwilling to do their part in realising cosmopolitan democracy, a fact which Held and others explain by referring to the ignorance, arrogance and selfishness of political elites. This argument is self-defeating, and it also reveals that theorists of cosmopolitan order underestimate the processes and institutions through which key political actors come to form their preferences.

This disregard of political actors becomes evident in the theory that Held and other cosmopolitan theorists present about how institutions of global governance have come to transform the meaning of state sovereignty by binding states to the expanding framework of international law. However, this account peculiarly ignores an at least equally powerful transformative force: The binding of states from within. As Cornelia Navari argues:

“The most significant trajectory in the modern state’s development as a state is the gradual movement of sovereignty from its locus in a relationship between the sovereign and a divine order, to its repository in a



constitution and, effectively, in a parliament, to its repository with a general or popular will.”<sup>140</sup>

While these shifts in the locus of public power have significantly shaped the rules by which states interact, they do not spell the end of international order, only that its dynamic alters. But cosmopolitan democrats either neglect such bottom up-sources of change in international order in their descriptive accounts of the expansion of international law and emerging cosmopolitan realities, or regard them as potential obstacles for further cosmopolitan reform; the binding of states from within by the familiar institutions of constitutionalism and democracy has reinforced the arrogance of political leaders.

While cosmopolitan democracy emphasises a multi-level institutional order and the renegotiation of sovereignty, this account of international institutional development seems uninformed by theoretical perspectives that discharge assumptions about states as unitary, rational actors, perspectives which seek to open up the black box of domestic political institutions and explore how they affect (and in turn, are affected by) international processes by representing variously the interests of individuals and groups.<sup>141</sup> Indeed, to the extent that theorists of cosmopolitan democracy address this dynamic scholarship in liberal international theory, it is mostly to reject the well-known democratic peace thesis on normative grounds, while neglecting the broader aim to understand how diverse societal interests aggregated through domestic institutions shape the preferences of states on the international arena.<sup>142</sup> This is unfortunate, if not else because such theoretical perspectives might help cosmopolitan democrats understand why states and their leaders have proven so reluctant to take on the cosmopolitan challenge.

My main point in this chapter has been to argue that theorists of cosmopolitan democracy present an ideal political order that is neither stable nor realisable, because the people for whom it is intended would not be inclined to act upon it. If this argument is convincing, is it a reason to reject the ideal of cosmopolitan democracy too? Of course, strictly speaking a normative ideal cannot be proven invalid by pointing to its unfeasibility. But to the extent that a normative ideal is neither stable nor realisable, its normative relevance becomes compromised too. And if not else, this analysis reveals an unsettling tendency in cosmopolitan democracy to sketch blueprints for a global political

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<sup>140</sup> Navari 2007

<sup>141</sup> Moravcsik 1996; 1997; Beitz 1999a; Milner 1997; 1998; Mansfield & Pevehouse 2006; Russett & Pevehouse 2006

<sup>142</sup> Franceschet 2000; Archibugi 1997; 2004; Marks 2000; cf. Bohman 2006

order while discounting the people for whom it is intended. And that raises serious doubts about its desirability, too.

## 6. Deliberative democracy in transnational governance

In Chapter 5, I questioned the feasibility of the political order of cosmopolitan democracy. However, a number of scholars suggest that deliberative procedures may enhance democratic legitimacy of existing structure of transnational governance and that deliberative democracy is an ideal especially suitable for the complex, pluralist, multi-level and multi-actor governance networks of our contemporary, globalised world. In this chapter, I turn to these approaches to transnational democracy, which at face value seem more feasible than the rigid political order of cosmopolitan democracy. Yet I shall argue that deliberative democracy is especially challenging precisely when it comes to transnational, multi-level governance.

Along these lines, John Dryzek argues that deliberative democracy is particularly suitable for transnational governance.<sup>1</sup> He takes issue with David Held's too government-based account of transnational democracy, and instead fuses a concept of governance with a discursive account of deliberative democracy. A broad array of actors contest dominating discourses (a term which Dryzek uses somewhere in between the Habermasian and Foucauldian sense). These actors may be states, but engaged in these discursive contestations are often also non-state actors, such as non-governmental organisations (NGOs), multinational corporations (MNCs), epistemic communities, intergovernmental organisations (IGOs), and so on. If democracy is understood not as electoral and representative, but rather as deliberative, Dryzek argues, then the democratic legitimacy of these discursive contestations might be enhanced by deliberative procedures.<sup>2</sup>

In response to Held, Habermas and Dryzek, James Bohman develops a delib-

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<sup>1</sup> Dryzek 1999; 2000; 2006

<sup>2</sup> Dryzek stresses that horizontal networks, for instance the makeshift coalition of NGOs, foundations, and academic institutions rallying against 'biopiracy', are a more fertile ground for deliberation than hierarchical organisations, exemplified by Greenpeace.

erative, republican account of transnational democracy.<sup>3</sup> Bohman argues that when democracy operates outside of the container of the state, it becomes a new conceptual terrain, which he characterises by the plural term of the Greek term *demos*. The political subjects of this transnational democracy are the multiple, overlapping *demoi* “within a larger political community of humanity,” and states are but one kind of *demoi* alongside and transgressed by others.<sup>4</sup>

In the context of the European Union and its infamous so-called democratic deficit, many scholars have suggested that deliberative democracy might be particularly suitable for the EU’s transnational style of governance.<sup>5</sup> Some even argue that “deliberative supranationalism is already more than Utopia” and that comitology, the open method of coordination and the convention method demonstrate that the EU follows a logic of deliberative, democratic problem-solving, rather than strategic bargaining.<sup>6</sup> Jürgen Neyer argues that the European Union should be understood as a “heterarchical polity that includes the domestic, governmental and supranational levels”, which can only be both efficient and legitimate if its “mode of interaction is based on deliberation.”<sup>7</sup> Similarly, Bohman specifically regards the EU’s open method of coordination as “institutionalized intermediaries” of “a process of deliberation among multiple *demoi*”.<sup>8</sup>

More generally, many scholars also argue that theories of deliberation and communicative action offer both normative and explanatory prospects for analysing problems of legitimacy in other forms of global governance. Building on Habermas’s theory of communicative action, Thomas Risse suggests that the non-hierarchical steering modes of global governance facilitate “argumentative rationality”, which may serve to improve the democratic legitimacy of such governance networks.<sup>9</sup> Patricia Nanz & Jens Steffek argue that actors from civil society organisation could and should act as a “discursive interface” or a “transmission belt” between international organisations and global citizenry, their role being “to monitor policy-making in these institutions, to bring citizens’ concerns into their deliberations and to empower marginalized groups so

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<sup>3</sup> Bohman 2007; 1999; 2005; 2006

<sup>4</sup> Bohman 2007: 5

<sup>5</sup> Hoskyns & Newman 2000; Eriksen & Fossum 2000; cf. Vink 2007

<sup>6</sup> Joerges & Neyer 1997; Maurer 2003

<sup>7</sup> Neyer 2003

<sup>8</sup> Bohman 2005; cf. Bohman 2004; 2007. Others suggest that the open method of coordination fails to live up to deliberative democratic standards; for example, see de la Porte & Nanz 2004; Benz 2007; Radulova 2007.

<sup>9</sup> Risse 2004; cf. Risse 2000

that they too may participate effectively in global politics.”<sup>10</sup> In this spirit, several scholars have applied theories of deliberative democracy, communicative action and public discourse to suggest remedies for the alleged democracy and legitimacy deficits of multilateral organisations such as the International Labour Organisation, the World Bank, the United Nations, the World Trade Organisation and the United Nations Commission on Human Rights.<sup>11</sup>

What these different contributions have in common is, first, an emphasis on governance rather than on government. Whereas government is associated with states as the sole actors and hierarchy as the dominating steering mode, governance implies a shift of focus to a wider range of actors and flatter forms of problem solving, coordination and decision-making.<sup>12</sup> States remain important, but they engage as more or less equal partners with other types of actors, for instance multinational corporations (MNCs), intergovernmental organisations (IGOs) and non-governmental organisations (NGOs) of a nascent global civil society, or the multiplicity of actors. Second, many of these accounts also stress that politics no longer has its exclusive locus at one level, such as the sovereign state. Governance implies interaction among various levels, from the local to the global, most obviously perhaps in the European Union, where local and regional levels, national parliaments and governments, as well as institutions at the EU level, have stakes in the process of steering the nebulous body of the Union.

Deliberative theorists argue that this variety of interacting actors and intermingling levels highlight the shortcomings of conventional theories of democracy. Models of democracy that focus on aggregation and electoral representation of interests, majoritarian procedures, and constitutional checks and balances cannot match this new reality of global or transnational governance, and thus such models risk making democracy as such increasingly irrelevant for ensuring legitimate and just collective decision-making. Deliberative democratic models, by contrast, can make better democratic sense of the political processes that global, transnational or multilevel governance gives rise to. Thus, compared to the political order of cosmopolitan democracy, which seeks to establish a rigid scheme of supranational institutions with global reach, this deliberative pragmatic approach seems considerably more feasible and to the extent that public reasoning conforms to the ideals of deliberation, global gov-

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<sup>10</sup> Nanz & Steffek 2004: 135; cf. Steffek 2003

<sup>11</sup> Verweij & Josling 2003; King 2003; Fung 2003; Niemann 2004; Kapoor 2004; Erman 2005. In 2006, the United Nations Commission on Human Rights was replaced by the new Human Rights Council.

<sup>12</sup> Pierre & Peters 2000; Rosenau 2000

ernance would gain in legitimacy, inclusiveness, robustness and correctness.

However, if theoretically sound and simple when applied to small, unitary polities, deliberative democratic theory faces a series of problems when applied to more complex environments characterised by multiple levels and many different types of actors.<sup>13</sup> First, some deliberative democrats seem to assume that deliberative procedures can improve the democratic legitimacy of transnational governance regardless of whether the actors deliberating in such institutions are internally democratic and accountable to the people they represent. This assumption, I shall argue, is problematic and somewhat paradoxical, but it might seem defensible because the alternative of taking the internal democratic legitimacy of the deliberants into account might be even more problematic.

Second, one way to avoid that problem would be to argue that collective actors, such as states or NGOs, are truly persons, not reducible to the sum of their parts and capable of engaging in deliberation on their own. Exploring this possibility, I shall argue that whereas we could sometimes perhaps ascribe personhood to states and other collective actors, they would be fit for democratic deliberation only if their internal collective will-formation approaches deliberative ideals. Furthermore, I raise some normative caveats against modelling collective actors rather than individuals as the subjects of deliberative politics.<sup>14</sup>

Finally, a theory of representation, accountability and two-level deliberation would obviously solve these problems. If deliberants in transnational governance are bound by chains of accountability to their constituents or engage in a two-front dialogue with both other collective actors and their principals, deliberative democracy could give a more convincing account of deliberation in these situations. However, I shall argue that deliberative democratic theory has difficulties accounting for representation and accountability, in part because of the well-known problem of scale, in part because accountability requires the strategic use of blaming, shaming, threats and ultimately, coercive capability, which the norms of communicative action rule out.

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<sup>13</sup> I leave a number of important issues aside, most notably the question whether the international sphere is a fruitful ground for deliberation and communicative action, given that actors have vastly different power resources, that the international sphere is anarchical and that it often lacks the publicity crucial in deliberative theory. My argument is rather in ideal theory, assuming that these potential obstacles to deliberation could be overcome. For an overview of these debates, see Deitelhoff & Müller 2005.

<sup>14</sup> In the following, I mostly focus on states as deliberating parties, because states present a critical case. Most of the ensuing argument holds for other kinds of collective and corporate actors too.

## 6.1 A CLEAN SLATE FOR DELIBERATION

A proponent of deliberative democracy may argue that the democratic legitimacy of an intergovernmental organisation, for instance, depends not on the internal democratic representative procedures of the governments that comprise it, but on deliberative procedures and practices at the international level.<sup>15</sup> Thus, if international actors approach the deliberative ideal in their interaction, taking communicative, understanding-oriented action rather than strategic, self-interested action, then the ensuing decisions will be democratically legitimate – regardless of whether or not those actors are democratically legitimate representatives of their states.

We may call this view anti-delegationism, because it negates delegationism, the claim that the legitimacy of intergovernmental organisations is solely a function of the democraticness of the states delegating power to them. According to the delegationist view, an international organisation is democratically legitimate to the extent that its member states are internally democratic. The delegationist view thus entirely dismisses the issue of democratic legitimacy in transnational governance: To question the democratic legitimacy of an international organisation is akin to a category mistake – the concept of democracy applies to states, not to the associations to which their governments delegate power. In that sense, delegationism presents an easy answer to the problem of transnational democracy: It is no real problem at all.<sup>16</sup>

Whereas delegationism argues that democratic legitimacy exclusively pertains to the national level, anti-delegationism inversely argues that the democratic legitimacy of transnational governance does not at all depend on the international actors being internally democratic. An almost ontologically separate realm, transnational democracy results from the procedures and practices prevailing in the transnational arena. Therefore, the anti-delegationist view, too, is a convenient solution, since if we accept it, we could focus exclusively on how actors interact on the transnational level and disregard their internal characteristics when seeking to democratise transnational governance. Thus,

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<sup>15</sup> Often, though, this view is tacit or implicit. When deliberation is prescribed as a solution to problems of legitimacy in IGOs, for instance, scholars often seem to assume rather than argue that any and all actors to come to the table with the same credentials and capabilities for engaging in deliberative procedures. Thus, my aim in this section is to reconstruct and uncover the tacit premises of this view of international deliberation.

<sup>16</sup> In the EU context, the delegationist view has been defended by *inter alia* Giandomenico Majone and Andrew Moravcsik (Moravcsik 2004; Majone 1996; Majone, Moravcsik & Schmitter 2000). For a critique of delegationism, see Agné 2007.

for reasons of economy, it may seem attractive for a theory of multi-level democracy not to premise transnational-level democratic legitimacy on domestic-level democratic legitimacy.

What I have here called anti-delegationism is hardly a view explicitly advanced by deliberative democrats addressing multi-level governance, though at times they do suggest that legitimate decisions may follow from rational deliberation among international actors even if those actors are not themselves internally accountable to the people they represent. For example, John Dryzek maintains that if we accept the deliberative account of democracy, rather than the liberal-constitutionalist view focusing on majority voting and electoral representation, “we can now look for democracy *in the character of political interaction*, without worrying about whether or not it is confined to particular territorial entities.”<sup>17</sup> Deliberative democratic theory thus promises to provide “generally applicable benchmarks to evaluate and improve decision-making processes within any political system”.<sup>18</sup>

In his more recent writings on cosmopolitanism, Habermas has reasoned along similar lines. Habermas stresses that formal democratic decision-making must constantly be fed on the discourses taking place in the public sphere, if citizens are to regard themselves as authors of the laws that bind them. However, at the supranational level, where global players negotiate to decide on issues of war, peace and human rights, inputs from global public spheres are rare, spontaneous and ad hoc bursts of moral indignation rather than a constant inflow of reasoned opinions. But this lack of a public sphere, Habermas seems to argue, need not pose critical obstacle for improving deliberation at the levels above nation-states.<sup>19</sup> Applying the work of Habermas for a historical reconstruction of multilateral diplomacy, Jennifer Mitzen argues that while early-modern European great powers and their rulers were not accountable to their citizens in any modern, democratic sense, their increasingly public and face-to-face deliberation in the form of multilateral diplomacy after Westphalia and during the Concert of Europe provided horizontal legitimacy to international outcomes.<sup>20</sup> Thus, a normative interstate order took shape in Europe

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<sup>17</sup> Dryzek 1999: 44, emphasis added

<sup>18</sup> Vink 2007: 311

<sup>19</sup> Habermas 1998a; 2004; 2007; Fine & Smith 2003; Anderson 2005; Hedrick 2007; Scheuerman 2008

<sup>20</sup> Mitzen 2005. However, Mitzen does not explicitly suggest that deliberation among great powers provided *democratic* legitimation, but rather as a strategy for both maintaining and legitimating international order under conditions of anarchy. She posits her argument against three other strategies whereby international order must first be



even without the vertical dynamic of the transmission belt which feeds the legitimacy of the public sphere into decision-making forums.

In a study of deliberative procedures in the United Nations Commission on Human Rights, Eva Erman argues that whether or not a state is democratic does not seem to determine the way it acts in international affairs, since democratic states too take strategic action. Erman explicitly rejects the idea that states (and other actors) that are not internally democratic could not contribute to democratising transnational politics, because how representatives of those states act internationally and in what way they make decisions matters more than whether or not they are democratic representatives of the states they represent:

“So even if we had a fully developed cosmopolitan democracy, with representative institutions and perfect representation in whatever sense, this would not be democratic if all actors used strategic action in line with self-interest, and political decisions were made solely through aggregative procedures.”<sup>21</sup>

That is, an international institution may properly be called democratic only if the actors take communicative action and follow deliberative procedures. But it is neither a necessary nor sufficient condition that the actors participating in such institutions are democratically legitimate representatives of the states (or other constituents) that they represent.

Thus, this reconstruction indicates how a theory of deliberative democracy in transnational governance might come to hold a view similar to what I have called anti-delegationism. However, for a normative theory of transnational deliberative democracy, the anti-delegationist view seems to build on disputable empirical premises (that an actor’s propensity to take communicative action does not depend on its internal composition) or equally questionable normative premises (that any actor is a legitimate party to deliberation or at least that an actor can be a legitimate member of transnational deliberation regardless of its internal decision-making procedures). I shall argue that neither the empirical nor the normative premises underpinning the anti-delegationist view are tenable, but let us first consider two reasons why they may be initially appealing to a deliberative democrat.

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consolidated before it can also be legitimated, either as top-down global positive law (similar to the political order of cosmopolitan democracy), as a dispersed and separate democratic peace or as cooperation within international regimes.

<sup>21</sup> Erman 2005

First, most deliberative democrats agree that deliberators are not supposed simply to take pre-political, self-interested preferences unchallenged into the deliberative procedure. Preferences, opinions and interests can only be truly discovered in a process of public deliberation, and they are also subject to change and transformation in the course of discourse. Deliberative theorists criticise aggregative, electoral models of democracy for assuming voters to secretly express privately conceived preferences.<sup>22</sup> Such pre-political preferences and interests are no real preferences and interests at all, deliberative theorists argue, because they have not been formed in public deliberation with others:

“Deliberative democracy is distinct in focusing on the impact of deliberative experiences on individuals’ preferences, opinions, ethical horizons, understanding, information and appreciation of the positions of others.”<sup>23</sup>

By analogy, the internal decision-making procedures of an actor in transnational governance may appear equally irrelevant, because the only valid way to form justified opinions is to engage in public discourse with other actors. What matters is the rules you follow when you make up your mind publicly, whereas the rules you use for privately and pre-politically deciding on the issue is insignificant, since you are supposed to form and transform your real opinion through public deliberation. So if we argue that the democratic legitimacy of transnational democracy depends on the deliberating actors’ internal decision-making procedures, we shift focus from the ultimately legitimating deliberative procedures to something similar to pre-political preferences, which is obviously undesirable for deliberative democrats.

Second, deliberative democracy should not be premised on good intentions, some of its proponents emphasise. Deliberation cannot be imagined as taking place between idealised gentlemen, Mark Warren argues: “we cannot define deliberation [...] in terms of individuals’ prior commitments to reasonableness, nor to their intentions to seek consensus, nor even their respect of opponents.”<sup>24</sup> Defining deliberation in that way would confine it to the easy, harmonious cases where people would be seeking mutual understanding anyway. Arguing, for example, that only actors with sufficiently democratic internal procedures may contribute to enhancing the democratic legitimacy of trans-

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<sup>22</sup> Deliberative democrats also criticise bargaining and market mechanisms for preference aggregation on similar grounds.

<sup>23</sup> Warren 2002: 186

<sup>24</sup> Warren 2002: 182

national governance might, analogously, look like an attempt to set membership criteria based on good intentions, which would effectively confine deliberation to those rare occasions when perfectly representative democracies quibble with each other. By the same token, some theorists also raise concerns that premising transnational deliberation on democratic regimes could serve as a justification for “forceful intervention by existing democracies to create democratic regimes.”<sup>25</sup>

However, the anti-delegationist account of deliberative democracy also has some obvious flaws. First, the anti-delegationist view assumes that actors participating in transnational, multi-level decision-making procedures are analogous to citizens in the domestic democratic setting, a problematic assumption to which we shall return. Moreover, anti-delegationism offers no solution to the problem of membership criteria. Even for a strictly procedural ideal, legitimate outcomes must depend, at least in part, on whether the deliberants taking part in the procedure are legitimate participants. Legitimacy need not be grounded in internal democratic procedures, but there must be some criterion for judging whether a deliberating party may legitimately speak. So if internal democratic legitimacy is not a criterion for entering into deliberation, what is? Rejecting any substantive criteria for membership could lead to an acceptability criterion similar to Joseph Schumpeter’s suggestion to “leave it to every *populus* to define himself” – in this case, to accept the prevailing actors of transnational governance (whether states or other kinds of actors) as legitimate parties to deliberation, whatever their internal legitimacy.<sup>26</sup> But to ground access to deliberation in the existing power relations of world politics seems flagrantly to violate the gist of deliberative democracy. What democratically legitimate will-formation can follow from deliberation among tyrants?<sup>27</sup> Even if tyrants were to take only perfectly communicative action within a multilateral institution and make their decisions solely by public, deliberative procedures, how could that ever be considered democratically satisfying?<sup>28</sup> Dahl’s *reductio* against Schumpeter seems to apply here too.<sup>29</sup>

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<sup>25</sup> Mitzen 2005: 406

<sup>26</sup> Schumpeter 1975: 245

<sup>27</sup> A more modest version would hold that deliberation is an added value to any decision-making process: Even when tyrants interact, deliberative procedures will produce better decisions than alternative procedures would.

<sup>28</sup> Obviously, we do not really solve the problem by arguing that communicative action and deliberative procedures by definition rule out deliberation among tyrants or that deliberative procedures must allow access to anyone.

<sup>29</sup> Schumpeter 1975: 245; Dahl 1999b: 190f

Furthermore, if the democratic legitimacy of transnational governance procedures depends on whether actors employ communicative action and stick to the rules of rational discourse, we should worry about whether any actor is just as good a candidate for sincere deliberation. Indeed, there is a broad literature in international relations suggesting that the kinds of procedures used to make foreign policy do matter for how actors behave in world politics. Machiavelli famously disagrees with “all writers” and “all historians” who, he claims, hold that popular governments, compared to monarchies, are fickle and unreliable in their foreign relations. To the contrary, Machiavelli argues that “commonwealths observe their engagements far more faithfully than princes.”<sup>30</sup> Idealists in the twentieth century claimed that democratising foreign policy making by bringing it out in the public view would render international relations more stable and peaceful.<sup>31</sup> More recently, liberal and constructivist international relations theory suggests that a state’s domestic political structures do indeed matter for all sorts of state behaviour in world politics. In particular, they argue that liberal democratic states behave differently in world politics, ranging from the democratic peace thesis that democratic states virtually never go to war with each other, to indications that democratic states are better at complying with international norms and institutions than non-democracies are.<sup>32</sup>

Of course, this tradition of liberal, second-image scholarship has been disputed and criticised on both theoretical and empirical grounds.<sup>33</sup> But a deliberative democrat, I believe, ought to side with the liberals rather than with their critics, since the liberal tradition so persistently underlines a key claim in deliberative democracy: That public reasoning and democratic procedures lead to more justified, legitimate and robust policies and that democracies can externalise their peaceful political procedures within to other polities ruled by similar norms. While democracies, too, often act strategically to further their own self-interests, they still seem to be our best candidates for communicative action in world politics. Far from the ideals of deliberative democracy, political procedures and practices in current, real-existing democratic states still come

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<sup>30</sup> Machiavelli 2004 [1883, 1530]: Book I, Chapter LIX; cf. Gaubatz 1996

<sup>31</sup> Carlsnaes 2002

<sup>32</sup> Gaubatz 1996; Milner 1997; Russett 1993; Maoz & Russett 1993; Moravcsik 1997; Checkel 1997; Mansfield & Pevehouse 2006; Russett & Pevehouse 2006. Reporting the results of a major research program on communicative action in international relations, Deitelhoff & Müller argue that in international negotiations, liberal democracies often supply “a reservoir of shared norms” which compensates for the lack of a shared life-world between international actors. They also indicate that domestic democracy may influence the argumentative behaviour of states (Deitelhoff & Müller 2005)

<sup>33</sup> See for example Alvarez 2001

closer to that ideal than corresponding procedures in non-democratic states.<sup>34</sup>

The last point becomes clear if we put the different levels of deliberation next to each other. When looking at a political unit (a state, for instance) in isolation, a deliberative democrat would argue that if it were to emulate more closely the ideals of deliberative democracy in its collective will-formation procedures, then more robust, better informed and more legitimate policies would follow. Now, if we regard this unit not as an organisation for decision-making but as a collective actor interacting with other collective actors (for example, in an intergovernmental organisation) the anti-delegationist view gives the actor a *carte blanche* and suggests that all actors, regardless of their internal legitimacy, come to the second-level table as equally legitimate representatives of their constituencies and equally legitimate participants, as long as they follow deliberative procedures in their joint decision-making. If we again switch levels and regard the intergovernmental organisation, in turn, as a collective actor among others, again the procedures by which it internally forms its collective will would be an irrelevant criterion for determining the democratic legitimacy of these third-level governance processes. Thus, depending on whether we look at an actor as a deliberative forum or as a collective actor in its own right, different conclusions follow. In the end, the anti-delegationist view denies the very problem of multi-level democracy or, as it were, solves the problem by transforming it into a single-level problem, where deliberation at each level operates independently from other levels.

## 6.2 INTENTIONAL AND RATIONAL COLLECTIVE ACTORS

A different approach to the problem of multilevel deliberation is to ask who the subjects of deliberative democracy are. That is, what do deliberative democrats assume about those who enter into deliberation? Are they necessarily individual human beings, or could they also be collective or corporate actors, or representatives of other collectives or constituencies? If actors like states are appropriate subjects of deliberative democracy, then the problem of multi-level democracy seems less problematic. Alternatively, if there are mechanisms by which wills and intentions formed in sub-units or constituencies can be trans-

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<sup>34</sup> Moreover, for deliberative democracy, it is vital that procedures for collective will-formation are informed by deliberations taking place in the broad public sphere (more on this below). In international forums, domestic democratic procedures are one of the few channels that exist for transmitting the concerns voiced in the domestic public spheres into international negotiations among states.

ferred reliably to higher levels and, importantly, vice versa, then multi-level democracy may also be feasible. I shall discuss both alternatives in turn.

The most common and least complicated assumption is to equate deliberators with individual human beings, citizens of a democratic state. Most deliberative democrats assume that the actors deliberating in the public sphere are citizens. Bohman & Rehg, for instance, broadly define deliberative democracy as referring “to the idea that legitimate lawmaking issues from the public deliberation of citizens. [...] it presents an ideal of political autonomy based on the practical reasoning of citizens.”<sup>35</sup> That ideal implies that citizens have certain qualities, capabilities and dispositions enabling them to engage in practical reasoning: a capacity to deliberate. Obviously, they must be equipped with practical reason. Reason and rationality is the basis of all argumentation. But deliberants are not simply rational, egotistical actors. Proponents stress that deliberative democracy is something qualitatively different than the mere aggregation of individual, pre-political preferences by majoritarian procedures. Deliberators must be able to go beyond private self-interest when deliberating with others and be able to see things with the eyes of the other. They must be open to changing their opinions and even their interests in the light of the better argument. Furthermore, for deliberation to be an emancipating process, deliberators must also be substantively, politically equal, so as not to allow threats and coercion to influence the deliberative process.

Could states and other collective actors qualify as participants in deliberative procedures? International theory generally refers to states as “actors” and “persons”, thereby ascribing to states properties – action, reason, emotion etc – that we usually associate more or less exclusively with individual human beings. However, most modern international theorists and international relations scholars would also quickly add that “states are not *really* persons, only ‘as if’ ones.”<sup>36</sup> That is, the bulk of international theory adheres to a form of reductionism and scientific instrumentalism, whereby state personhood is just a “useful fiction”, an economical shorthand metaphor for theorising about international politics but not referring to anything real. States are *actually* reducible to the individual human beings who make them up. As Colin Wight puts it, mainstream international relations “simply does not believe its main unit of analysis exists.”<sup>37</sup>

Against this view of state personhood as fictional or metaphorical, Alexan-

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<sup>35</sup> Bohman & Rehg 1997: ix

<sup>36</sup> Wendt 2004

<sup>37</sup> Wight 2004

der Wendt argues that states are persons too, for real.<sup>38</sup> They are persons for real in at least the important sense of being intentional and purposive actors. Arguing from scientific realism (as opposed to the instrumentalism implicit in mainstream reductionist notions of state personhood), Wendt suggests that if it seems so indispensably useful for international theory to regard states as persons, it would be utterly unlikely if state personhood did not refer to something real. Drawing on emergence theory, Wendt argues more controversially that states are not just reducible to the sum of their parts, that is, individual human beings, but are super-organisms, like beehives or ant-hills, with a form of collective consciousness.

Also addressing the problem of collective actors, Philip Pettit argues that integrated collectivities of a certain kind can be not just intentional subjects, but institutional *persons*, and “like individual human beings, and unlike non-human animals, they display everything that is strictly necessary in personal as distinct from just intentional subjects.”<sup>39</sup> Persons are “those intentional agents who can avow their intentional states and the actions they perform in words – or in signs of some other sort – and who can then be held to the associated expectations.”<sup>40</sup> This further means that collectivities are subjects that are capable of being deliberants – “properly conversable interlocutors”.<sup>41</sup>

To demonstrate this point, Pettit constructs what he terms a discursive dilemma. Consider a situation in which three actors (A, B and C) have to take a stand on a complex issue that can be broken down into at least two premises corresponding to a conclusion. The dilemma arises if each actor holds consistent but differing views on each point, so that the majorities on the premises do not overlap, as in the following matrix, where our three actors are about to decide whether to get a car and if so, what kind of car.<sup>42</sup>

	Car desirable?	Volvo a desirable car?	Get a Volvo?
A	Yes	Yes	Yes
B	Yes	No	No
C	No	Yes	No

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<sup>38</sup> Wendt 1999

<sup>39</sup> Pettit 2002.

<sup>40</sup> Pettit 2002.

<sup>41</sup> Pettit 2002.

<sup>42</sup> While Pettit uses this matrix as an example of internal deliberation, where the three sets of judgments A–B are held by one person, I choose this example because it is a simple formulation of the discursive dilemma.

If the group decides to vote on each of the premises, it's conclusion will be to get a Volvo. By contrast, if it decides to vote directly on the conclusion, it will reach the opposite decision. The dilemma is which procedure to prefer: "Going the first way means sacrificing collective rationality for the sake of responsiveness to individuals, going the second means sacrificing responsiveness to individuals for the sake of collective rationality."<sup>43</sup> Pettit argues that a deliberative democrat ought to go the second way.

Therefore, Pettit argues, not all groups are persons, because not all groups "impose the discipline of reason at the collective level. Collectivities of this aggregate kind will not be answerable in the same way to words previously authorized or deeds previously performed."<sup>44</sup> For instance, whereas we may criticise a political party for holding a particular view on an issue, we may not criticise the populace as consulted through opinion-polls for holding the same view, since unlike the party the populace does not discipline itself to reason collectively on the matter. Both the party and the populace as a whole are intentional subjects, but only the party may also be held to the standard of being a reasonable person.

Now, even if we would recognise "social integrates", like states, as persons in their own right, a deliberative democrat would still put requirements on the way the integrated collectivity forms its collective intentions. Any procedure would not do. Hobbes sovereign, for instance, could be considered an integrated collectivity with a will distinct from its constituent individual wills, as pictured so ingeniously on the cover of the book.<sup>45</sup> But a deliberative democrat could hardly accept a procedure where one ruler decides for all the other, nor an aggregative procedure, at least not uncoupled from extensive public reasoning, since such procedures do not constitute the collectivity as a person.<sup>46</sup> If we

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<sup>43</sup> Pettit 2001

<sup>44</sup> Pettit 2002

<sup>45</sup> Hobbes 1996 [1651]. As Runciman points out, Hobbes both maintains (a) that the state is a collective entity, created by a covenant among individuals, and (b) that "the state is more than collectively constituted, because the sovereign must represent the single 'person' of the state, and thus something more than the aggregate of individuals who have covenanted in the state of nature" (Runciman 2004: 46).

<sup>46</sup> As Pettit puts it: "There is no talking to a group that operates like this. It is inherently unconvertible. It is a disparate, aggregate sort of thing. It is not one, but many." (Pettit 2002) On the other hand, there is nothing in Pettit's argument that requires all citizens to participate in forming the collective will, only that those who do so form that will in a deliberative way. So a small group of people – such as a government or a board of directors – following deliberative procedures may well be a conversable entity without inviting everyone to participate in deliberation. In fact, a deliberating junta might be



follow Pettit's argument, even if many different procedures may reproduce the group as an intentional subject with a will representing the collectivity, a will viable for second-stage deliberation would result only to the extent that the collectivity imposes the discipline of reason upon itself. It is solely by entering into public reasoning that a group can also be regarded as one person. Accordingly, for deliberative democracy to be applicable to global governance, whereby states, NGOs, IGOs and MNCs can deliberate in person with each other, we must assume that these actors internally follow deliberative democratic procedures to make up their collective will, for otherwise they will not be collective, conversable persons.<sup>47</sup>

Thus, deliberative theorists could well hold that integrated collective actors are persons in the deliberative sense, distinct though not independent from the myriad individuals composing them. It may even be an advantage of deliberative models, compared to the aggregative models of democracy from which they like to distance themselves, which correspond to the instrumentalist, summative approach, according to which collective intentions are merely the sum of every individual's intentions seems.

By contrast, deliberative democratic theory has no problem accommodating a non-reductionist view of collective will which amounts to something qualitatively different than the mere sum of private preferences of individuals. In the deliberative model, preferences do not exist independently of the democratic process; they are discovered, tested and corroborated through public deliberation. In that sense, individual wills are just as much a product of public deliberation as collective will.

However, while such an accommodation may work in theory, it sharply raises the hurdles for transnational democracy, because for states and other collective actors to qualify for second-order deliberation, they must internally follow deliberative procedures to make up their collective wills. Otherwise, they will not be conversable persons in the sense stipulated by deliberative theory. Unlike other theorists of international relations who may well hold

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more conversable than a group which makes its collective decisions solely by secretive majority votes without first publicly making up its mind through deliberation.

<sup>47</sup> But we may also encounter a second-order deliberative dilemma, similar to the dilemmas of multi-level preference aggregation we faced in the previous chapter (section 5.3), because depending on whether the deliberants are individuals or collectively integrated actors, different decisions may follow. This time, it is not how we slice the issue but how we slice the group that affects the outcomes of rational discourse. This contingency in the outcomes of rational deliberative procedures seems unnerving for a deliberative democrat. It is difficult to take the perspectives of all into account, if those perspectives are themselves altered by how we construct the deliberative setting.

that states are intentional and conscious actors (following Wendt), a deliberative theory further requires that they are conversable persons whom we can hold to the standards of reason. Needless to say, that is a demanding criterion causing problems for all of the approaches to transnational deliberation and democracy surveyed here. They cannot simply assume that collective actors – whether states, IGOs, MNCs, NGOs, multiple demoi, or the institutions involved in European governance – are persons fit for deliberation. That must be verified in each case. And then there is the problem, of course, of what to do with those collective actors that do not meet the internal deliberative standards. If there is no talking to them, deliberation is stillborn.

### 6.2.1 *The normative problem in treating states as persons*

Thus, following Wendt and Pettit, states and other collective actors could qualify as persons – intentional, self-conscious, and rational – and thus fit for second-order deliberation, but only to the extent that they form their collective wills through deliberative procedures. To regard the collective will of the people as not reducible to the sum of its parts is an old theme in democratic theory, most famously stated by Rousseau with the concept of the general will.<sup>48</sup> But it is worth to recall the standard critique against the general will, that it subordinates individuals to the infallible, indivisible and absolute will of the collectivity.<sup>49</sup> Henry Richardson argues that the problem with Rousseau's general will is not conceptual, but moral or normative:

“The notion of an institutional will not identical with the wills of any person in the institution makes conceptual and methodological sense; it simply gives up the link to individual wills important in a democracy

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<sup>48</sup> Rousseau 1762. However, unlike contemporary republican and deliberative theorists, Rousseau is notably sceptical of public deliberation as a prerequisite for validly forming the will of the collective. He argues that a sufficiently enlightened people would pronounce the general will most clearly if there were no parties, factions and private associations within the state, and if each citizen only voted for himself – ideally without public deliberation and debate. Public deliberation would only fragment the general will and citizens would fall prey to passions and interests and be seduced by orators seeking to split the populace. Thus, citizens should preferably keep their views private and express them by shouting, not by talking, as public deliberation makes politics mediated and indirect (Urbinati 2000).

<sup>49</sup> David Runciman suggests that Rousseau also holds that the state is a “‘collective, artificial’ entity, and each responsible member of that state is made responsible for the actions of the state as a whole”. This view of the state as the sum of its members is obviously in tension with the claim that the general will is not reducible to the will of all (Runciman 2004).

and insisted upon by the ideal of regarding citizens as self-originating sources of claims.”<sup>50</sup>

Regarding citizens or individuals as self-originating sources of claims implies regarding them as somehow intrinsically valuable, that is, their voices deserve to be respected not only because they are important sources of political argument that ought to be heard, but also because their claims to some extent do not require any further basis or justification. Thus, Richardson takes sort of an ethical individualist view of the general will: While conceptually and methodologically useful, it is morally significant only because individual citizens are. In normative terms, the general will is nothing more than the sum of its parts. Supra-individual entities, such as a people, a majority or a state, are not self-authenticating sources of valid claims.<sup>51</sup> This is also a central claim in cosmopolitanism: Only individual human beings are units of ultimate moral concern.<sup>52</sup>

Why, then, one might ask, should we regard citizens or individuals as self-originating sources of claims? Here the broadly Kantian tradition to which deliberative democrats belong would argue that individual human beings deserve this special, non-instrumental moral status because they are moral subjects, which is to say that they possess rational capacities.<sup>53</sup> But these properties that make individual persons self-originating sources of claims, that is, intrinsically valuable beings, seem uncomfortably similar to the properties we have now ascribed to collectivities. If individuals are morally significant because they are persons, and if integrated collectivities are persons in a similar sense, then should not those integrated collectivities similarly be morally significant?

Theorists of deliberative democracy might have moral reasons to think twice before anthropomorphising the state (and other collective actors) in this fashion. Whereas the Wendtian view might be conceptually defensible (though many theorists of international relations take issues with his holism), for a theory of democracy anchored in a liberal tradition it must look suspicious. States may well be psychological persons, in the same sense as a beehive, an anthill or a distributed global epistemic community of physicists are (to cite Wendt's examples), without having a moral status comparable to individual human beings.<sup>54</sup> Wendt ponders the potential normative consequences of his argument:

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<sup>50</sup> Richardson 1997; cf. Bobbio 1990: 41ff

<sup>51</sup> Michelman 1997: 152

<sup>52</sup> Beitz 2005; Pogge 1992

<sup>53</sup> Gunnarsson 2008

<sup>54</sup> Cf. Eckert 2006

“If states are reducible to their members, then it seems to follow that individuals should be the ultimate bearers of rights and responsibilities. Like most of us I have no wish to overturn that principle. However, we should want liberalism to be lucid and ontologically sound, and here the realist view of state persons poses a challenge. If state persons in fact cannot be reduced to their members, then we cannot rely on physicalism as a metaphysical firewall against non-liberal politics, and in particular against normative claims on behalf of state persons themselves, or *raison d’etat*.”<sup>55</sup>

Wendt concludes by noting that organismic thinking about the state has historically led down the drain to “fascism, genocide, and war”. But if states are persons too, how can we justify liberalism and the claim that only human individuals are bearers of rights and responsibilities, or self-originating sources of claims?

Combining the insights from Wendt and Pettit, we may argue that corporate actors, like states and NGOs, may qualify as intentional, conscious and rational persons if their internal will-formation strictly follows public deliberative procedures. Otherwise they will not have the capacity for second-order deliberation.<sup>56</sup> These criteria are strict, so strict that it may appear unlikely that real actors will approach them more often than not. However, let us assume that the collective actors implied in transnational would meet these criteria: they would be intentional, conscious and rational corporate persons because they follow deliberative procedures in their internal will-formation.<sup>57</sup> How would they deliberate with each other? Even if we assume that some collective actors can also be conversable, corporate actors, it still seems strange to say that they can participate in deliberation in any real sense. For instance, when we say that states negotiate, in the European Union, the United Nations or the

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<sup>55</sup> Wendt 2004: 292

<sup>56</sup> If a state or an NGO nonetheless engages in deliberation, it will probably be of a reductionist kind: Someone – an individual person or a collective person composed of a subset of individuals, for instance a government – speaking in the name of the collectivity could be an intentional, conscious and rational actor capable of deliberation.

<sup>57</sup> On the other hand, if corporate actors are truly persons in their own right, not reducible to the individuals from which they are composed, then they are also other persons than those individuals. Even if the corporate actors were intentional, conscious and rational persons (which they would have to be for second-stage deliberation to be possible) in virtue of having formed their collective wills by deliberative procedures, the decisions that they take in the second stage may be binding upon other persons than themselves, namely the individual persons comprising them.

World Trade Organisation, we do not really mean that states discuss and bargain with each other, but that their representatives do: Diplomats, ministers or bureaucrats representing governments which in turn represent states. As David Runciman argues, state agency requires representation.<sup>58</sup>

### 6.3 REPRESENTATION TO THE RESCUE

Now, it may seem that many of the problems we have faced here could quite easily be solved by amending the deliberative democratic approach to transnational democracy with a theory of representation and accountability. The problem of multi-level deliberative democracy lies in specifying the interaction between different levels of decision-making institutions. For example, in an institution such as the UN where nations convene to take decisions, the democratic legitimacy of the institution would at least in part be a function of whether the delegates to the UN are accountable, if only indirectly, to the people of the states they represent.<sup>59</sup>

However, as I shall argue here, there are two reasons why the deliberative democratic model's account of representation is unsatisfying. First, by stressing that deliberative democracy requires all people to engage in actual deliberation, deliberative democracy runs into well-known problems of scale, rendering it impracticable for any sizeable, complex community. Second, I shall argue that democratic representation and accountability ultimately cannot rest solely on understanding- or consensus-oriented reason-giving, but must also allow for strategic action, something that deliberative democrats rule out from ideal democratic procedures.

#### 6.3.1 *The problem of scale in deliberative democracy*

While some theorists argue that deliberative democracy provides a model for improving democratic legitimacy at a transnational or global level, both proponents and critics have recognised that deliberative democracy faces serious problems of scale.<sup>60</sup> A small group may engage in rational and honest discussion aimed at reasoned consensus, but for any larger group meaningful deliberative interaction soon becomes impossible.

The problem of scale in deliberative democracy originates in the hard core

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<sup>58</sup> Runciman 2004

<sup>59</sup> But the problem may pertain to political representation in general, and not only to democratic representation (Rehfeld 2006).

<sup>60</sup> Goodin 2000; Dryzek 2001; Parkinson 2003; Kuper 2006; Pingree 2006; Friedman 2006

assumption of deliberative democracy, namely, that the legitimacy of decisions, institutions and norms is anchored in the public reasoning involving everyone that they affect, subject or concern. We find this core principle variously formulated by all deliberative theorists. Robert Goodin suggests that theorists of deliberative democracy “suppose that outcomes will be democratically legitimate only in so far as they emerge through external-collective processes of deliberation involving a free and equal exchange among everyone who will be affected by them.”<sup>61</sup> Seyla Benhabib similarly claims that “Legitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of all about matters of common concern.”<sup>62</sup> Jürgen Habermas embeds the same ideal in his discourse principle, claiming that “Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse.”<sup>63</sup> On Joshua Cohen’s account, outcomes are legitimate to the extent that they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question.<sup>64</sup>

The problem, obviously, is that for all to be able to participate in authentic, free and unconstrained external-collective processes of deliberation or rational discourse, ‘all’ cannot be more than a handful of people.<sup>65</sup> Thus, the scale prob-

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<sup>61</sup> Goodin 2000: 82

<sup>62</sup> Quoted in Parkinson 2003

<sup>63</sup> Habermas 1996a: 107. However, the ‘could’ included in the discourse principle invites us to interpret it as weaker and more hypothetical than the other legitimacy criteria cited here; cf. footnote 36 below.

<sup>64</sup> Quoted in Dryzek 2001

<sup>65</sup> Mill 1991 [1861]: 256. Note that the problem of scale is not rooted in the all-affected principle, although it may seem so. As I argued in Chapter 2, the all-affected principle, stating that everyone who is affected by a decision has a right to participate in making that decision, cannot solve the boundary problem in democratic theory. But it is not because of the all-affected principle that deliberative democrats face problems of scale. The problem is not that “all those affected” always is a wide and indefinite crowd. Rather, problems of scale arise whenever any group of people larger than a mere handful try to apply deliberative democratic procedures, regardless of how they determine who is a legitimate member of their group. That is, even if we would treat the demos as more or less given – for instance, by assuming that the demos comprises all the citizens of a state or all the members of an association – the problem of scale would still appear. The problem is rooted in the requirement that all – however we determine who ‘all’ are – participate, because in any society of scale ‘all’ will be more people than can actually deliberate with each other. It is simply a matter of numbers and economy, a trade-off between inclusion and efficient deliberation.

Nor is the problem that ordinary people would be unwilling or unable to engage in the sort of communicative behaviour that deliberative democracy requires (though that

lem results from two postulates of deliberative democratic theory: (1) All (whoever they are) should participate in (2) actual deliberation. Solving the problem of scale involves modifying or compromising either or both of these requirements. Either we restrict the (1) number of participants, or we restrict (2) the deliberation they enter into, or both.<sup>66</sup>

So why do deliberative democrats end up in this strange problem of scale? Andrew Kuper gives a clarifying account of why Habermas's deliberative theory ends up in the problem of scale and argues that deliberative democracy "cannot provide firm foundations for deepening and globalising democracy."<sup>67</sup> Let us inspect this argument.

Why is it so important that real people engage in actual discourse? On the Habermasian view, there are two reasons why real people must engage in actual discourse. First, other people tend to have distorted views of your needs and interests, and the best way to ensure that your interests are correctly

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is an important feasibility consideration, too). As Michael Walzer writes: "I don't mean that ordinary men and women don't have the capacity to reason, only that 100 million of them, or even 1 million or 100,000 can't plausibly 'reason together'" (Walzer 1999).

<sup>66</sup> Suggested solutions to the problem of scale by other means than representation include: (a) Restricting deliberation to major moments, such as when a constitution is adopted (Rawls 1996: 406). However, rather than solving the problem of scale, this solution merely limits the number of occasions the problem occurs (Dryzek 2001). (b) Aggregating the outcomes of serial deliberation in smaller sub-groups (Goodin 2000; Rawls 1996: 408). But this has the disadvantage that outcomes in one or many small groups will not be the same as if the entire group had deliberated together. This procedure also raises the issue of how to aggregate the outcomes from small groups (Kuper 2006: 67). Selecting or electing a microcosm from the community meets similar objections, and additionally, we face the problem that the microcosm would have to justify its decisions to the public at large (Dryzek 2001). (c) Filtering out the most relevant contributions, for example by regulating speaking time or by having the most salient issues and arguments percolate to the top through various aggregators, such as newspapers and internet forums. Critics argue, however, that these filtering solutions might undermine the quality of public discourse, leading to a 'democracy of sound bites', privileging topics that are easy and interesting to discuss (Goodin 2000; Kuper 2006; Pingree 2006; Habermas 2008). (d) Finally, some solutions altogether give up the ambition to engage real people in actual public deliberation, by modeling deliberation as taking place in each person's or a lone philosopher's mind or by regarding consent as a mere hypothetical requirement (Goodin 2000; Warren 1996; Dryzek 2001; Heyd 2007; Habermas 1998b: 58; Michelman 1997: 156f; Rawls 1996: 383, n14). However, then we have already left the domain of deliberative democracy, for, as Dryzek argues, "surely the theory hangs by a slender thread if its viability depends crucially on the vast majority always choosing not to exercise the rights and capacities that are so fundamental to the theory" (Dryzek 2001).

<sup>67</sup> Kuper 2006: 49

taken into account is to take you into account. Every person is the best judge of his or her own interests.<sup>68</sup> Second, not only others may be mistaken about your true needs and interests, but you too. Thus, since no individual can interpret and revise on his or her own the real, intersubjective cultural background conditions against which such needs and wants must be understood, “the terms in which each person perceives and asserts their wants and interests within such a discourse must be open to actual criticism”.<sup>69</sup>

This is one of Habermas’s central points, which he maintains against Rawls’s idea of a hypothetical agreement: Only real argument makes moral insight possible, Habermas claims, and the lone philosopher cannot know what free and equal persons would agree to under hypothetical conditions.<sup>70</sup> If no actual deliberation is carried out, individual thinkers would not be able to take into account and fully empathise with the situations, judgments and interests of all those who are affected by laws and other norms. As Samuel Freeman writes: “What matters most for deliberative theorists is not hypothetical, but actual deliberation among free and equal citizens under the realized ideal conditions of deliberative democracy.”<sup>71</sup>

So what are these ideal conditions of deliberation? Usually, they require that citizens must be willing to deliberate, that citizens must be substantively equal, and that citizens must regard themselves as collectively bound only by the outcomes of such deliberative processes. As many critics have pointed out, these ideal conditions are pretty far from any real-world deliberative situation. However, the proponents of deliberative democracy retort, these ideal conditions should not be confused with how they are realised or operationalised in any real society.

On Habermas’s two-track model, real-world public deliberation occurs in two domains: Informal, decentered networks of the public sphere and institu-

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<sup>68</sup> Habermas 1990: 67

<sup>69</sup> Kuper 2006: 53; cf. Habermas 1990: 67f. Republican theories of democracy usually motivate citizen participation and public deliberation by referring to what is good for human beings. Only by actively participating in public life can people become good citizens and good persons. But contemporary advocates of deliberative democracy usually do not argue that it is intrinsically good for people to participate in public deliberation or that it is necessary for their human self-fulfilment. Instead, they argue that public deliberation is “essential to the discovery of truth about rational laws that best promote justice and the common good.” (Freeman 2000: 378f) Rawlsian accounts, by contrast, rather stress that deliberative democracy is morally necessary for political legitimacy: Legitimate institutions should be justifiable to all by reasons that all can accept.

<sup>70</sup> Habermas 1998b

<sup>71</sup> Freeman 2000: 380



tionalised deliberation in parliamentary bodies.<sup>72</sup> Habermas conceives of the public sphere as a “network for communicating information and points of view [...] the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specific *public* opinions.”<sup>73</sup> The public sphere thus serves as a dispersed system for raising and amplifying common problems in society pressing for solutions by the political system. Importantly, the public sphere is decentred, anonymous and faceless; it does not need to be embodied by and identified with present, active citizens, as it is concerned with forming opinions about what needs to be done, not with making decisions.

Habermas assures that there will also be representative institutions, which are able to deliberate in a more efficient, hierarchical and structured fashion than the weak public sphere. These institutions (typically, parliamentary bodies) not only deliberate, they are also empowered with forming a collective will and making binding decisions. What is done within these institutions, however, is legitimate only insofar as it incorporates, proceeds from, and leads back to the reasoning of citizens in the public sphere. It is not enough, then, that citizens choose procedures and representatives, the substantive decisions must also correspond to what the public sphere could in fact assent to.<sup>74</sup>

Unlike liberal models of democracy, where citizens are called in regularly to pass judgements on how adequately they think representatives have performed and will perform in the future, deliberative democracy requires a tighter correspondence between what representatives do and the public opinions formed by citizens in the public sphere. As Kuper argues:

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<sup>72</sup> Kuper 2006; cf. Nanz & Steffek 2004; Eriksen 2000

<sup>73</sup> Habermas 1996a: 360

<sup>74</sup> This is not to suggest that Habermas embraces Rousseau’s idea that public opinion can never be represented. As John Peters argues, the early Habermas is explicitly suspicious of representation, in both a political and aesthetic sense, and of representative government. In early works, he assumes that democracy implies the identity of citizens and the government – they are to be the same. Like Rousseau and Schmitt, Habermas contrasts the *identity* between rulers and ruled with the *representation* of the ruled by rulers. However, the later Habermas wants to lustrate modern democratic theory from its Athens-envy:

“If the idea of popular sovereignty is to find realistic application in highly complex societies, it must be severed from a concrete interpretation of a body of present, participating and mutually consenting members of a collective’. Instead, he proposes a procedural notion of popular sovereignty in which the dispersed citizenry can embody itself in ‘subjectless ... forms of communication’.” (Peters 1993, citing Habermas).

“On deliberative conceptions, in contrast, the interests that are pursued and the judgements that are made by representatives must be recognisably those that citizens have themselves *already* discovered, interpreted and confirmed.”<sup>75</sup>

The question, however, is by what mechanisms the decision-making representatives in the strong public sphere are to be bound, if at all, by the deliberative outcomes of the weak public sphere of civil society. Habermas admits that for technical reasons, formal political discourses must be conducted by representatives, but they:

“must not be conceived along the deputy or proxy model; they simply form the organized mid-point or focus of the society-wide circulation of informal communication. Discourses conducted by representatives can meet the condition of equal participation on the part of all members only if they remain open, porous, sensitive or receptive, to suggestions, issues and contributions, information and arguments that flow in from a discursively structured public sphere.”<sup>76</sup>

If this inflow from the public sphere to representatives is so important for the democratic legitimacy of deliberation, how is it to be regulated? Habermas is not alone in ascribing this pivotal role to the informal public sphere. In charting the loci of deliberative democracy, Michael Saward finds that various deliberative theorists suggest a wide range of sites: especially constructed micro-forums such as deliberative opinion-polls and citizens’ juries; supra-national committee networks; civil society broadly speaking; associations; the supreme court; a broad public sphere of protected enclaves (such as social movements, interest groups, churches, workplaces etc.); subaltern counter-publics; and publicly-funded political parties (the list could probably be extended with similar examples from transnational politics). Distinguishing these sites by two dimensions – representative and non-representative, formal and informal – Saward notes that those theorists of deliberative democracy who make the most expansive claims about political legitimacy site deliberation in non-representative and informal forums, which corresponds to Habermas’s idea of the wider public sphere. But if deliberation is so crucial for democratic legitimacy, Saward asks, “why not formalize it and put it on a representative basis?”<sup>77</sup>

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<sup>75</sup> Kuper 2006: 61

<sup>76</sup> Habermas 1996a: 182

<sup>77</sup> Saward 2000b. John Parkinson suggests terms on which a theory of deliberative democracy could accept representation as a legitimate form of exclusion (apart from solv-

Most theorists of deliberative democracy seem to agree that representation in some form is necessary to solve the problems of scale; on the other hand, theorists also recognise the unavoidable trade-off in terms of deliberative legitimacy. How would representatives be selected or elected, in order to ensure that their deliberations are representative of the wider public sphere? Not only do deliberative theorists associate elections with competitive, elitist, interest aggregative models of democracy; moreover, as John Dryzek argues, for election campaigns to conform to standards of deliberative legitimacy, “they would have to involve the deliberation *of all*.”<sup>78</sup> On the other hand, if we select a subset representative of the population to deliberate, then we still have to ensure that the population at large would accept the subset’s conclusions. Either way, the problem of scale reappears.<sup>79</sup>

And more fundamentally: whether selected or elected, could deliberators ever be representative of the wider public sphere? Not only would the answers that emerge from deliberation in smaller subsets differ from those hypothetically given by the population at large, but the questions raised, too. Given the problem of scale, public opinion, in the thick sense of a collective opinion formed through public reasoning in the public sphere as a whole, is chimerical. Deliberative representation thus seems to presuppose that we could hold the deliberations of representatives to a counterfactual standard.<sup>80</sup>

### 6.3.2 *The two-front dilemma and deliberative accountability*

Now, if representation is inescapable for deliberative democracy as a model of transnational democracy in multi-level governance, what are the ties that bind representatives to those whom they represent? In this final section, I shall argue that deliberative democracy faces a delicate dilemma between accountability and deliberation, which reveals a fundamental difficulty in modelling relations of authority and accountability on communicative action. While incorporating the idea that power-wielders should be accountable to those who hold

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ing the problem of scale): Non-participants may agree that representation often is more efficient, as some people may not feel strongly enough about an issue to participate in deliberation, and they may also believe that a competent spokesperson would better further their view than they would themselves. Additionally, representation may often be “better than ‘the thing itself’ because, by trimming away the inessential, it focuses attention on specific features” (Parkinson 2003).

<sup>78</sup> Dryzek 2001

<sup>79</sup> Dryzek 2001; Parkinson 2003

<sup>80</sup> Goodin 2000; Pingree 2006; Kuper 2006

stakes in their decisions, deliberative democratic theory misconstrues the conditions for effective accountability.

First, the dilemma: On the one hand, for deliberation to be fruitful and to approach the standards of communicative rationality, deliberants must be open-minded and willing to change their views under the force of the better argument. On the other hand, representatives come to second-level deliberations bound by mandates from the people or entities in whose name they stand and speak (or the wider public sphere in general). Whether they represent governments, corporations or non-governmental organisations, delegates usually have a mandate from their principals to represent their principals' interests and agenda. As Thomas Risse argues:

“As a result, there are limits in the extent to which [delegates] are allowed to engage in freewheeling deliberation. What if negotiators change sides in the course of negotiations because they have been persuaded by the better argument? [...] At least, one would have to require that they engage in a process of ‘two-level arguing’, i.e. of trying to persuade their principals that they should change their preferences, too.”<sup>81</sup>

Indeed, we encounter this problem in any multi-level setting, whether a forum of transnational governance or a traditional parliament, where representatives need to deliberate both with other representatives and with their principals. But how can we make such two-level deliberation compatible with the legitimacy demands of deliberative democracy? When representatives face this dilemma between second-level deliberation and the home front, which deliberative situation should take precedence? John Parkinson argues that we can resolve this dilemma between modelling representatives as either trustees, authorised by their principals to act freely, or delegates, bound by strict instructions and held to account in retrospect, because they are actually both:

“Legitimate representatives [...] act as both trustees and delegates, having both accountability and authorisation from their principals. Thus, the ‘better arguments’ that persuade representatives within the deliberative forum should also convince those people outside it once they have been exposed to those arguments by their representatives in their own, separate deliberations.”<sup>82</sup>

While this might look like an offer to eat the cake and have it too, it helpfully

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<sup>81</sup> Risse 2004: 312

<sup>82</sup> Parkinson 2003

shifts our attention from how to ensure that deliberations in representative forums match those in the public sphere, to the issue of how to ensure that agents will be legitimate representatives in that double sense. So if legitimate representation consists in acting as both a trustee and a delegate, how can principals both authorise their representatives to act in their name and retrospectively hold them to account for their actions?

Just as it takes two to tango, so accountability requires a relation between two actors. On the one side are agents who have been entrusted a certain authority. On the other side are principals who have some sort of interest in how agents exercise their authority. The concept of accountability, Ngaire Woods suggests, can be broken down into three components: transparency, compliance and enforcement.<sup>83</sup> Similarly, Ruth Grant & Robert Keohane define the concept of accountability as implying that “some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”<sup>84</sup> These three components constitute accountability (they are all necessary conditions for accountability to apply and function), but we could also understand them as consecutive stages of holding someone accountable. First, information about the actions taken by the agent is gathered and publicised (this is why mechanisms of transparency are so important if we wish to assure accountability). Second, the principal evaluates the information as to whether the agent has complied with agreed upon standards of conduct. This means that accountability implies norms or standards by which to evaluate the actions taken by the agent. Third, if necessary, the principal imposes sanctions on the agent, such as dismissing, fining, or mudslinging her. And this final element of sanctioning is crucial: “For an agent to be accountable, the agent must face adverse consequences if his or her actions are inconsistent with the values and preferences of the principals.”<sup>85</sup> Or, as Robert Behn more directly puts it: to agents, accountability means that “when they screw up, all hell can break loose. [...] Accountability means punishment.”<sup>86</sup>

Thus, although accountability has an important element of public reasoning, merely giving an account is not enough. If principals are unsatisfied with the reasons given, they should also ultimately have the means for sanctioning those that they hold to account. In general, accountability functions as

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<sup>83</sup> Woods 2001

<sup>84</sup> Grant & Keohane 2005

<sup>85</sup> Keohane & Nye 2003

<sup>86</sup> Behn 2001: 3 Also see Mulgan 2000.

an *ex post* mechanism of control. As voters, for instance, we may expel our representatives for what they did in office, as shareholders we can dismiss the corporate board for meagre results, and as consumers we may choose other products to demonstrate our dislike for a particular company's ethical record. But the point with accountability mechanisms is that they work *ex ante* too, albeit indirectly. Making power-wielders accountable is supposed to affect how they behave in power.<sup>87</sup> As Jon Elster notes, the "value of an accountability mechanism may derive from its actual use or from the belief that it might be used."<sup>88</sup> Deterrence, he argues, is more important in modern political systems than incapacitation, and when it works, it is essentially costless whereas incapacitation is always costly.<sup>89</sup>

Obviously, there are many different kinds of mechanisms by which principals can hold agents accountable and there are other sanctions than dismissal or punishment. Where agents only have limited terms, the fear of being dismissed will obviously not suffice to keep them in check. Elster argues that this is why other accountability mechanisms were so important in the Athenian democracy, which relied on lot for appointing certain important officials. The fear of being ostracised or publicly charged may deter just as well as the risk of not being re-elected. Similarly, Machiavelli believed electoral mechanisms to be necessary but insufficient to keep elites in check, and argued that the institution of public accusations was the best means for guarding freedom in a republic.<sup>90</sup>

Control, sanctions, punishment, deterrence, fear, threats, shaming, ostracism, accusations – such is the language of accountability. These terms indicate that accountability rests on the possibility that power resources, whether material or immaterial, can be deployed strategically to force actors not only to give accounts of their actions *ex post*, but also to shape their behaviour *ex ante*. Accountability necessarily relies on the possibility that actors will not agree, that the accounts given are not satisfactory, and that if such disagreements are

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<sup>87</sup> Therefore, too, accountability requires that the two actors are relatively independent. Courtiers cannot hold their king accountable and cabinet ministers cannot hold their prime minister accountable; at any rate, they are not suitable to be charged with the task (Goodin 2003).

<sup>88</sup> Elster 1999: 257

<sup>89</sup> Essentially costless, perhaps. But against Elster one may argue that if a threat to use force is to be effective, it must be backed, to some degree, by the capacity actually to use force, and that capacity comes at a cost. Deterrence without the possibility of incapacitation will thus be a rather weak mechanism of accountability. If we have no reason to believe that a threat could be realised, why should we comply?

<sup>90</sup> McCormick 2001

irresolvable, the actor held to account bears the cost. Accountability is antagonistic and it relies on ultimata: Behave – or else!

This is where accountability will start to feel awkward for deliberative democrats. In communicative action theory, these kinds of acts are routinely ruled out as strategic action, and as such inimical to rational discourse oriented toward reaching understanding. Not only is it impermissible to threaten to use physical force or economic power to get one's way in deliberative situations, but even speech acts such as blaming, shaming, irony, rhetoric and even expressing emotions could violate the rules of rational discourse, because it indicates the breakdown of argumentation.<sup>91</sup> The ideal speech situation, the regulative normative ideal for deliberation, is (a) inclusive, so that nobody is excluded from taking part in discussing issues relevant to him or her; (b) coercion free, so that everybody engages in rational argumentation, without being dominated or intimidated by other participants; and (c) open and symmetrical, so that anyone can initiate discourse on any topic, including the deliberative procedures.<sup>92</sup> Accountability dialogues conceptually violate all three of these ideal conditions: They can result in exclusion, when a mischievous agent is fired or ostracised; they are not coercion free and intimidation is their constitutive condition; they presuppose an asymmetrical power relation between agent and principal. As Richard Mulgan argues, accountability requires a dialogue different in kind from that of the deliberative public sphere:

“The dialogue of accountability occurs between parties in an authority relationship and can only be understood in the context of that relationship. This relationship is crucially different from that presupposed by democratic debate which takes place in a public space between citizens conceived of as equals.”<sup>93</sup>

This is not to make the trivial objection that the ideal speech situation rarely applies in real situations, which Habermasians meet by arguing that the ideal speech situation constitutes a regulative ideal for any real argumentative situation: By entering into such situations, we have always already agreed to being measured according to the standard of the ideal speech situation. No, the point here is that the ideal speech situation is unsuitable as a regulative ideal for accountability dialogue. It seems strange to measure a form of interaction which

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<sup>91</sup> Notably, though, some deliberative theorists seek to accommodate rhetoric, irony and emotions in deliberation (Parkinson 2003; Chambers 2003).

<sup>92</sup> Habermas 1990; Kapoor 2002: 462

<sup>93</sup> Mulgan 2000: 570

must rest on potential exclusion, coercion and asymmetrical power relations by a standard that proscribes such mechanisms as inherently illegitimate.<sup>94</sup>

Now, theorists of deliberative democracy might respond that just like procedurally regulated bargaining, accountability dialogue should still be based on procedures that could be verified through discourse. Bargaining is the fall-back position when there is no hope of reaching a rationally grounded consensus through discourse. Instead, strategic action prevails and threats and promises replace the force of the better argument. Such bargaining procedures are legitimate, however, to the extent that they can be tested in moral discourse, and the rules governing them should be neutral and impartial for the outcomes to be normatively valid. But I doubt that accountability dialogues would fulfil even the legitimacy criterion of bargaining situations, in this Habermasian sense, since they are not aimed at consensual agreement over a procedure that guarantees a balance of interests and equal opportunities for all parties to claim their interests and influence each other.<sup>95</sup> For accountability to work, we cannot model principals and agents as equals striving for a compromise acceptable to both sides.

All in all, for representation to be a solution to the problem of scale, it must include mechanisms of authorisation and accountability by which principals can both empower and restrict their agents. But for all its stress of public, deliberative dialogue between decision-makers and stakeholders, the deliberative model tends to neglect that giving reasons is not all there is to accountability; threats and sanctions may be necessary to force agents to speak. This tendency is problematic not only because it makes it difficult to resolve the problem of scale by means of representation, but also because it might seem to mask relations of power and authority in actual deliberation.<sup>96</sup>

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<sup>94</sup> Cf Kuper 2006: 65. As argued by Andrew Kuper, the root of many problems with applying deliberative democratic theory to real political institutions is that it models communication on conversation, because “conversation lacks the fundamental objective that is the generative source of public institutions: no coercive, collective decision has to be made.”

<sup>95</sup> Habermas 1996a: 165ff

<sup>96</sup> For example, some suggest that court negotiations should be conceived as democratic, public deliberation between various stakeholders, such as prosecutors and defenders, defendants and victims, social agencies and community groups (Dzur & Mirchandani 2007). This suggestion seems either to be morally absurd (if the aim is to reach rational consensus among these parties) or to blink the fact that the courts represent the coercive powers of the state.



## 6.4 CONCLUSION

As I have argued in this chapter, deliberative democracy might be a more complicated model for increasing the democratic legitimacy of transnational, multilevel governance than its proponents have hoped. Similar to the problems we located in the political order of cosmopolitan democracy, the problem here concerns how to ensure democracy between different levels and in the interaction among diverse, collective agents, such as states, non-governmental organisations and multi-national corporations.

I have considered three possible strategies for making deliberative democracy applicable in such situations, all of which turn out to be problematic. First, the argument that the legitimacy of deliberative procedures in transnational settings are unrelated to the participants' internal democratic legitimacy rests on dubious normative and empirical premises and it also reduces the very problem of multi-level democracy to a single-level problem of procedure. A second strategy would instead consider states and other collective actors as persons in their own right: intentional, rational and not reducible to the sum of their parts. While this strategy presents a solution to the obvious flaw in the first strategy, it also sharply raises the bar of acceptance: only a collectivity that follows deliberative procedures to make up its collective mind will qualify as intentional and conversable. Besides, making collective actors the subjects of democracy in this sense may be at odds with normative individualism.

Finally, a theory of representation looks like the most promising strategy for solving these problems. If not else, any deliberation in the transnational setting must always be indirect, between representatives, whether they represent electorates, states, NGOs or other kinds of collective entities. But although many theorists of deliberative democracy admit the need for representation in order to solve the problems of scale, it is still problematic to provide an account of representation if we hold on to the claim that legitimacy requires that all must be involved in actual deliberation. Moreover, if we argue that legitimate representatives should be authorised by and accountable to their principals, we cannot model relations of accountability on communicative action. Accountability involves the strategic use of threats and sanctions against misbehaving agents.

All in all, while some theorists have suggested that the ideal of deliberative democracy may serve as a shortcut for improving the democratic legitimacy of transnational governance, since unlike cosmopolitan democracy, it does not presuppose a rigid scheme of supranational, representative institutions, I hope to have shown a few reasons to be suspicious of such expectations. This is not

to deny the importance of communication, deliberation and arguing in international politics. All things equal, it seems preferable that agents communicate with each other, whatever else they might also do. But such communication is not always best modeled on communicative action or, more generally, deliberative democracy, with its insistence on public reason-giving aimed at mutual understanding and consensus.

## 7. Conclusion

I opened this thesis by surveying the dramatic statements made by various advocates and theorists of transnational democracy. Globalisation, they argue, challenges democracy as we know it. Whether advocating cosmopolitan democracy and its specific supra-national, post-sovereign institutional order or rather a deliberative democracy, seeing public deliberation among stakeholders and decision-makers as the way to improve the democratic legitimacy of global governance, these theorists largely agree that we must embark upon drastic reforms if democracy is to survive and flourish in the future. If everything else has become global or transnational – systems of economic production and exchange, cultural flows and identities, political decision-making and institutions – then democratic mechanisms for holding power-wielders to account must become global or transnational too, they argue. Some even suggest that we face a transformation of democracy as fundamental both in theory and practice as when democracy went from being associated with citizens participating directly in the ruling of a small city-state to representative mass-democracy in modern nation-states.

I have argued against such claims and the theories supporting them. My argument has operated in two domains: the principled problem of how to constitute transnational democracy and the practical problem of how to realise it. Before drawing some general conclusions, let me briefly summarise the argument thus far.

I started out in by suggesting that we should not reduce the discussion about transnational democracy to a question of globalisation and its causes and effects. Certainly, empirical claims about globalisation are important for taking stock of theories of transnational democracy, but so are the normative claims which cannot be evaluated simply by testing empirical or factual premises.

I then turned to two fundamental principled arguments made by theorists of transnational democracy: that all who are affected by political decisions have a legitimate claim to participate in their making, and that universal hu-

man rights and democracy are equally important in some non-trivial sense.

In Chapter 3, I presented four arguments against the all-affected principle, a principle to which theorists of cosmopolitan democracy and deliberative democracy often appeal in justifying transnational democracy. Instead, I argued that a better way of determining who has a legitimate claim for democratic participation is the subject-to-the-law principle, suggesting that those who are subject to the law, ultimately backed by a coercive force, also should be allowed to participate in its making. Just as the all-affected principle, the subject-to-the-law principle cannot account for the constitution of the demos, since it merely presumes a pre-existing law-giving sovereign which is to be ruled democratically. But it does advance beyond the all-affected principle in being more determinate and by focusing on the relevant costs that living in a political order implies for people: Not being vaguely affected, but being subject (and subjected) to coercive institutions enacting law. While the subject-to-the-law principle could justify claims for transnational democracy, such justifications depend on whether there are transnational sources of law of the kind that justifies democratic participation, which turns out to be a contested matter. Is the world today bound together under global hegemonic law, an emerging cosmopolitan constitution, a diffuse, self-organised transnational legal system? To the extent we think it is, there might be a good case for justifying transnational democracy by the subject-to-the-law principle. But the claims about global hegemonic law not only exaggerate the role of international law, but also misconceive of its coercive and binding force over individuals. Thus, I concluded Chapter 3 by suggesting that while the subject-to-the-law principle solves some of the problems with the all-affected principle, the problem of how to constitute a democratic community democratically remains in principle unsolvable.

Chapter 4 turned to the concepts of human rights and democracy, which feature in many normative theories of transnational democracy. However, human rights and democracy serve rather different roles in cosmopolitan and deliberative democracy. Theorists of cosmopolitan democracy come to define democracy as the implementation of a non-negotiable scheme of rights, while also arguing that democracy thus conceived should be extended to all sites of power. In doing so, they both abandon liberal mechanisms for constraining governmental powers and republican mechanisms for popular participation and self-determination. The scope of democracy thus becomes very restricted. Some theorists of deliberative democracy stress that democracy and human rights, or public and private autonomy, are co-original. I argued that the co-originality thesis as an attempt to solve the alleged paradox between human rights and democracy leads to a vicious regress, because the individual rights

constitutive of democratic procedures would themselves be up for grabs in the procedure of democratic deliberation. And the solutions offered to this problem in a constitutional democracy make it even more difficult to sustain the co-originality thesis in the international context, where the rule of law and democratic procedures are not already in place to anchor and give substance to human rights. Thus, my main conclusion of this chapter suggested that democracy and human rights cannot always be justified in terms of each other. Following the approach of cosmopolitan democracy, we end up reducing democracy to a matter of implementing a scheme of rights, whereas following Habermas's route, we will have difficulties to justify any human rights independent of democratic procedures.

The second part of my argument turned to problems of how to institutionalise transnational democracy. Theorists of transnational democracy usually claim to offer a model of democracy that fits new forms of transnational governance. Whereas some envisage a cosmopolitan political order where authority is dispersed to multiple levels and sites, others champion deliberative democracy as a more feasible democratic ideal within emerging forms of transnational governance. Assessing each model in turn, I argued that neither presents a feasible model of transnational democracy, albeit for quite different reasons.

Chapter 5 suggested that the political order sketched by theorists of cosmopolitan democracy, an order based on multiple levels and sites of authority, would neither be stable nor realisable, because it does not take into account the actors that would need to act upon and uphold its ordering principles. It would not be stable because in any multi-level political order, conflicts of authority and jurisdiction will arise, as various actors use whatever institutional possibilities they have to pursue their goals. The mechanisms that theorists of cosmopolitan order suggest to resolve such conflicts (such as the principle of subsidiarity) seem to neglect that people not only disagree over means but also over ends. I also argued that the political order of cosmopolitan democracy seems to be difficult to realise even on its own terms. Tendencies that cosmopolitan democrats see as indications that a cosmopolitan order is emerging, such as the international human rights regime, may actually be premised on an international order of sovereign states. Seemingly realising that their desired political order has failed to materialise, theorists of cosmopolitan democracy resort to faulting political leaders for being too selfish, arrogant and ignorant to heed the cosmopolitan call. This argument is not only self-defeating, but also reveals that cosmopolitan democracy would benefit from developing a more sophisticated account of how political institutions shape the motives and preferences of political leaders and other actors.

Chapter 6, finally, turned to the problem of realising deliberative democracy in multi-level governance. Some of its advocates suggest that an advantage of this conception of democracy is that it could work quite well in such institutional settings. I pursued three different possible interpretations of these claims: We can regard the internal democratic legitimacy of a state as irrelevant for any second-order deliberation in which it engages, but this version turns out to be wrought with tensions with core assumptions in deliberative democratic theory. We could regard states as collective persons not only metaphorically, but as something more than the sum of their parts. This raises the bar for when a corporate actor can be regarded as a conversable interlocutor. Or we could simply assume a theory of representation by which second-order deliberants are bound. This seems to be the most promising solution, but I concluded that deliberative democratic theory has difficulties supplying a theory of representation since they insist on the participation of all in actual deliberation and seem to rule out the modes of communication required by accountability.

## 7.1 CRITIQUE AND COUNTER-CRITIQUE

If the previous section summed up my main conclusions, let me now consider some general objections against my overarching argument and also suggest some lessons to be learned from this undertaking. While the bulk of my argument has been a critique of theories of transnational democracy, I hope my effort taken as a whole is not perceived as one-sided, negative or ill-humoured. As I argued in the introduction, a good critic neither acts as an intellectual sanitation worker nitpicking on the endeavours of others, nor as the big bad wolf which squashes what others have carefully built up. Moreover, a critical argument calls for reflexion and humility. I hope that proponents of transnational democracy will find that I have done their arguments justice, that the arguments that I have presented against theirs are worth taking seriously and that I have staked out some potential avenues and paths for further fruitful debate and discussion.

One potential point of opposition concerns the design, so to speak, of the study. Throughout the thesis I have argued against two perspectives on transnational democracy and as I argued in the introduction, treating cosmopolitan democracy and deliberative democracy as distinct and coherent theories, traditions or models inevitably is to do the subject area some injustice, when there is in fact a multitude of theories and arguments relating to transnational democracy that do not fit easily into this taxonomy. I argued that cosmopolitan

democracy and deliberative democracy should rather be regarded as ideal-typical constructs, employed primarily for giving context and structure to arguments but ideal-typical in the sense that real theorists and arguments may be more or less but rarely completely aligned to them. But I think this approach is defensible, if not else because it has allowed me to consider a wider range of possible arguments than what might have followed if I had focused instead on, say, certain thinkers and theorists. Of course, the choice of cosmopolitan democracy and deliberative democracy might also shadow arguments that might have deserved more scrutiny and that would have gained a more prominent position if more contenders had been granted entry.

Since my main argument has been critical, an important counterargument might hold that I do not formulate an alternative to either cosmopolitan democracy or deliberative democracy. To criticise a theory is a simple matter; a greater challenge is to present a better theory. While normative political theory does not necessarily follow the same standards of progress and success as positive social science theory, the task of the critic is similar because what distinguishes the critic from the mere grouser is believing to know of a better way, and you can't beat something with nothing.<sup>1</sup>

I would address this concern by suggesting both that my argument does point to alternatives and better ways, but also that theories of transnational democracy come to seem the most sophisticated solutions only once we accept a certain view of the problem. First, as I argued in the introduction, the point of view from which I have criticised cosmopolitan democracy and deliberative democracy is broadly internationalist and liberal. I have sought to demonstrate that you can be a friend of democracy and human rights without necessarily accepting either the solutions or the problem of transnational democratic theory. To paraphrase Kwame Anthony Appiah, there are friends of democracy and human rights who make me nervous.<sup>2</sup> But some critics do, too. Notably, my argument is not that of a political realist, a moral nihilist or a moral relativist.<sup>3</sup>

For example, I argued that contrary to the claims that the establishment of the international human rights regime and the International Criminal Court signal the demise of sovereignty, they are premised on an international order where states are responsible for their own citizens and other persons under their jurisdiction. Moreover, arguing that the all-affected principle should be rejected, since it fails to give any advice on how to democratically delimit po-

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<sup>1</sup> Cf. Green & Shapiro 1994: 183f

<sup>2</sup> Appiah 2006

<sup>3</sup> Critiques of cosmopolitanism and in particular cosmopolitan democracy launched from such positions include Zolo 1997; Evans 2005b; 2005a; Chandler 2003; 2002.

litical communities, I suggested that the subject-to-the-law principle offers both a more feasible and desirable way of justifying claims for inclusion in political decision-making, although it perhaps does not really provide an internal solution to the boundary problem. Likewise, in assessing the ways in which cosmopolitan democracy and deliberative democracy, respectively, could be realised within new or existing institutions of multi-level, multi-sited governance, I argued that both neglect, in different ways, representative institutions. These arguments might seem to be of a more limited range than the grand theories of transnational democracy, but they are consistent with a broad and established tradition of liberal democratic theory and liberal international theory. In that sense, my argument is rather that there are established theories that, both empirically and normatively, can make quite good sense of the world. As far as we seek solutions, this is where I think we should look for them.

In both cosmopolitan democracy and deliberative democracy, however, there is a worrying tendency to disdain representative democratic politics, as for example when cosmopolitan democrats regard democracy in states as an obstacle to cosmopolitan reform and mock anyone who fails to act on their interpretation of cosmopolitan norms as ignorant, arrogant or selfish. Likewise, deliberative democrats routinely reject electoral, interest-aggregative, elitist models of democracy, while the political procedures they suggest instead may turn out to be just as elitist, but without being anchored in representation. Both accounts of transnational democratisation radically claim that democracy should be extended, deepened and entrenched across state borders and to all sites of power, from the local to the global, but they often seem to reject the most successful forms of democracy we have seen thus far. But with all its flaws and shortcomings, the devil we know might just beat the devil we don't.

On the other hand, any argument that conventional liberal democracy still provides a viable option might look inferior, if we agree to the problem as advocates of transnational democracy frame it. Once we accept a certain set of empirical and normative assumptions (for example, a transformationalist account of globalisation and some version of the all-affected principle, etc.), then transnational democracy becomes a pressing problem for which existing alternative conceptions of democracy and international order cannot account. That is, whether the alternatives are truly perceived as viable alternatives at all crucially boils down to whether we accept the description of the problem which they are supposed to address. But then we are already playing on the home turf of theories of transnational democracy. As I argued in the introduction, the alleged consensus among theorists addressing the same problems could just as



well be an indicator that those who do not agree on the problem are occupied with things that they find more worthwhile. If accepting those premises is a condition for entering the game, then any alternatives will be found wanting and inferior by default, because the playing field is prepared to the advantage of theories of transnational democracy.

## 7.2 TWO OPENINGS, TWO ENDINGS

So what can we learn from transnational democracy? Many would agree that while theorists of transnational democracy do not necessarily get everything right, they have at least opened our eyes to an interesting set of problems, provocatively questioning the baseline assumption of the nation-state as the natural unit of social and political analysis.<sup>4</sup> This popular view holds that political theory has taken the nation-state as the given and unproblematic container for politics, and that international theory correspondingly has assumed that the most important actors in world politics are states, modelled as unitary, rational actors, opaque like billiard balls. Consequently, what we can learn from theorists of transnational democracy, this argument goes, is that these distinctions are not given naturally or unproblematic assumptions, but they should be questioned, theorised and justified. There is some truth in this view. To take but one of the most frequently criticised examples: Rawls starts from the assumption that we should seek principles of justice for a well-ordered society, modelled in ideal theory as self-sufficient, enclosed from the outside world. Citizens enter only by birth and leave only by death, and there is no need for armed forces.<sup>5</sup> While Rawls underlines that this is an abstraction for methodological purposes, one may suspect, as many critics indeed have, that it abstracts too much to be of any help in finding principles of justice for a world where people migrate, trade, make war and so on, and where no society is complete, closed and self-sufficient.

There is a sense, however, in which theorists of transnational democracy are bound by the very assumptions of political theory which they criticise others for taking for granted, such as methodological nationalism. By claiming that due to globalisation, democracy must now be radically transformed, they invoke an image of a time in which democracy worked better, both in theory and practice, than it does today. Presumably, it was a time when democracy was practised in largely self-sustaining, sovereign and homogenous nation-

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<sup>4</sup> Grande 2006

<sup>5</sup> Rawls 1996: 12, 40f; 1999b: 26

states, the very form of political organisation currently being transformed by globalisation. While this notion might be challenged as historically myopic and also, for lack of a better word, Euro-centric (in the sense of making the experience of a rather small number of industrialised, democratic, Western welfare states the rule when in fact it is a rather rare exception), it also seems to rely on an assumption that we can regain the lost congruence between political, economic, cultural, and social parameters. In this sense, the cosmopolitan challenger seems to be just as intellectually dependent on methodological nationalism, or even political realism, as the conventional perspectives it criticises.<sup>6</sup>

Instead, I think there is another lesson to be learned here, one that is less contemporary, and therefore also less momentary. Rivalling the overture praising the radical newness of the recent cosmopolitan turn in political and social theory, another popular way of opening arguments for and against cosmopolitanism instead traces its long lineage to its classic forebears, the Stoics and the Cynics, or to Enlightenment cosmopolitans such as Immanuel Kant and Jeremy Bentham. This way of approaching the matter rather suggests that the issues with which theorists of transnational democracy grapple, and cosmopolitanism more generally, are perennial questions about the relations – actual, desirable and possible – between individual persons, the communities in which they live and the world at large composed by those communities.<sup>7</sup> Viewed from this angle, political theory has always grappled with how to justify the state; democratic theory has always been concerned with justifying the demos; and international relations theory has always been troubled by and theorising precisely the distinction between domestic and international order.<sup>8</sup> Indeed, proposals for world order reform is a persistent theme in the intellectual history of international theory.<sup>9</sup> Even the international theorists in the era of the peace treaties of Westphalia were concerned with how to achieve peace, stability and order in world politics. Few of them actually regarded the parameters of the Westphalian order as something immutable, fixed and beyond the control of political actors.<sup>10</sup>

What theorists of transnational democracy and cosmopolitanism remind us is to ask these old questions anew, in a new manner and from our present predicament. Reviving, revitalising, and reforming this tradition of thought, rather

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<sup>6</sup> Hirst & Thompson 1999; Rosenberg 2000; Näsström 2003

<sup>7</sup> Or to speak with Kenneth Waltz: Man, the state and war (Waltz 1959).

<sup>8</sup> Cf. Rosenberg 2000

<sup>9</sup> For an overview of some classic contributions, see Suganami 1989; Kainz 1987; Cabrera 2004

<sup>10</sup> Weinert 2007

than inventing it from scratch, is the major feat of the theorists we have encountered in these pages.

On the other hand, looking back upon this long tradition of thought, we should perhaps not make the fallacy of believing that our own time is special, or that globalisation somehow provides the determinate cause or reason for finally transcending the system of sovereign states. Grand plans and ingenious proposals for international reform have often foundered. But certainly, the international system has changed and developed, in part driven by actors under the impression and inspiration of visionary ideas of large-scale world order reform. For instance, while we may dispute why European leaders decided to initiate what is today the European Union, it seems less controversial to argue that the shape it took was in part influenced by the ideas held by its founding fathers: federalism, a pragmatic approach to welfare policies, notions of Western European community and the general conviction that the European states system could be reformed and amended in order to avoid war and devastation and that doing so was in the best interest of the states of Western Europe.<sup>11</sup> But one lesson to learn from Europe is also that even successful institutional innovations and changes may create their own unforeseen problems, and that institutional reforms never spell the end of politics, they only alter the rules by which the game is played.

Thus, ideas do matter. I hope to have demonstrated that the ideas underlying the grand calls for transnational democracy that were surveyed in the introduction deserve serious consideration. But are these the ideas that should guide future action and reforms of international institutions? I have expressed doubts about their normative appropriateness and practical viability. But of course, as the concern for globalisation, transnational democracy and international reform persists, this is hardly the last word on the subject.

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<sup>11</sup> Parsons 2002

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